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' OPPOSITION TO DEFENDANTS' MOTION FOR LEAVE TO SUBMIT DOCUMENTS *EX PARTE, IN CAMERA*

Note on Motion Calendar: March 22, 2019

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I. INTRODUCTION

The Court should deny Defendants' motion for leave to submit the declarations of FBI Executive Assistant Director Jay S. Tabb, Jr., USCIS Associate Director Matthew D. Emrich, and HSI Assistant Director Matthew C. Allen *ex parte* and *in camera*. First, Defendants have waived any right to assert privileges over the A-Files at this juncture, well after they failed to comply with the requirements set out by Federal Rule of Civil Procedure 34 and failed to follow the Court's discovery orders. How many bites at the apple should Defendants get on the same issue? Second, if Defendants are permitted to litigate anew the merits of their privilege assertions, they fail to meet the high burden to justify review of these declarations *ex parte, in camera*. Defendants' motion should be denied.

The Court is well versed in the facts and legal arguments associated with whether Defendants must produce the "why" information, including what is in Plaintiffs' A-files. This has been the subject of several motions and Court orders, but Plaintiffs briefly summarize the facts below to highlight the unreasonableness of Defendants' latest request.

Over 18 months ago, on September 5, 2017, Plaintiffs requested documents as to why the Named Plaintiffs were subjected to CARRP. Dkt. 92, Perez Decl., Ex. A. Defendants refused, citing vague assertions of privilege, and did not move for a protective order. *See id.* at 32, 34–39 (responding and objecting to RFP Nos. 13, 15, 17, 19, 21). On October 19, 2017, the Court ordered Defendants to produce information showing the reasons "why the Named Plaintiffs were subjected to CARRP." Dkt. 98 at 4. Defendants did not move to reconsider this portion of the Court's order. *See* Dkt. 100 at 2 n.2. Plaintiffs filed a motion for sanctions on March 29, 2018 in part seeking the "why" information Defendants had not yet produced. *See* Dkt. 137 at 11–12. Facing the threat of sanction, Defendants sought leave to file two declarations for the Court's review *ex parte* and *in camera* to justify their failure to properly assert privilege claims and avoid sanctions. Dkt. 147. The Court reviewed those declarations. *See* Dkt. 223 at 4. On February 21, 2019, Plaintiffs filed *another* motion to compel production of the "why" information. Now,

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Defendants ask the Court to review *more* declarations *ex parte* and *in camera* to prevent disclosure of information the Court already ordered Defendants to produce 17 months ago.

II. ARGUMENT

A. Defendants Cannot Avoid Producing Plaintiffs' "Why" Information by Serially Litigating the Underlying Privilege Issue.

Defendants improperly seek to re-litigate the merits of orders the Court issued almost 18 months ago by raising new arguments as to privileges asserted too late. The Court should not consider materials *ex parte* and *in camera* where doing so would allow Defendants to circumvent the Court's prior orders and undercut the Federal Rules of Civil Procedure.

The Court has already rejected Defendants' attempts to withhold information about why the named Plaintiffs were subjected to CARRP. Plaintiffs moved to compel production of this information, challenging Defendants' unsupported assertion that it was privileged. In October 2017, the Court ordered Defendants to produce these documents. Dkt. 98 at 4. Defendants should have addressed the merits of their privilege claims, including filing these latest declarations, in response to Plaintiffs' motion to compel or by filing their own motion for a protective order. Instead, Defendants produced heavily redacted A-files and, only after being confronted with the prospect of sanctions for that and other discovery misconduct, did Defendants articulate "a credible basis for their privilege assertions." Dkt. 223 at 8. But Defendants' latest request to assert the merits of their privilege claims *ex parte* and *in camera* is too little, too late.

The Federal Rules of Civil Procedure aim to prevent this kind of conduct by requiring parties to submit responses and objections to written discovery within 30 days. *See* Fed. R. Civ. P. 34(b)(2); *see also Hall v. Sullivan*, 231 F.R.D. 468, 473 (D. Md. 2005) (setting forth "strong policy reasons favoring a requirement that a party raise all existing objections to document production requests with particularity and at the time of answering the request."). "No benefit is achieved by allowing piecemeal objections to producing requested discovery, as this adds unnecessary expense to the parties and unjustified burden on the court." *Hall*, 231 F.R.D. at 473.

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That is why Defendants should have lodged their objections based on privilege with specificity within the time frame set out by the Rules and not in opposition to a motion for sanctions after failing to comply with court orders 17 months after the Court ordered production—or in opposition to *another* subsequent motion to compel regarding the very same information. Defendants have not made a good faith effort to comply with the Court's October 19, 2017 order to produce information regarding why the Named Plaintiffs were subjected to CARRP, and they have waived their right to assert new privileges and re-litigate this issue at this juncture. *See Stonehill v. I.R.S.*, 558 F.3d 534, 540–41 (D.C. Cir. 2009) ("[I]n a discovery proceeding there are potentially adverse consequences if the agency fails to examine the documents and to raise all its defenses: The district court may order production, *see* Fed. R. Civ. P. 37, and the agency could not rely on immediate appeal.").

Defendants' piecemeal approach is contrary to law and should be rejected.

B. Defendants' Motion for Leave Highlights the Unfairness of *Ex Parte* and *in Camera* Review.

Defendants' lack of transparency in its Motion for Leave and the speculative declarations filed on the public record impair Plaintiffs' ability to meaningfully respond to Defendants' Opposition to Plaintiffs' Motion to Compel and Cross-Motion for a Protective Order.

For example, Defendants do not make clear what aspects of the Plaintiffs' Motion to Compel and Defendants' Cross-Motion for a Protective Order the declarations are purportedly necessary to support. Nor can Plaintiffs determine whether the declarations Defendants seek to submit *ex parte* and *in camera* demonstrate with necessary specificity and particularity why disclosure of the "why" information to Plaintiffs (or to Plaintiffs' counsel on an Attorneys' Eyes Only basis) would harm the national interest, or why Defendants only now seek to introduce such "*necessary*" information. Similarly, Defendants' motion leaves unclear whether the declarations purport to show that the 100 random A-files are privileged and thus protected. If they do, it is also unclear how the declarations could make such a showing with necessary

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specificity, given Defendants' arguments that "it is not possible at this time to make specific privilege claims" vis-à-vis the random A-files. *See* Dkt. 227 at 2.

Defendants' expansive and non-specific assertion of the need to submit materials *ex parte* and *in camera* subverts the adversarial process by omitting the information necessary to evaluate and contest it.

C. Defendants Have Not Met Their High Burden to Justify Submitting Documents *Ex Parte* and *In Camera*.

Even if Defendants' privilege assertions were procedurally proper and timely, Defendants have not met their burden to support *ex parte, in camera* review. "[C]ourts routinely express their disfavor with *ex parte* proceedings and permit such proceedings only in the rarest of circumstances." *United States v. Libby*, 429 F. Supp. 2d 18, 21 (D.D.C. 2006), *opinion amended on reconsideration*, 429 F. Supp. 2d 46 (D.D.C. 2006); *see also Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring) (observing that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights" and holding use of *ex parte* evidence unauthorized by statute in employment context, even given national security concerns). Defendants' vague argument does little to satisfy their burden. Defendants merely assert consideration of these declarations is "necessary" for Court to fully understand Defendants' response and cross-motion. Dkt. 227 at 2.

Defendants' motion omits several critical details for the Court to properly assess whether *ex parte, in camera* submissions are appropriate here. Defendants do not establish that the declarations contain classified information. The "damage to the national interest" rationale could be read merely as the government's preference to not file the declarations publicly. And, even if the declarations did contain classified information, Defendants should be required to utilize "mitigation measures" such as declassification of relevant information, unclassified summaries, or the use of restricted protective orders, rather than blanket withholdings based on generalized national security claims. *See Al Haramain Islamic Found., Inc. v. U.S. Dep't of Treasury*, 686

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F.3d 965, 984 (9th Cir. 2012); *see also Latif v. Holder*, 28 F. Supp. 3d 1134, 1162 (D. Or. 2014) (requiring the government provide, *inter alia*, "unclassified summaries of the reasons for [plaintiffs'] respective placement on the No-Fly List"). Indeed, Department of Homeland Security regulations provide that where a record of a proceeding includes classified information, "the USCIS Director or his or her designee should direct that the applicant or petitioner be given notice of the general nature of the information and an opportunity to offer opposing evidence." 8 C.F.R. § 103.2(b)(16)(iv); *see also* 8 C.F.R. § 1003.46 (giving immigration judges authority to issue protective orders and seal records containing national security information while still providing for their use by immigrants).

Defendants additionally make no express claim that the declarations themselves are privileged and incapable of review by the Plaintiffs. Instead, Defendants merely claim that the declarations contain sensitive nonpublic explanations of the harms and risks that may result if certain information withheld from production were disclosed. *See* Dkt. 227 at 2. Finally, Defendants offer no compelling rationale why the Protective Order in this case or an alternative procedure, such as permitting Plaintiffs' counsel to review *in camera*, are not sufficient to safeguard the information contained in the declarations.

In addition, exceptions to the general rule against *ex parte, in camera* submissions "are both few and tightly contained." *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986). The court in *Abourezk* identified three narrow exceptions to the presumption against *ex parte, in camera* proceedings: (1) review of the redacted or withheld documents to assess the claim of privilege, (2) in the face of a proper invocation of the state secrets privilege, and (3) when a statute expressly provides for such proceedings. *See id.* Defendants' request does not fall within any of these three exceptions.

First, Defendants do not seek to submit withheld documents for adjudication of the scope of their asserted privilege. Although the "inspection of materials by a judge isolated in chambers may occur when a party seeks to prevent use of the materials in the litigation," this exception is

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intended to facilitate the judge's review of the actual materials the party seeks to protect from disclosure. *See id.*; *Arieff v. U.S. Dep't of Navy*, 712 F.2d 1462, 1469 (D.C. Cir. 1983) (distinguishing between the submission of *documents* and the submission of *affidavits* and observing that the latter constitutes "a greater distortion of normal judicial process, since it combines the element of secrecy with the element of one-sided, *ex parte* presentation"). Here, Defendants do not ask the Court to review the withheld A-file documents and information and decide whether they are in fact privileged. Defendants' citation to cases that exclusively discuss the *ex parte, in camera* review of underlying documents is thus unavailing. *See, e.g.*, *In re City of New York*, 607 F.3d 923, 948–49 (2d Cir. 2010) ("[R]ather than require that the parties file the potentially privileged documents with the court, the district court may, in the exercise of its informed discretion and on the basis of the circumstances presented, require that the party possessing the documents appear ex parte in chambers to submit the documents for in camera review by the judge.").

Defendants instead seek to submit three declarations that apparently contain Defendants' explanation as to *why* this information cannot be "disclosed outside the U.S. government." Dkt. 227 at 2. But this is the type of information that should be provided to Plaintiffs to enable Plaintiffs to challenge Defendants' privilege assertions. Indeed, "[w]hile a court may review documents *in camera* to assess the scope of a privilege, the court may not rely on an *ex parte* and *in camera* review of documents to resolve an issue on the merits." *See Apple Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846-LHK, 2015 WL 3863249, at *10 (N.D. Cal. June 19, 2015). Defendants not only ask the Court to rely on an *ex parte, in camera* review of documents to resolve an issue on the merits, but Defendants argue it is *necessary* to do so. *See* Dkt. 227 at 2. The Court should not resolve both motions using information that Plaintiffs cannot see and thus to which they can offer no reply. *See United States v. Abuhamra*, 389 F.3d 309, 322 (2d Cir. 2004) (rejecting attempt to rely on secret evidence and holding that "due process demands that the individual and the government each be afforded the opportunity not only to advance their

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respective positions but to *correct or contradict arguments* or evidence offered by the other") (emphasis added).

Defendants also fail to support their contention that the rationale for the privilege is itself privileged. They have not explained why "release of the declaration[s] would disclose the very information that the agency seeks to protect," *see Greyshock v. U.S. Coast Guard*, 107 F.3d 16, 1997 WL 51514, *3 (9th Cir. Feb. 6, 1997). Instead, Defendants merely assert disclosure would "damage [] the national interest." Dkt. 227 at 2.

Second, courts have reviewed materials *ex parte* and *in camera* when the government has properly invoked the state secrets privilege, demonstrated "compelling national security concerns," and disclosed, "prior to any *in camera* examination, … as much of the material as it could divulge without compromising the privilege." *Abourezk*, 785 F.2d at 1061. But Defendants have not invoked the state secrets privilege, and the Court has not adjudicated it. *See* Dkt. 227 at 2 n.1. The cases they cite that involved *ex parte, in camera* procedures when the state secrets privilege had properly been invoked are therefore inapposite. *See Kasza v. Browner*, 133 F.3d 1159, 1169 (9th Cir. 1998) ("in camera review of both classified declarations was an appropriate means to resolve the applicability and scope of the state secrets privilege"); *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007) (holding that the government sustained its burden as to state secrets privilege regarding a sealed document containing classified information).

Third, Defendants identify no statute that expressly permits the use of *ex parte, in camera* procedures here. *See Abourezk*, 785 F.2d at 1061; *see, e.g.*, 5 U.S.C. § 552(a)(4)(B) (providing for *in camera* inspection in Freedom of Information Act (FOIA) cases); 18 U.S.C. App. § 4 (*ex parte, in camera* review available under the Classified Information Procedures Act (CIPA)). Accordingly, this exception does not apply, and the various cases Defendants cite that allowed *ex parte, in camera* review pursuant to statute are irrelevant. For instance, Defendants cite *ACLU v. Dep't of Defense*, No. 09-cv-8071, 2012 WL 13075286 (S.D.N.Y. Jan. 24, 2012), but

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neglect to note that the court in that case expressly grounded its ruling vis-à-vis *ex parte* submission "in the FOIA context." *Id.* at *1; *see also United States v. Ott*, 827 F.2d 473, 476 (9th Cir. 1987) (concerning "section 1806(f)'s requirement that the district court conduct an *ex parte, in camera* review of FISA materials upon request of the Attorney General"); *United States v. Klimaviciusi-Viloria*, 144 F.3d 1249, 1261 (9th Cir. 1998) (use of *ex parte, in camera* procedures under CIPA).

Ultimately, that the Court "has the authority" to review materials *ex parte* and *in camera*, Dkt. 227 at 3—and that other courts have considered such materials under specific circumstances—says little about whether review of Defendants' proffered materials *ex parte* and *in camera* is warranted here. Considered under the proper standard, Defendants' request fails.

III. CONCLUSION

Defendants waived their ability to assert new privileges and should not be permitted to re-litigate decided issues, and Defendants have not demonstrated that *ex parte, in camera* review of any of the declarations is warranted. Defendants' motion should be denied.

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Respectfully submitted,

DATED: March 18, 2019

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CERTIFICATE OF SERVICE

The undersigned certifies that on the dated indicated below, I caused service of the foregoing document via the CM/ECF system that will automatically send notice of such filing to all counsel of record herein.

DATED this 18th day of March, 2019 at Seattle, Washington.

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