HONORABLE RICHARD A. JONES

IN THE 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.	CASE NO. 2:17-cv-00094-RAJ **DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL**

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INTRODUCTION

Defendants have properly claimed the law enforcement and deliberative process privileges over the redacted portions of the 25 documents at issue, and have provided the required detail in their privilege logs supporting the privilege claims. Plaintiffs' motion seeks information that is both privileged and irrelevant, such as database codes and instructions for navigating governmental electronic systems. Plaintiffs have failed to demonstrate a compelling need for the disclosure of such information, while Defendants have articulated the risks to public safety and national security if the redacted material is disclosed. Consequently, the Court should deny Plaintiffs' motion.

PROCEDURAL BACKGROUND

Several months ago, Plaintiffs questioned Defendants' assertion of the law enforcement and deliberative process privileges over 38 documents. After conferring with Plaintiffs' counsel, Defendants reproduced the documents with fewer redactions and even lifted redactions on certain privileged material in the interest of transparency. *See* Affidavit of Matthew D. Emrich, Exhibit A, ("Ex. A"), ¶¶ 7-8. Following that reproduction, Plaintiffs now challenge the privilege assertions for 25 of the documents. The privilege logs for the 25 documents are attached at Exhibits B and C.[1]

ARGUMENT

I. Defendants Have Satisfied the Procedural Requirements for Asserting the Law Enforcement and Deliberative Process Privileges

A. Defendants Have Properly Invoked the Privileges

To invoke the law enforcement and deliberative process privileges, Defendants "must satisfy three elements: (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 as to why it properly falls within the scope of the privilege." Dkt. 148 at 3 (citing *In re Sealed Case*, 856 F.2d 268, 271 (D.C. Cir. 1988)). Defendants have satisfied these elements.

[1] Defendants have no objection to Court review *in camera* of some or all of the 25 documents.

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Matthew D. Emrich, as the Associate Director of the Fraud Detection and National Security ("FDNS") Directorate, USCIS, heads the FDNS Directorate and meets the definition of agency head. Ex. A, ¶ 1; *see Landry v. FDIC*, 204 F.3d 1125, 1135 (D.C. Cir. 2000) (affidavit not required from "the very pinnacle of agency authority"). Also, he has received a formal delegation from the Director of USCIS to invoke the law enforcement and deliberative process privileges. Ex. A, ¶ 2. Second, Mr. Emrich has reviewed the documents, or exemplars of versions of the same document, and information withheld. *Id*., ¶¶ 4-6. Third, in his declaration, Mr. Emrich formally invoked the privileges, *Id.*, ¶ 53, and explains why the withheld information is within the scope of the privilege, including a description of the types of harm that can occur if the redacted material is released. *Id*., ¶¶ 10 - 52. Additionally, Defendants provided declarations in support of the privilege claims contemporaneously with production of the associated privilege logs. Thus, Defendants have satisfied all three elements required for asserting the law enforcement and deliberative privileges.

B. Defendants' Privilege Logs Satisfy the Requirements of Rule 26(b)(5)

Under Fed. R. Civ. P. 26(b)(5), a privilege log must "describe the nature of the documents, communications, or tangible things not produced or disclosed – and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." Fed. R. Civ. P. 26(b)(5); *Alliance v. Whitley Manufacturing Co.*, No. 13-cv-1690, 2015 WL 13567493 (W.D. Wash. Nov. 9, 2015) (privilege log must include the nature of the redacted information, the date, the parties to the communication, and the privilege asserted). The level of detail required to be included in privilege logs varies depending on the circumstances of the case, including "the magnitude of the document production" and "other particular circumstances of the litigation that make responding to discovery unusually easy . . . or unusually hard." *See Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615, 638 (D. Nev. 2013) (citing *Burlington Northern & Santa Fe Ry. Co. v. U.S. Dist. Court for Dist. of Mont.*, 408 F.3d 1142 (9th Cir. 2005)).

Plaintiffs' conclusory assertion that Defendants' privilege logs are insufficient is not supported by any argument or authority. Plaintiffs baldly state that the privilege logs "do not adequately describe and justify why the privileges apply to these documents," Dkt. 260 at 2, but they do not cite the privilege logs or make any attempt to explain how those logs fail to meet the

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requirements of Rule 26(b)(5). The Court should reject Plaintiffs' conclusory statement unsupported by any facts or argument. *See United States v. Balcar*, 141 F.3d 1180 (9th Cir. 1988) ("None of these conclusory arguments are discussed in any depth and we thus decline to address them.").

In any event, Defendants' privilege logs are sufficient under Rule 26(b)(5), as they contain, among other information, the title of the document, the date of the document's creation, the custodian responsible for producing the document, Bates numbers, the privilege(s) asserted, and a detailed and tailored privilege description. *See generally* Exhibits B and C. The privilege logs contain detailed information sufficient to "enable [Plaintiffs] to assess the claim." Fed. R. Civ. P. 26(b)(5). Furthermore, given the magnitude (Defendants have produced over 22,000 documents, containing over 200,000 pages of material) and unusually difficult nature of production, as the documents discuss national security processes and procedures, the level of detail in the privilege logs exceeds the standard required. *See Burlington Northern & Santa Fe Ry. Co.*, 408 F.3d at 1149. Given these facts, it would be entirely unreasonable to require Defendants to provide more specific privilege descriptions for each document. *See id.*

II. Defendants Have Properly Asserted the Law Enforcement Privilege

A. Legal Standard for the Application of the Law Enforcement Privilege

"The purpose of the [law enforcement] privilege is to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witness and law enforcement personnel, to safeguard the privacy of individuals involved in investigation, and otherwise to prevent interference with an investigation." *In re Dep't of Investigation of the City of N.Y.*, 856 F.2d 481, 484 (2d Cir. 1988); *see also Bowen v. FDA*, 925 F.2d 1225, 1229 (9th Cir. 1991) (protecting from FOIA disclosure information that would "present a serious threat to future law enforcement . . . investigations"). The privilege covers information contained in both criminal and civil investigatory files. *See Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1136, 1341 (D.C. Cir. 1984); *United States v. McGraw-Hill Cos. Inc.*, No. 13-cv-779, 2014 WL 1647385, *6 (C.D. Cal. Apr. 15, 2014). The law enforcement privilege may be invoked to protect the future effectiveness of investigatory techniques as well as ongoing investigations. *Black v. Sheraton Corp.*, 564 F.3d 531, 546 (D.C. Cir. 1977).

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Plaintiffs quibble that neither the Ninth Circuit nor the Supreme Court has expressly recognized a law enforcement privilege, Dkt. 260 at 3, but the overwhelming weight of judicial authority have recognized the privilege. *See, e.g. In re Dept. of Homeland Sec*, 459 F.3d 565, 569 (5th Cir. 2006) (citing cases). And this Court has twice recognized the existence of the law enforcement privilege in this litigation. *See* Dkt. 98 at 3; Dkt.148 at 3.

The privilege is "rooted in common sense as well as common law," particularly the principle that "law enforcement operations cannot be effective if conducted in full public view" and that the government and the public accordingly have an interest in "minimiz[ing] disclosure of documents whose revelation might impair the necessary functioning" of law enforcement agencies. *Black*, 564 F.2d at 542; *accord Commonwealth of Puerto Rico v. United States*, 490 F.3d 50, 62-63 (1st Cir. 2007). That principle is "even more compelling" in "today's times," when "the compelled production of government documents could impact highly sensitive matters relating to national security." *In re Dept. of Homeland Sec*, 459 F.3d at 569. The government thus may invoke the privilege "to prevent disclosure of information that might impede important government functions such as conducting criminal investigations, securing the borders, or protecting the public from international threats." *Id.* Plaintiffs' argument that the law enforcement privilege is a "very narrow one," Dkt. 260 at 3, is inconsistent with the weight of legal authority addressing the privilege.

The law enforcement privilege is qualified, not absolute. *See In Re City of New York*, 607 F.3d 923, 945 (2d Cir. 2010). In assessing a law-enforcement privilege claim, the court must balance the "public interest in nondisclosure" against "the need of a particular litigant for access to the privileged information." *In Re Sealed Case*, 856 F.2d 268, 272 (D.C. Cir. 1988). That is, the court must conduct a case-specific analysis of the parties' competing interests to determine whether the privilege should apply. *See id.; Kelly v. City of San Jose*, 114 F.R.D. 653, 660 (N.D. Cal. 1987).

The party invoking the privilege need not establish that any particular future harm will occur; it is enough to show that disclosure would risk compromising, *inter alia*, "law enforcement techniques and procedures, information that would undermine the confidentiality of sources," or information that would "otherwise . . . interfere with an investigation." *In Re City of New York*, 607 F.3d at 944. Every assertion of law-enforcement privilege inherently involves a prediction of future

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risks; the purpose of the privilege is to avoid "future" harm. *Id.* Consequently, if every assertion of the privilege that relied on the risk of future harm were rejected as speculative, the privilege could never be invoked.

B. Disclosing the Material Redacted for Law Enforcement Privilege Would Present a Significant Risk to Public Safety and National Security

Mr. Emrich's Declaration discusses two broad categories of information within the 25 documents: third agency information and USCIS information, and further divides USCIS information into six categories. It then articulates the potential harm that could occur from disclosing each category of redacted material. Ex. A, ¶¶ 18 - 53.

Defendants redacted third party information, including codes and guidance on how USCIS can utilize and operate its law enforcement and intelligence partners' electronic systems (21 documents), operation of the Terrorist Screening Database (8 documents), information about the FBI National Namecheck Program and fingerprint check (7 documents), certain third agency information from hypothetical exercises (6 documents), and USCIS' process and techniques to seek and evaluate information from its partners (12 documents). Ex. A, ¶¶ 19 - 23. Disclosure of this information owned by other law enforcement and intelligence agencies could lead to reduced information sharing and harm the collaborative relationships between USCIS and its collaborative partners. Ex. A, ¶¶ 25 - 28. If such information is disclosed, it can lead agencies to reduce information sharing, especially relating to national security and immigration enforcement. This has public policy implications of the highest order, as the 9/11 Commission found that both lack of information sharing and less-than-full partnership of immigration agencies contributed to the 9/11 attacks. *See* 9/11 Commission Report, 416-17 & Executive Summary, 14 (2004), https://www.9-11commission.gov/report/911Report.pdf; *see also* Dkt. 119-2, (previously-filed Emrich Affidavit), ¶¶ 15; 23.

Finally, three non-party federal agencies have also provided declarations asserting the law enforcement privilege over their agencies' information in the 25 documents at issue. *See* Exhibit D

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(Declaration of Timothy Groh – Federal Bureau of Investigation ("FBI")); Exhibit E (Declaration of John Wagner – Customs and Border Protection ("CBP")); Exhibit F (Declaration of Matthew Allen – Immigration and Customs Enforcement ("ICE")). The FBI states that 24 of the documents at issue contain law-enforcement-privileged information relating to the Terrorist Screening Database. Ex. D, ¶ 14. If such information is disclosed, bad actors could learn (1) how to tell whether an individual is listed in the TSDB, and (2) how to avoid becoming listed in the TSDB, and then adjust their behavior. *Id.*, ¶¶ 17, 22-23; *see also* Declaration of Timothy Groh (submitted *in camera, ex parte*), ¶¶ 16-19, 24. The CBP states that 23 of the documents at issue contain law-enforcement-privileged information relating to CBP's systems, methods, and techniques, including highly sensitive information about TECS – CBP's principal law enforcement and anti-terrorism data base system. Ex. E, ¶¶ 7-10. Ex. E. And ICE indicates that 5 of the documents at issue contain law-enforcement-privileged information relating to ICE's systems, methods, and techniques. Ex. F ¶¶ 6-7. Disclosure of this information could provide bad actors with the ability to evade or otherwise thwart law enforcement efforts. *Id.*, ¶ 12. These agencies' declarations further support Defendants' law enforcement privilege claims over the documents at issue.

Defendants have redacted information from six documents that provide insight into the operation and navigation of the FDNS-Data System, FDNS's primary case management system. Ex. A, ¶¶ 32-33. If an individual had access to this information and was able to access the system, he could ascertain whether he was the subject of an investigation and, in response, could alter behavior, conceal evidence or falsify information. *Id.*, ¶¶ 34–36. In his previously-filed affidavit, Mr. Emrich provided five examples, from public documents, of instances where immigration benefit applicants attempted to hide their activities, associations and affiliations. Dkt. 119-2, ¶ 25.

Beginning in 2013, USCIS made an effort to prioritize CARRP cases by using an intelligence-based scorecard to identify risk, but it ultimately abandoned the effort. Ex. A, ¶ 38. In

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two documents, USCIS redacted information related to the scoring methodology that was utilized, Ex. A, ¶ 37, as this could show how USCIS evaluates risk and thus an individual could conceal information that would result in a higher risk assessment if USCIS were to adopt a similar scoring methodology in the future. *Id.*, ¶¶ 39 - 40.

Two documents identify the methods and techniques for vetting national security concerns employed by the Refugee, Asylum and International Operations Directorate of USCIS. Ex. A, ¶ 41. In addition to being irrelevant to this litigation – since it has nothing to do with CARRP review of naturalization and adjustment applicants – disclosing these documents would provide individuals with a road map to evade USCIS processes and facilitate efforts to conceal, falsify or misrepresent information. *Id.*, ¶ 43.

Seven documents contain examples of actual CARRP cases, and while the descriptions of the cases themselves are generally revealed, USCIS has redacted information that could permit identification of a specific individual, such as the filing date for a benefit application. Ex. A, ¶ 45. Disclosing information sufficient to identify individuals could permit such individuals to learn of derogatory information possessed by USCIS or other government agencies, and permit bad actors to falsify or misrepresent information or otherwise obstruct USCIS enforcement efforts. *Id.*, ¶ 46.

One document contains a description of the format USCIS officers should use to create a password when sending substantive information about individuals who present a national security concern to the Terrorist Screening Center. Ex. A, ¶¶ 48 – 49. Disclosing this information could permit bad actors to open documents containing such information despite password protection. *Id.*, ¶ 49.

Six documents contain information about sensitive vetting methods and techniques used by USCIS to investigate national security concerns. Ex. A, ¶ 50. Disclosing this information would provide a road map for evading USCIS processes and facilitate conduct by bad actors who might conceal, falsify or misrepresent information, thus allowing potential threats to avoid detection. *Id.*, ¶

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51. *See also* Dkt. 119-2, ¶¶ 13 – 14; 23. The Court's recent decision sustaining Defendants' assertion of the deliberative process privilege relied on Defendants' affidavits that articulated "the serious danger of public disclosure, whether intentional or inadvertent." Dkt. 263 at 4.

C. Plaintiffs Have Not Demonstrated a Compelling Need for the Law Enforcement Privileged Information

Once the law enforcement privilege is found to apply, "the district court must balance the public interest in nondisclosure against the need of a particular litigant for access to the privileged information." *In Re City of New York,* 607 F.3d at 948. There is a "strong presumption against lifting the privilege," *Dellwood Farms, Inc. v. Cargill, Inc*., 128 F.3d 1122, 1125 (7th Cir. 1997), that may be rebutted only by a showing that the information sought is not available through other discovery or other sources, and that the party has a "compelling need" for the information. *In Re City of New York,* 607 F.3d at 948. Here, Plaintiffs speak in broad generalities about needing documents related to CARRP, Dkt. 260 at 6 – 7, but they never explain why they need access to the sensitive and limited material that was redacted from the 25 documents. Certainly, information such as "codes and instructions and guidance" on how USCIS can access and utilize its partners' electronic systems, *see* Ex. A, ¶ 19, could not possibly be of assistance to their efforts to litigate this case.

Plaintiffs' need argument makes no mention of the thousands of CARRP-related documents Defendants produced in discovery. *See* Dkt. 198 at 8-9. Indeed in a recent decision sustaining Defendants' assertion of deliberative process, the Court recognized that "Defendants have provided Plaintiffs with a number of other documents that explain existing CARRP policy." Dkt. 263 at 3. In addition to the documents produced to Plaintiffs in discovery, the American Civil Liberties Union of Southern California, one of the organizations representing Plaintiffs, has received thousands of pages of documents related to CARRP. *See* Dkt. 198 at 8-9. Plaintiffs make no attempt to articulate why they need password information, database codes, documents explaining how to navigate various electronic systems, and other such operational guidance to prosecute this action.

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D. The Potential for Harm to Public Safety and National Security From Disclosing the Redacted Information far Outweighs Plaintiffs' Need

Plaintiffs argue that the law enforcement privilege does not apply because "[t]he government is not seeking to protect information relating to an ongoing investigation or that would tend to reveal the identity of a confidential informant." Dkt. 260 at 7. However, the law enforcement privilege extends well beyond "information relating to an ongoing investigation or that would tend to reveal the identity of a confidential informant." For example, in an analogous case, the D.C. District Court held that the law enforcement privilege applied to documents describing "aspects of the naturalization adjudication process including law enforcement techniques and processes such as: the types of information revealed through certain security checks; the external databases that are searched as part of the background screening process; questions USCIS employees may ask applicants in order to detect fraud and evaluate applicants' eligibility for immigration benefits; and information about the techniques and procedures USCIS uses to perform security checks while processing naturalization applications." *See Kusuma Nio v. United States Dep't of Homeland Sec*., 314 F. Supp. 3d 238, 244 (D.D.C. 2018)

In ruling on the law enforcement privilege, courts have sometimes turned to the ten-factor balancing test in *Frankenhauser v. Rizzo*, 59 F.R.D. 339, 344 (E.D. Pa. 1973). *See, e.g., In Re Sealed Case*, 856 F.2d at 271. But these factors, derived from a wrongful death suit against a police department, were never meant to be exhaustive or applied rigidly in all instances where the law enforcement privilege is at issue. *See Frankenhauser*, 59 F.R.D. at 344 ("the ingredients of the test will vary from case to case"); *Sealed Case*, 856 F.2d at 272 (factors are "illustrative"); *In Re U.S. Dept. of Homeland Sec.*, 459 F.3d at 570-71, ("district court has considerable leeway in weighing the different factors"). And, in fact, some courts have ruled on the law enforcement privilege without mentioning the *Frankenhauser* factors. *See e.g. Dellwood Farms*, 128 F.3d at 1125. The *Frankenhauser* balancing test has little relevance here, where the law enforcement privilege is asserted not in the context of an individual prosecution, but instead over information critical to assessing risks to public safety and national security presented in USCIS' review of benefit applications.

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The application of the law enforcement privilege here should instead turn on the very sensitive nature of the redacted material, and the potential harm to public safety and national security from its disclosure. Ex. A, ¶¶ 18 - 52. Where, as here, the potential risk to national security is significant, there is "a pretty strong presumption against lifting the privilege." *In Re City of New York*, 607 F.3d at 945, (quoting *Dellwood Farms, Inc.*, 128 F.3d at 1125). At a minimum, the party seeking disclosure must show a "compelling need" for the information sought in making its case. *Id*. And even that showing "does not automatically entitle a litigant to privileged information. Rather, disclosure is required only if that compelling need outweighs the public interest in nondisclosure." *Id*.

Defendants address the *Frankenhauser* factors to the limited extent that they have any relevance here. The first and second factors, (relating to informant confidentiality) and seventh factor (relating to disciplinary proceedings) are essentially irrelevant to the assertion of the law enforcement privilege here. *Frankenhauser's* fourth factor (whether the information sought is factual data or an "evaluative summary"), may apply in an ordinary criminal or civil prosecution, where purely factual information may be disclosed while evaluations leading to program improvement are protected. But the redacted portions of the CARRP policy documents are not "factual data" in the ordinary sense, but instead consist of sensitive information essential for USCIS' administration of the immigration laws to prevent risks to public safety and national security, and hence these factors are not relevant here.

Frankenhauser's third factor ("the degree to which governmental self-evaluation and consequent program improvement will be chilled by the disclosure"), also militates against disclosure. USCIS has made periodic efforts to improve CARRP procedures, *see* Ex. A, ¶¶ 11 – 13; 38, and disclosure of documents describing those actions will inevitably have a chilling effect on any future efforts at programmatic improvements to CARRP.

In the context of the police excessive force claim at issue in *Frankenhauser*, the fifth factor, asking if the requester is an actual or potential defendant in a criminal action and the sixth factor, asking if the police investigation is complete, both present narrow questions about the status of a discrete investigation. Yet Plaintiffs' motion seeks sensitive redacted material in policy documents

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relevant to all of the class members in this litigation, all of whom have pending benefits that are currently or were processed pursuant to the CARRP policy – effectively, over 5,000 separate, on-going investigations. The redacted material will continue to be relevant to future processing of immigrant benefit applications raising national security concerns, and possibly to collateral proceedings, such as removal or denaturalization. Hence, these two factors weigh against disclosure.

The ninth factor asks if the same information is available from other sources and the tenth concerns the importance of the information to Plaintiffs' case. Both of these factors weigh strongly against disclosure since Plaintiffs have received an enormous number of CARRP policy and training documents thus far in discovery, explaining how the CARRP policy is applied. *See* Dkt. 198-2; Dkt 263 at 3. Plaintiffs' motion makes no reference whatever to this material. *Cf. Ctr. for Biological Diversity v. U.S. Army Corps of Eng'rs*, No. CV 14-1667, 2015 WL 3606419, at *7 (C.D. Cal. Feb. 4, 2015) ("the availability of other evidence is perhaps the most important factor in determining whether the deliberative process privilege should be overcome"). Thus these two factors also weigh strongly against disclosure, leaving "good faith" as Plaintiffs' only supporting factor.

III. Defendants Have Properly Asserted the Deliberative Process Privilege Over Document DEF-0094269

Defendants have properly invoked the deliberative process privilege with respect to DEF-0094269, *see* I.A, *supra*, a memorandum discussing proposed changes to CARRP that were never adopted. *See* Exhibit. B at 3. "This document covers the same subject matter as the Paragraph 17 documents addressed in the Court's April 23, 2019 order denying plaintiffs' motion into compel. Dkt. No. 263." *See* Ex. A, ¶ 11. The document is covered by the deliberative process privilege because it is a predecisional document that reflects "recommendations and deliberations comprising part of a process" by which a government decision was reached. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975). Plaintiffs' reliance on *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 145 F.3d 1422 (D.C. Cir. 1998), *on reh'g in part*, 156 F.3d 1279 (D.C. Cir. 1998), *see* Dkt. 260 at 11, is unavailing, as the Court has previously rejected that approach in favor of the Ninth Circuit's balancing test in *FTC v. Warner Commc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). *See* Dkt. 189 at 2-4.

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The balancing test in *Warner* weighs against disclosure of DEF-0094269 as that would hinder frank and independent discussion regarding contemplated policies and decisions, Ex. A, ¶ 14; and providing documents related to proposed policy changes that were abandoned also has the potential to mislead and cause confusion, *id.*, ¶ 15. *See e.g., Modesto Irrigation Dist. v. Gutierrez*, No. CV 06-453, 2007 WL 763370, at *12 (E.D. Cal. 2007) (holding that the disclosure of draft documents and deliberations among high-level policymakers "would stifle frank and independent discussions regarding policy matters"). Plaintiffs assert that DEF-0094269 "may provide important insights into the motivation behind CARRP as a whole," Dkt. 260 at 12, but that argument is entirely implausible as the document relates to proposed recommendations that were never adopted. Ex. A, ¶¶ 11-13, 16. Moreover, Plaintiffs have not demonstrated a compelling need for draft revisions to CARRP that were never adopted when they have access to numerous documents that fully describe and explain the CARRP process. *See* Dkt. 263. Thus, Defendants have properly asserted the deliberative process privilege with respect to DEF-0094269, and Plaintiffs have not shown that their interest in the document outweighs Defendants' interest in non-disclosure.

IV. Disclosing the Documents Subject to an Attorney-Eyes-Only Protective Order Is Insufficient to Prevent Harm

Plaintiffs argue that the Court can impose an "attorney eyes only" protective order to mitigate any risk of disclosure, Dkt. 260 at 4, but, as Defendants have noted elsewhere, Dkt. 226-1 at 18-19, Dkt. 257 at 11-12, that "deeply flawed procedure" cannot fully protect the confidentiality of this sensitive law enforcement information. *See In Re City of New York*, 607 F.3d at 935, n. 12. Defendants incorporate those arguments herein by reference. *See also* Ex. A, ¶ 52 (disclosure pursuant to a protective order "would not mitigate the risk to national security or public safety because sensitive law enforcement information would be provided to third parties outside of the federal government").

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CONCLUSION

Wherefore, the Court should deny Plaintiffs' Motion to Compel.

Dated: April 26, 2019

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 26, 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/Daniel Bensing

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