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

REPLY IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF DOCUMENTS WITHHELD UNDER THE LAW ENFORCEMENT AND DELIBERATIVE PROCESS PRIVILEGES

NOTE ON MOTION CALENDAR: May 3, 2019

REPLY ISO PLAINTIFFS' MOTION TO COMPEL RE: LAW
ENFORCEMENT AND DELIBERATIVE PROCESS PRIVILEGES
(No. 2:17-cv-00094-RAJ)

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1   CARRP is an extra-statutory internal vetting policy for identifying and processing

2 immigration applications. A crucial part of this process is a determination that an applicant poses

3 a "national security concern." Plaintiffs challenge CARRP on both statutory and constitutional

4 grounds and are entitled to documents that are important to proving their claims. Critical to

5 Plaintiffs' claims is fully understanding *how* and *why* Defendants designate applicants for

6 immigration benefits as "national security concerns" and then subject those applicants to

7 CARRP. Redacted portions of these documents contain such information. Defendants contend

8 this information is privileged because disclosing it would reveal law enforcement processes and

9 pose a "risk to public safety and national security." But these are the very processes that

10 Plaintiffs challenge as unlawful and unconstitutional. Defendants cannot assert privilege to hide

11 the very processes at the heart of this case and avoid litigating this case on the merits. And, even

12 if the Court finds that any of Defendants' purported concerns have merit, there is no reason why

13 they cannot produce the requested information under an attorney's-eyes-only protective order.

14 **A.   Defendants' Reproduced Privilege Logs Are Insufficient and Misleading**

15   Defendants' failure to provide adequately descriptive privilege logs, for the small number

16 of highly relevant requested documents from the hundreds produced asserting the law

17 enforcement privilege, left Plaintiffs to guess about the nature of the underlying information and

18 its importance—and therefore hampered in their ability to contest those assertions of privilege.

19 When parties seek to withhold information on the basis of privilege, they must describe the

20 withheld material "in a manner that . . . will enable other parties to assess the claim." Fed. R.

21 Civ. P. 26(b)(5)(A)(ii). Defendants' privilege logs fall short of this standard. For example,

22 without any page numbers associated with the privilege descriptions, it is very difficult to match

23 privilege descriptions to redacted sections. The Court already gave Defendants two bites at the

24 apple, and should now order the requested documents produced.

25   Neither Defendants' reproduced privilege logs nor their initial affidavits assert any

26 privileges from third parties. While Defendants attempt to assert new third-party privileges for

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1   the first time in opposition to Plaintiffs' motion to compel, as explained further below, those

2   privileges are waived. *See infra* pp. 6. Moreover, in their opposition, Defendants take issue with

3   Plaintiffs seeking password formatting instructions. Dkt. 266 at 8. This argument alone shows

4   the insufficiency of Defendant's privilege logs because nowhere in the privilege log description

5   do Defendants mention redacting password formatting instructions. *See* Dkt. 266-1, Ex. B at 42.

6   Plaintiffs do not challenge these redactions. Defendants also now state that DEF-0094271 and

7   DEF-0094994 redact scoring methodology "no longer used by USCIS." *See* Dkt. 266-1, Ex. A,

8   Emrich Aff. ¶ 11. But their privilege logs tell a different story: they say the withheld information

9   "would reveal *current* law enforcement procedures." Dkt. 266-1, Ex. B at 42, 43 (emphasis

10   added). If the scoring methodology is as the privilege log indicates, it is highly relevant to

11   Plaintiffs' claims and should be produced.

12   **B.   Plaintiffs' Need for the Documents Outweighs Defendants' Interest in Nondisclosure**

13   The law enforcement privilege is not absolute, and Plaintiffs' need for the 25 documents

14   identified in this motion outweighs Defendants' interest in nondisclosure. *See In re Sealed Case*,

15   856 F.2d 268, 272 (D.C. Cir. 1988).

16   **1.   Plaintiffs Cannot Obtain the Withheld Information Through Other Means**

17   Defendants' analysis of the ten factors that courts consider when ruling on the qualified

18   law enforcement privilege largely ignores two of the most important factors in this case: whether

19   the information is available from other sources (factor nine) and the importance of the

20   information to the plaintiff's case (factor ten). *See Ibrahim v. Dep't of Homeland Sec.*, No. C 06-

21   00545 WHA, 2013 WL 1703367, at *4 (N.D. Cal. Apr. 19, 2013).

22   In addressing factor nine, Defendants argue they have already provided policy and

23   training documents. But this argument assumes the information Plaintiffs seek in this motion is

24   available elsewhere. Plaintiffs moved to compel on these limited documents because this

25   information is not available anywhere else in unredacted form.

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1   As to factor ten, Defendants decline to acknowledge that indicators, methods, and

2   techniques they use to identify whether an applicant poses a "national security concern," and

3   examples or hypotheticals of the same, are very important and relevant to Plaintiffs' claims.

4   Defendants ignore the central allegations in this case: that Defendants employ "non-statutory

5   indicators" to determine whether an applicant is a "national security concern" and therefore

6   subject to CARRP. Dkt. 260 at 6-7. Plaintiffs are entitled to know what "non-statutory

7   indicators" and other information Defendants consider to make this determination. The Court's

8   analysis of factor ten is dispositive, and should compel disclosure because how and why

9   Defendants decide whether an applicant is a "national security concern" is central to this case.

10   Because the balancing test clearly favors disclosure, the Court should order the

11   documents produced. *See* Dkt. 260 at 7-10.

12   **2.   The Withheld USCIS Information Is Highly Relevant to Plaintiffs Claims**

13   Many of the documents at issue in this motion are training and guidance documents that

14   teach USCIS officers how to determine whether an applicant is a "national security concern."

15   Inherently, these documents and the redacted portions are important to Plaintiffs' claims because

16   they demonstrate how Defendants identify "national security concerns" and what information

17   Defendants consider when making this determination.

18   Many documents identify certain indicators of suspicious activity or circumstances that

19   might indicate an applicant allegedly poses a concern—such as "vetting family members and

20   close associates." *See* Emrich Aff. ¶ 50. The redacted portions of these documents are the very

21   indicators and examples of suspicious activities that would support Plaintiffs' constitutional and

22   statutory claims challenging CARRP. Defendants' speculative claim that lifting these redactions

23   may allow future applicants to evade detection or the adjudication process is unpersuasive

24   because the government already publicly reveals its standards of reporting suspicious activity

25   and other related national security information in other contexts. *See, e.g.*, Nationwide

26   Suspicious Activity Reporting (SAR) Initiative, Functional Standard, Suspicious Activity

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1   Reporting (Feb. 23, 2015), https://nsi.ncirc.gov/documents/SAR_FS_1.5.5_PMISE.pdf; Dkt. 241

2   at 8-15. Moreover, producing the information under an AEO protective order would address

3   Defendants' purported concern.

4   Actual examples of adjudicated CARRP cases are also highly relevant to Plaintiffs' case

5   because they show how Defendants determined whether an applicant was a "national security

6   concern." These examples are of particular import because Defendants have not produced the

7   information in the Named Plaintiffs' A-files describing why they were subjected to CARRP.

8   Plaintiffs do not oppose Defendants redacting names or other personally identifiable information

9   from the examples.

10   Redacted portions of the documents also appear to contain training and guidance on how

11   USCIS identifies purportedly Known and Suspected Terrorists, where national security concerns

12   originate, and other training on how to identify national security concerns. *See, e.g.*, DEF-

13   0095125 at 00095264-65, 68, and DEF-0095760 at DEF-0095805-06, 19-21. Again, this

14   information is crucial to Plaintiffs' challenge to CARRP on constitutional and statutory grounds,

15   because without it, Plaintiffs are forced to speculate regarding how Defendants identify such

16   "concerns," and whether they do so arbitrarily or discriminatorily.

17   Finally, Defendants suggest the RAIO documents are irrelevant. *See* Emrich Aff. ¶ 41.

18   The redacted sections are relevant because they appear to describe the same CARRP review

19   process and considerations for determining whether an applicant is a national security concern.

20   **3.   Plaintiffs Only Seek Third-Agency Information Relevant to Their Claims**

21   Defendants raise alarms about third-agency information sharing. But Plaintiffs only seek

22   the putative third-agency information that reveals how USCIS uses that information to determine

23   whether an applicant is a "national security concern." And much of the redacted information is

24   highly relevant because it includes insight into USCIS's process and procedures. *See e.g.*, Dkt.

25   266-1, Ex. C, Privilege Log Entry for DEF-00095597 ("The withheld information in this training

26   includes certain information collected from law enforcement and/or intelligence partners *and*

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1   *how that law enforcement and/or intelligence information should be considered by USCIS in*

2   *cases posing national security concerns.*") (emphasis added).

3   Redacted portions of the documents provide guidance on external vetting of applicants to

4   determine whether they allegedly pose national security concerns. Included in this external

5   vetting appear to be determinations reached by third agencies about an applicant; *see* DEF-

6   0094351 at 0094423-28, 35-44, the questions USCIS should ask third agencies; *see* DEF-

7   00095009 at DEF-00095031, and what determinations a USCIS adjudicator should reach based

8   on information obtained during external vetting in coordination with such agencies, *see id.* at

9   DEF-00095031-33. Lifting redactions of this information will help elucidate whether the fairness

10 and lawfulness of the process USCIS uses to gather information about applicants.

11 Defendants also caution that many of the documents contain redactions of screenshots

12 and electronic systems. It is not immediately clear which redactions Defendants refer to because

13 they do not provide page numbers for their redactions. Still, if, for example, the screenshots and

14 electronic systems Defendants refer to appear in the National Security Indicator Training,

15 January 2017 (DEF-0094351 at DEF-0094435-44), they seem to be substantive examples of how

16 USCIS determines whether an applicant presents an alleged national security concern. Plaintiffs

17 do not seek specific information that will allow hackers or unauthorized users to navigate

18 government databases. But Plaintiffs do challenge the substantive information the examples and

19 training documents provide for the same reasons previously stated.

20 Database codes and their descriptions are also important to Plaintiffs' claims. The codes

21 appear to indicate whether an applicant poses a national security concern and what type of

22 information and from what sources Defendants consider when making that determination. DEF-

23 0094536 at DEF-0094540-44. The database codes may also be relevant to understanding other

24 produced documents or to be produced documents, including possibly Plaintiffs' unredacted A-

25 files. Defendants regularly produce such codes in FOIA and related litigation. *See* Dkt. 241 at

26 12-14; Dkt. 243.

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C.   The Court Should Disregard the Third-Agencies' 11th-Hour Privilege Claims

"Failing to timely assert a privilege results in its waiver." *United States v. $43,660.00 in U.S. Currency*, No. 1:15CV208, 2016 WL 1629284, at *5 (M.D.N.C. Apr. 22, 2016). Yet again, third-party agencies wait until after Plaintiffs move to compel before formally asserting privilege over these 25 documents despite at least four opportunities to do so. *See* Dkt. 150 at 4. And again, Plaintiffs are forced into an endless game of whack-a-mole, addressing one claim of privilege only to find that more pop up. *See id.* The agencies waived these claimed privileges, and the Court should consider neither the assertions of privilege nor the supporting affidavits.

D.   Defendants Fail to Explain Why the Protective Order or an AEO Designation Would Not Satisfy Their Concerns

First, the Court should disregard Defendants' AEO arguments incorporated by reference to the extent they exceed the page limits established by the local rules. *Calence, LLC v. Dimension Data Holdings, PLC*, 222 F. App'x 563, 566 (9th Cir. 2007).

Second, Defendants' supporting declarations make general, unsupported claims that disclosure under the Protective Order "would not mitigate the risk to national security or public safety." *See* Emrich Aff. ¶ 52. But Defendants and their affiants demonstrate no compelling reason why the Stipulated Protective Order is insufficient and make no argument that Plaintiffs' counsel cannot and will not uphold the Protective Order. The Court has numerous tools at its disposal to punish improper disclosure of information subject to the Protective Order. Dkt. 148 at 9. The same is true of the even more stringent AEO designation. Indeed, Defendants have already agreed to disclosure of the Class List under an AEO protective order to protect similar "national security and intelligence interests." Dkt. 126 at 3. Plaintiffs' counsel have diligently complied with that order, and there is no reason why they would not do so again.

<p style="text-align:center">*   *   *</p>

Plaintiffs request an order compelling Defendants to produce the 25 documents identified in the motion unredacted. Plaintiffs alternatively ask that the Court review the documents *in camera*, which Defendants do not oppose, to determine whether disclosure is warranted.

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CERTIFICATE OF SERVICE

The undersigned certifies that on the date 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 3rd day of May, 2019, at Seattle, Washington.

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