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 A DOCUMENT *EX PARTE, IN CAMERA*

Note on Motion Calendar: May 17, 2019

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

TABLE OF CONTENTS

Page

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

TABLE OF AUTHORITIES

Page(s)

CASES

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

RULES

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

I. INTRODUCTION

The Court should deny Defendants' Motion for Leave to Submit the Declaration of Timothy P. Groh, Deputy Director for Operations of the Terrorist Screening Center ("TSC") of the Federal Bureau of Investigation ("FBI") *ex parte, in camera*. First, Defendants intend this *ex parte, in camera* declaration to support, at least in part, yet another 11th-hour assertion of privilege, this time by the FBI. By not asserting privilege over the documents that Plaintiffs specifically requested unredacted *seven months ago*, the FBI has waived any claim to privilege over the documents at issue. Second, Defendants also seek to introduce this declaration to argue that Defendants' interest in nondisclosure of the redacted information outweighs Plaintiffs' need for the information. The Court's review of *ex parte, in camera* documents—to which Plaintiffs have no meaningful way to respond—puts Plaintiffs at a significant disadvantage in proving the applicable balancing test weighs in their favor. Third, Defendants fail to meet the high burden to justify review of the declaration *ex parte, in camera*. Defendants do not claim the document is classified. Defendants have not invoked the state secrets privilege. Defendants claim no statutory authority requiring *ex parte, in camera* review. Nor is this FOIA litigation. The authority that Defendants rely on is unpersuasive. To address Defendants' purported security concerns, Defendants could produce the declaration to Plaintiffs' counsel under an Attorneys' Eyes Only protective order, but they have refused to do so. Defendants' motion should be denied.

The Court is well versed in the facts and legal arguments associated with this motion to compel. In addition to briefs on the issue, Defendants have already filed nearly 50 pages of declarations to support their position on the 25 documents at issue here alone. *See* Dkt. 266-1. Therefore, the Court should not allow Defendants to undermine the adversarial legal system and submit another declaration without providing Plaintiffs, or at least their counsel, any opportunity to respond.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

II. ARGUMENT

A. Defendants Cannot Avoid Producing Documents by Asserting Additional Privilege Claims at the 11th-Hour.

Defendants ask for the Court's permission to raise another roadblock to prevent Plaintiffs from receiving documents to which they are entitled. At the latest, Defendants should have raised the FBI's assertion of privilege over certain law enforcement redactions over seven months ago—when Plaintiffs first met and conferred with Defendants seeking only 38 documents from hundreds asserting the law enforcement privilege. Dkt. 261 at 1–2. Instead, Defendants and the FBI waited to assert the FBI's privilege claim until after Plaintiffs filed a motion to compel a subset of those 38 documents. Dkt. 266-1, Ex. D, Groh Decl. ¶14.

By failing to raise the law enforcement privilege at an earlier juncture, the FBI waived the privilege. "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); *see also Applied Sys., Inc. v. N. Ins. Co. of New York*, No. 97 C 1565, 1997 WL 639235, at *2 (N.D. Ill. Oct. 7, 1997) (finding waiver of privilege assertion where defendant produced nothing in the months following plaintiff's discovery requests and did not apprise the plaintiff of its intent to object based on privilege or the work-product doctrine until the motion to compel hearing). Defendants should have raised the FBI's assertion of privilege with specificity at a much earlier juncture and not for the first time in opposition to a motion to compel. 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."). Neither logic nor legal authority supports Defendants piecemeal strategy of raising privilege claims seriatim. Defendants' piecemeal approach is contrary to law, significantly prejudices Plaintiffs' ability to challenge those privilege claims, and should be rejected. The Court should deny Defendants' motion for

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

leave to the extent the declaration seeks to bolster the FBI's invocation of the law enforcement privilege.

B. Defendants' Motion Highlights the Unfairness of *Ex Parte, In Camera* Review.

Defendants submit the declaration *ex parte, in camera* in an attempt to influence the balancing test that determines whether Defendants' interest in nondisclosure outweighs Plaintiffs' need for information that is highly relevant to proving their claims. Dkt. 267 at 1. This puts Plaintiffs at a significant disadvantage, because they have no ability to challenge Defendants' assertions. *See United States v. Thompson*, 827 F.2d 1254, 1258 (9th Cir. 1987) ("Even in civil cases, the district court may not adopt procedures that tend to significantly favor one party over the other."). Allowing Defendants to provide a declaration *ex parte, in camera* that claims to be relevant to Defendants' interest in non-disclosure, and to which Plaintiffs have no meaningful opportunity to respond, unfairly places a heavy thumb on the balancing scale in favor of Defendants. *See* Dkt. 239 at 3–4. As such, the Court should deny Defendants' motion.

C. Defendants Have Not Met the High Burden to Justify *Ex Parte, In Camera* Review.

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 not satisfy their burden. Defendants assert in broad strokes that the declaration cannot be filed publicly or under seal "without damage to the national interest." Dkt. 267 at 2.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

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 declaration contains classified information. The "damage to the national interest" rationale could be read merely as the government's preference to not file the declaration publicly. And, even if the declaration 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 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").

Defendants additionally make no express claim that the declaration itself is privileged and incapable of review by the Plaintiffs. Instead, Defendants merely claim that the declaration contains sensitive nonpublic explanations of the harms and risks that may result if certain information withheld from production were disclosed. *See* Dkt. 267 at 1–2. 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* or under a more restrictive Attorneys' Eyes Only protective order, are not sufficient to safeguard the information contained in the declaration.

Moreover, 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.* None of these exceptions apply here.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

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 intended to facilitate the judge's review of the actual materials the party seeks to protect from disclosure. *See id.*; *see also 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 25 documents at issue in the motion to compel to 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 . . . 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 a declaration that apparently contain the FBI's explanation as to *why* this information cannot be "disclosed outside the U.S. government." Dkt. 267 at 1. But this is the type of information that should be provided to Plaintiffs (or at least their counsel) 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*, *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. 267 at 1. The Court should not resolve both motions using information that Plaintiffs cannot see and to which they therefore can offer no reply. *See United States v. Abuhamra*, 389 F.3d 309,

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

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

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 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. 267 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. 267. Defendants' cited cases 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

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

ACLU v. Dep't of Defense, No. 09-cv-8071, 2012 WL 13075286 (S.D.N.Y. Jan. 24, 2012), but 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 *ex parte, in camera* review of FISA materials); *United States v. Klimaviciusi-Viloria*, 144 F.3d 1249, 1261 (9th Cir. 1998) (use of *ex parte, in camera* procedures under CIPA). Further, the case Defendants cite to demonstrate that courts have inherent authority to review "sensitive" information that is not protected by statute is inapposite. In *United States v. Thompson*, 827 F.2d 1254, 1261 (9th Cir. 1987), the Ninth Circuit expressly rejected the district court's decision to consider *ex parte* argument and remanded the case for a hearing on the matter. If anything, *Thompson* undercuts the Defendants' position.

Ultimately, that the Court "has the authority" to review materials *ex parte* and *in camera*, Dkt. 267 at 2—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 Defendants have not demonstrated that *ex parte, in camera* review of any of the Groh Declaration is warranted. Defendants' motion should be denied.

Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Phone: 206.359.8000
Fax: 206.359.9000

Respectfully submitted,

DATED: May 13, 2019

s/ Jennifer Pasquarella
s/ Sameer Ahmed
Jennifer Pasquarella (admitted pro hac vice)
Sameer Ahmed (admitted pro hac vice)
ACLU Foundation of Southern California
1313 W. 8th Street
Los Angeles, CA 90017
Telephone: (213) 977-5236
jpasquarella@aclusocal.org
sahmed@aclusocal.org

s/ Matt Adams
Matt Adams #28287
Northwest Immigrant Rights Project
615 Second Ave., Ste. 400
Seattle, WA 98122
Telephone: (206) 957-8611
matt@nwirp.org

s/ Stacy Tolchin
Stacy Tolchin (admitted pro hac vice)
Law Offices of Stacy Tolchin
634 S. Spring St. Suite 500A
Los Angeles, CA 90014
Telephone: (213) 622-7450
Stacy@tolchinimmigration.com

s/ Hugh Handeyside
s/ Lee Gelernt
s/ Hina Shamsi
Hugh Handeyside #39792
Lee Gelernt (admitted pro hac vice)
Hina Shamsi (admitted pro hac vice)
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
Telephone: (212) 549-2616
lgelernt@aclu.org
hhandeyside@aclu.org
hshamsi@aclu.org

s/ Harry H. Schneider, Jr.
s/ Nicholas P. Gellert
s/ David A. Perez
s/ Cristina Sepe
Harry H. Schneider, Jr. #9404
Nicholas P. Gellert #18041
David A. Perez #43959
Cristina Sepe #53609
Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000
HSchneider@perkinscoie.com
NGellert@perkinscoie.com
DPerez@perkinscoie.com
CSepe@perkinscoie.com

s/ Trina Realmuto
s/ Kristin Macleod-Ball
Trina Realmuto (admitted pro hac vice)
Kristin Macleod-Ball (admitted pro hac vice)
American Immigration Council
1318 Beacon Street, Suite 18
Brookline, MA 03446
Telephone: (857) 305-3600
trealmuto@immcouncil.org
kmacleod-ball@immcouncil.org

s/ Emily Chiang
Emily Chiang #50517
ACLU of Washington Foundation
901 Fifth Avenue, Suite 630
Seattle, WA 98164
Telephone: (206) 624-2184
Echiang@aclu-wa.org

Counsel for Plaintiffs

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 13th day of May, 2019 at Seattle, Washington.

s/ Cristina Sepe
Cristina Sepe, WSBA No. 53609
Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000
Email: CSepe@perkinscoie.com