

THE HONORABLE RICHARD A. JONES

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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

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFFS'
MOTION TO COMPEL**

This matter comes before the Court on Plaintiffs' motion to compel documents withheld under the law enforcement and deliberative process privileges (Dkt. # 260). For the reasons stated below, Plaintiffs' motion is **GRANTED in part and DENIED in part.**

I. BACKGROUND

The facts underlying this lawsuit have been detailed in several previous orders, and the Court assumes familiarity with them. Of particular relevance to this dispute is this Court's order on April 11, 2018. Dkt. # 148. There, the Court held that the

1 Government had failed to properly invoke the law enforcement privilege and ordered it to
2 produce revised privilege logs, detailing the basis for this privilege. Dkt. # 148 at 4-5.
3 Following the Court's order, the parties continued to meet and confer regarding the
4 Government's assertion of the law enforcement privilege. Of the many documents that
5 the Government has withheld or redacted under the law enforcement privilege, Plaintiffs
6 have identified 38 that they believe to contain relevant information. Dkt. # 260 at 5.
7 Defendants agreed to review and reproduce the 38 documents with fewer or no
8 redactions. On December 5, 2018, Defendants reproduced the 38 requested documents.
9 Dkt. # 260 at 5.

10 Plaintiffs allege that many of the documents still contain redactions in areas
11 purportedly relevant to Plaintiffs' claims and now move to compel the production of 25
12 documents without redactions. *Id.* On October 24, 2019, the Court held a telephone
13 conference and ordered the Government to submit the 25 documents, unredacted, for the
14 Court's *in camera* review. Dkt. # 297.

15 **II. LEGAL STANDARD**

16 The Court has broad discretion to control discovery. *Hallett v. Morgan*, 296 F.3d
17 732, 751 (9th Cir. 2002); *see also Avila v. Willits Env'tl. Remediation Trust*, 633 F.3d 828,
18 833 (9th Cir. 2011); *In re Sealed Case*, 856 F.2d 268, 271 (D.C. Cir. 1988). That
19 discretion is guided by several principles. Most importantly, the scope of discovery is
20 broad. A party must respond to any discovery request that is not privileged and that is
21 "relevant to any party's claim or defense and proportional to the needs of the case,
22 considering the importance of the issues at stake in the action, the amount in controversy,
23 the parties' relative access to relevant information, the parties' resources, the importance
24 of the discovery in resolving the issues, and whether the burden or expense of the
25 proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1).

26 If a party refuses to respond to discovery, the requesting party "may move for an
27 order compelling disclosure or discovery." Fed. R. Civ. P. 37(a)(1). "The party who

1 resists discovery has the burden to show that discovery should not be allowed, and has
2 the burden of clarifying, explaining, and supporting its objections.” *Cable & Computer*
3 *Tech., Inc. v. Lockheed Saunders, Inc.*, 175 F.R.D. 646, 650 (C.D. Cal. 1997).

4 **III. DISCUSSION**

5 Plaintiffs seek, and the Government refuses to provide, 25 documents containing
6 law enforcement and deliberative process privilege redactions. As a threshold matter,
7 Plaintiffs take issue with the Government’s privilege logs, claiming that they do not
8 “adequately describe and justify why the privileges apply” to the documents. Dkt. # 269
9 at 3 (noting the Government takes issue with Plaintiffs seeking to compel password
10 formatting instructions, but the privilege logs do not mention password formatting
11 instructions). The Government’s privilege logs are sufficiently detailed. Rule 26(b)(5)
12 requires the party withholding privilege information to “describe the nature of the
13 documents, communications, or tangible things not produced or disclosed . . . in a manner
14 that, without revealing information itself privileged or protected, will enable other parties
15 to assess the claim.” Fed. R. Civ. P. 26(b)(5). Given the volume of documents at issue in
16 this case, the Government cannot be expected to provide an individual explanation for
17 every page containing a redaction or assertion of privilege.

18 Plaintiffs also object to assertion of the third-party law enforcement privilege on
19 behalf of several other law enforcement agencies because the privilege was not raised in
20 the Government’s privilege logs or any of the initial affidavits. Dkt. # 269 at 2. The
21 Government offers no explanation for its failure to raise these additional privilege claims
22 in a timely manner and the Court is inclined to find that the privilege was waived because
23 of this needless delay. However, given the circumstances of this case and the nature of
24 the privilege the Court declines to find a waiver based on this record.¹ *See Singh v. S.*

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26 ¹ Although the Court declines to find waiver at this time, the Government is warned that
27 future unexplained delays will not be met with similar leniency. The Government has

1 *Asian Soc'y of George Washington Univ.*, No. CIV A 06-574 RMC, 2007 WL 1556669,
2 at *2 (D.D.C. May 24, 2007) (declining to find waiver of law enforcement privilege
3 “[g]iven the importance of the values that the privilege is designed to protect (i.e., the
4 effective functioning of law enforcement investigations).”).

5 **A. Law Enforcement Privilege**

6 Turning to the merits of the Government’s privilege claim, the parties agree that
7 three requirements must be met in order to establish the law enforcement privilege: (1)
8 there must be a formal claim of privilege by the head of the department having control
9 over the requested information; (2) assertion of the privilege must be based on actual
10 personal consideration by that official; and (3) the information for which the privilege is
11 claimed must be specified, with an explanation why it properly falls within the scope of
12 the privilege. *In re Sealed Case*, 856 F.2d 268, 271 (D.C. Cir. 1988).

13 The parties do not dispute that the Government has satisfied the first two
14 requirements to assert the privilege. *See* Dkt. # 266-1, Exs. A, D, E, F. In assessing
15 whether the Government has demonstrated the final requirement—i.e., that the
16 information properly falls within the scope of the privilege—the Court must “weigh the
17 public interest in nondisclosure against the [requesting party’s] need for access to the
18 privileged information.” *Tuite v. Henry*, 98 F.3d 1411, 1417 (D.C. Cir. 1996) (internal
19 quotation marks and modifications omitted).

20 To achieve this end, a number of factors must be considered,
21 including: (1) the extent to which disclosure will thwart governmental
22 processes by discouraging citizens from giving the government
23 information; (2) the impact upon persons who have given information
24 of having their identities disclosed; (3) the degree to which
25 governmental self-evaluation and consequent program improvement
will be chilled by disclosure; (4) whether the information sought is

26 repeatedly plagued this Court with unnecessary delays and the Court will not hesitate to
27 award further sanctions, including waiver, if this pattern of behavior continues.

1 factual data or evaluative summary; (5) whether the party seeking
2 discovery is an actual or potential defendant in any criminal
3 proceeding either pending or reasonably likely to follow from the
4 incident in question; (6) whether the police investigation has been
5 completed; (7) whether any interdepartmental disciplinary
6 proceedings have arisen or may arise from the investigation; (8)
7 whether the plaintiff's suit is non-frivolous and brought in good faith;
8 (9) whether the information sought is available through other
9 discovery or from other sources; (10) the importance of the
10 information sought to the plaintiff's case.

11 *Frankenhauser v. Rizzo*, 59 F.R.D. 339, 344 (E.D. Pa. 1973).

12 In support of its privilege claim, the Government submits declarations by the
13 departmental heads of several law enforcement agencies including the U.S. Citizenship
14 and Immigration Services ("USCIS"), Federal Bureau of Investigation ("FBI"), Customs
15 and Board Patrol ("CBP"), and United States Immigration and Customs Enforcement
16 ("ICE"). Dkt. # 266-1, Exs. A, D, E, F. *See* Dkt. # 166-1. Each of these declarations
17 describes in detail specific potential harms to public safety and national security if the
18 information in these documents is disclosed. *Id.* This leaves the Court in a difficult
19 position. As Plaintiffs correctly note, the very core of this case relates to USCIS' vetting
20 procedures and techniques for identifying and prioritizing national security concerns.
21 However, the Court must seriously consider the potential harms and national security
22 risks that the Government alleges could result from the disclosure of the redacted
23 information.

24 After considering the *Frankenhauser* factors and reviewing the documents *in*
25 *camera*, the Court finds that the Government has demonstrated that the public interest in
26 nondisclosure outweighs Plaintiffs' need for access to some, but not all, of the
27 information that the Government proposes to redact. The Court will address each
category of documents in turn.

1 i. Information regarding law enforcement databases

2 The Government argues that the law enforcement privilege protects any
3 information that would allow individuals to access law enforcement databases, including
4 screenshots, unique codes, password formatting information, and other instructions or
5 guidance regarding how to navigate these law enforcement databases. Dkt. # 266 at 7.
6 The Court agrees. The Government has articulated a very real concern that disclosing
7 this information may allow unauthorized users to access these systems. *See* Dkt. # 266-1,
8 Ex. A at ¶¶ 32-36, Ex. E at ¶¶ 10-15, Ex. F at ¶¶ 15-16. When balanced against these
9 national security risks, the Government’s interest in nondisclosure outweighs Plaintiffs’
10 need for this information. Plaintiffs’ motion to compel this information is **DENIED**.

11 ii. Personal identifying information

12 The Government also argues that the law enforcement privilege protects personal
13 identifying information or details from ongoing cases, such as the filing date for a benefit
14 application. *See* Dkt. # 266-1, Ex. A at ¶¶ 45-47. Disclosure of this information “could
15 permit such individuals to learn of derogatory information possessed by USCIS or other
16 government agencies, and permit bad actors to falsify or misrepresent information or
17 otherwise obstruct USCIS enforcement efforts.” Dkt. # 266 at 8. Plaintiffs do not oppose
18 the redaction of names or other personally identifiable information. Dkt. # 269 at 5.
19 Accordingly, because Plaintiffs’ need for this information is vastly outweighed by the
20 Government’s interest in nondisclosure, Plaintiffs’ motion to compel this information is
21 **DENIED**.

22 iii. Third-party law enforcement agency information

23 Plaintiffs next seek disclosure of information from third-party law enforcement
24 agencies including the FBI, CBP, and ICE. Dkt. # 269 at 5. As the Court noted in a
25 previous order, these third-party agencies are not defendants in this case and their internal
26 processes and techniques are not at issue. Dkt. # 274 at 4. But, to the extent Defendants
27 rely on third-party agency information to make CARRP determinations, Plaintiffs argue

1 that such information may indeed be relevant to their case. This is a closer call.
2 Declarations submitted by the departmental heads of each of these law enforcement
3 agencies describe significant potential national security risks that could result from the
4 disclosure of this information. Dkt. # 266-1, Exs. D, E, F. In addition, the Government
5 contends that disclosure of this information would thwart future cross-agency information
6 sharing. Dkt. # 266 at 6. Considering all these factors, the Court finds that the potential
7 harms of disclosure of this information outweigh any interest Plaintiffs may have in
8 accessing the information, Plaintiffs' motion to compel is **DENIED**.

9 iv. Internal USCIS information

10 Finally, Plaintiffs request information regarding USCIS' internal vetting
11 procedures and methodologies for identifying risk. As this Court has previously
12 articulated, the internal vetting procedures used by USCIS to identify and screen national
13 security concerns are directly relevant to this dispute. Dkt. # 274 at 5. USCIS is unique
14 in that only some of its functions relate to law enforcement. *Am. Civil Liberties Union of*
15 *S. California v. United States Citizenship & Immigration Servs.*, 133 F. Supp. 3d 234,
16 245 (D.D.C. 2015). *Id.* As a result, the Court must analyze its law enforcement
17 privilege claim "with some skepticism."

18 Here, the balance of factors weighs in favor of disclosure. The withheld
19 information regarding USCIS' processes is directly relevant to Plaintiff's claims and does
20 not appear to be obtainable from alternative sources. Furthermore, aside from the
21 Government's conclusory assertion that an "attorney eyes only" ("AEO") designation
22 will not "fully protect" this information, the Court finds no basis to conclude that an AEO
23 protective order is inadequate to protect the competing interests involved. *MacNamara v.*
24 *City of New York*, 249 F.R.D. 70, 94 (S.D.N.Y.2008) (permitting disclosure under AEO
25 protective order where defendants failed to articulate a non-conclusory basis in support of
26 their assertion that the limited disclosure of such information would pose a risk to the
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1 safety of law enforcement personnel and/or the integrity of ongoing criminal
2 investigations).

3 With respect to the information regarding USCIS' internal vetting procedures and
4 techniques, scoring methodologies, indicators of national security concerns, related
5 hypotheticals and examples, and information regarding how USCIS prioritizes risk,
6 Plaintiffs' motion to compel is **GRANTED**.² Consistent the Court's prior order, these
7 documents may be produced under an attorney's-eyes-only protective order. *See* Dkt. #
8 183. These files must bear the "ATTORNEYS EYES ONLY" designation and may only
9 be disclosed to (1) Plaintiffs' attorneys of record, during such time as they continue to
10 represent Plaintiffs; (2) experts retained by Plaintiffs to the extent reasonably necessary to
11 prepare expert reports and testimony; and (3) the Court. Plaintiffs' attorneys shall
12 maintain these files in a secure manner, such as a locked filing cabinet or password
13 protected electronic file and shall not transmit these files over any e-mail or cloud-based
14 sharing platform unless the transportation method utilizes appropriate encryption.
15 Plaintiffs' counsel may not disclose these files, or the newly-unredacted information
16 contained therein (if applicable), to any other individual. The Court expects strict
17 compliance with this directive and will impose severe sanctions if the parties do not
18 follow it.

19 **B. Deliberative Process Privilege**

20 The Government also asserts deliberative process privilege over 3 of the 25
21 documents. Plaintiffs only seek to lift the deliberative process redactions on one
22 document, DEF-0094269. Dkt. # 260 at 15. The Government argues that DEF-0094269
23 is a pre-decisional policy proposal that was never implemented. Dkt. # 266-1 at ¶ 12.
24 The Court has reviewed the unredacted document provided by Defendants and agrees that

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26 ² This decision is subject to the limitations outlined above. For example, if a document
27 that discusses USCIS' internal vetting processes includes personal identifying
information from actual cases, the personal identifying information may remain redacted.

1 the deliberative process privilege applies to this document because it is (1) predecisional
2 and (2) deliberative in nature, in that it relates to “opinions, recommendations, [and]
3 advice about agency policies.” *F.T.C. v. Warner Connc’ns Inc.*, 742 F.2d 1156, 1161 (9th
4 Cir. 1984). In addition, the Court does not believe that this document would be useful in
5 ascertaining whether Defendants are currently administering CARRP in a discriminatory
6 fashion. In addition, the extent to which disclosure of this document could hinder “frank
7 and independent discussion[s] regarding contemplated policies and decisions” weighs in
8 favor of denying the motion. Dkt. # 166-1 at ¶¶ 14-15. Plaintiffs’ motion to compel the
9 production of DEF-0094269 without the deliberative process redactions is **DENIED**.

10 **IV. CONCLUSION**

11 For the foregoing reasons, the Court **GRANTS in part** and **DENIES in part**
12 Plaintiffs’ motion to compel (Dkt. # 260). Defendants are ordered to reproduce the 25
13 documents in Plaintiffs’ motion consistent with the parameters outlined above within
14 twenty-one (21) days from the date of this order.

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16 Dated this 16th day of January, 2020.

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19 The Honorable Richard A. Jones
20 United States District Judge
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