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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

AYMAN LATIF, et al., *Plaintiffs*,	Case 3:10-cv-00750-BR
v. LORETTA LYNCH, et al., *Defendants*.	**DEFENDANTS' SECOND SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

Defendants respectfully submit this supplemental memorandum and accompanying declarations, in accordance with the Court's Orders, dated March 28, 2016 ("Mem. Op.") (Dkt. No. 321) and April 8, 2016 (Dkt. No. 323), and in further support of Defendants' motion for summary judgment. The Court directed the Defendants to file "(1) a summary of any material information (including material exculpatory or inculpatory information) that Defendants withheld from the notice letters sent to each Plaintiff and (2) an explanation of the justification for withholding that information, including why Defendants could not make additional disclosures." *See* Mem. Op. at 60; *see also* Dkt. No. 323. The Court's order provided further that Defendants' supplemental submission may be in the form of declarations or other statements from an officer or officers with personal knowledge of the No-Fly List determinations as to each Plaintiff. *Id*. at 61. The Court added that, if necessary to protect sensitive national security information, Defendants may make such submissions *ex parte* and *in camera*, but that if Defendants submit any materials *ex parte* and *in camera*, they must also make a filing on the public record that memorializes the submission and provides as much public disclosure of the substance of Defendants' submission as national security considerations allow. *Id.*

In response to the Court's order, Defendants have submitted a classified Declaration of Michael Steinbach, Executive Assistant Director for the FBI's National Security Branch,[1] solely for *in camera*, *ex parte* review, together with the accompanying *in camera*, *ex parte* exhibits, which details the information Defendants withheld from the notice letters provided to the five

[1] Defendants refer below to the declaration of Mr. Steinbach filed with the Court on May 28, 2015 as the "First Steinbach Declaration." (Dkt. No. 254).

remaining Plaintiffs[2] and explains the bases for the various withholdings. Further, in response to the Court's order, Defendants have filed a public declaration of Mr. Steinbach that, along with this memorandum, memorializes the *ex parte, in camera* submission and provides as much public disclosure of the substance of Defendants' submission as national security considerations allow. *See* Mem. Op. at 61.

During the redress process made available to each of the Plaintiffs, the TSC Principal Deputy Director provided to the Acting Administrator of the Transportation Security Administration ("TSA") a classified memorandum, which summarized information supporting a recommendation to maintain each Plaintiff on the No Fly List. The Acting Administrator considered the recommendation and information contained in each classified memorandum, along with each Plaintiff's submissions, in reaching a final determination with respect to each Plaintiff. *See* Declaration of Deborah O. Moore ("Moore Decl.") ¶¶ 14-17, 19 (Dkt. No. 252) (May 28, 2015) (describing application and redress process provided to Plaintiffs). The classified Steinbach Declaration submitted herewith explains why certain information in each memorandum was not provided to the Plaintiffs in their notice letters. This classified declaration shows that Defendants properly withheld only that information considered by TSA that implicated national security, law enforcement, or privacy concerns. As an original classification authority, Mr. Steinbach has determined that the classified information withheld is currently and properly classified and that its disclosure reasonably could be expected to cause serious damage to the national security. Mr. Steinbach has also determined that the disclosure of certain information in the memoranda would reveal sensitive law enforcement techniques and

[2] *See* Dkt. No. 324 (Plaintiffs' Notice concerning the death of Steven Washburn). Because Mr. Washburn's claims are moot, they are not addressed in this submission. *Id.*

procedures, such as the use of court-ordered searches and surveillance, confidential human sources, and undercover operations or various forms of national security process, which would interfere with investigations.[3]

DISCUSSION

In resolving Plaintiffs' procedural due process challenge, this Court considered (i) what process is constitutionally required under the circumstances, (ii) whether the challenged procedures satisfy the constitutional requirements, and (iii) assuming the challenged procedures are constitutional, whether the individual Plaintiffs received the constitutionally required procedures. The Court addressed the first question in its June 2014 order (Dkt. No. 136), where it weighed the competing private and public interests and outlined the core parameters of a procedurally adequate redress process. This Court addressed the second question in its March 2016 order (Dkt. No. 321), where it held that the "Defendants' revised DHS TRIP procedures satisfy in principle most of the procedural due-process requirements that the Court set out in its June 2014 Opinion." Mem. Op. at 7. The materials submitted with this memorandum are provided at the Court's direction in connection with the third question—whether the individual Plaintiffs received the constitutionally required procedures.

In considering this question, the pertinent inquiry is whether the Government's withholding decisions were consistent with the process upheld by this Court—that is, whether the relevant agencies carried out a careful, fact-intensive assessment as to the kind and quantity of information that could be disclosed to each Plaintiff. Such assessments are entitled to substantial deference, given the Executive's constitutional prerogative to determine what

[3] Nothing in this Supplemental Memorandum is meant to confirm or deny that the FBI was the nominating agency as to any Plaintiff or that any of these types of sources or methods were used with regard to the determination to include any Plaintiff on the No-Fly List.

national security information to protect, how to protect it, and to whom it should be disclosed. *See Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988); *Al-Haramain Islamic Found., Inc. v. Bush ("AHIF")*, 507 F.3d 1190, 1196 (9th Cir. 2007) ("[W]e acknowledge the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second guessing the Executive in this arena."). Indeed, courts have "consistently deferred to executive affidavits predicting harm to the national security, and have found it unwise to undertake searching judicial review." *Ctr. For Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 927 (D.C. Cir. 2003); *ACLU v. Dep't of Def.*, 628 F.3d 612, 619 (D.C. Cir. 2011) ("Because courts lack the expertise necessary to second-guess such agency opinions in the typical national security FOIA case, [they] must accord substantial weight to an agency's affidavit.").

The Steinbach Declarations submitted herewith establish that information withheld from Plaintiffs on grounds of national security was and is properly classified national security information that cannot be disclosed without risking serious damage to the national security. *See* Public Steinbach Decl. ¶ 27; Classified Steinbach Decl.; *see also* Exec. Order No. 13,526, 75 Fed. Reg. 707, 709 (Dec. 29, 2009). They further establish, consistent with a prior public declaration by Mr. Steinbach, that the Government fully considered whether additional information could be disclosed to the individual Plaintiffs without undermining law enforcement interests. *See* Public Steinbach Decl. ¶¶ 25, 27; Classified Steinbach Decl.; First Steinbach Decl. ¶¶ 32–33 (explaining that No Fly determinations often hinge on law enforcement sensitive information); *see also In re City of N.Y.*, 607 F.3d 923, 940 (2d Cir. 2010); *Brooks v. Cty. of San Joaquin*, 275 F.R.D. 528, 532 (E.D. Cal. 2011). In many instances, this law enforcement privileged material is intertwined with classified information and cannot be segregated without

risking unauthorized disclosure of the classified information. *In re DHS*, 459 F.3d 565, 569 (5th Cir. 2006) ("[T]he reasons for recognizing the law enforcement privilege are even more compelling" when "the compelled production of government documents could impact highly sensitive matters relating to national security."). The Steinbach Declarations also establish that such additional information could not be disclosed to Plaintiffs because disclosure would harm law enforcement interests, such as the use of court-ordered searches or surveillance, confidential human sources, undercover operations or various forms of national security process. Public Steinbach Decl. ¶¶ 15-25; Classified Steinbach Decl.[4]

As specifically directed by the Court, the Government also considered the possibility of disclosing national security information to Plaintiffs' counsel, and has explained why it declines to grant such access. *See* Public Steinbach Decl. ¶ 28; First Steinbach Decl. ¶¶ 37-38; Defs.' Summ. J. Mem. at 43-44 (Dkt. No. 251); Defs.' Reply at 25-30 (Dkt. No. 304). Under well-established separation of powers principles, decisions about who may access or use classified information and under what circumstances are committed to the Executive Branch and not subject to judicial review. *See Egan*, 484 U.S. at 529-30; *CIA v. Sims*, 471 U.S. 159, 180 (1985) ("[I]t is the responsibility of the [Executive], not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether [to disclose sensitive information]."); *see also Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990) ("The decision to grant or revoke a security clearance is committed to the discretion of the President by law."). As the Court is

[4] The pending question for purposes of Plaintiffs' procedural due process claim is whether the individual Plaintiffs received the constitutionally required procedures during the administrative process. The Court need not yet consider whether any non-classified law enforcement information withheld during administrative proceedings could be safely segregated and provided under a protective order during consideration of the merits of Plaintiffs' placement on the No-Fly List. The current submissions show that the Government afforded Plaintiffs the proper procedures during the administrative process.

aware, in *Al Haramain Islamic Foundation, Inc. v. United States Department of the Treasury (AHIF II)*, the Ninth Circuit reviewed classified information *ex parte* and rejected an argument that such information must be disclosed in order to satisfy the demands of due process. 686 F.3d 965 (9th Cir. 2012); *see also Jifry v. F.A.A.*, 370 F.3d 1174, 1182 (D.C. Cir. 2004); *Ralls Corp. v. Comm. on Foreign Inv. in U.S.*, 758 F.3d 296, 318-19 (D.C. Cir. 2014) (stating that "due process does not require disclosure of classified information supporting official action") and citing *NCRI v. Dep't of State*, 251 F.3d 192, 209-10 (D.C. Cir. 2001) (observing that determinations about access to classified information are "within the privilege and prerogative of the executive, and we do not intend to compel a breach in the security which that branch is charged to protect")). The panel in *AHIF II* did suggest the possibility of providing cleared counsel access to classified information as one among a range of options the Executive Branch could consider in the terrorism designations context (including providing an unclassified summary, which occurred here) but did not require disclosure to counsel. *See* 686 F.3d at 984.

Here, the Government has determined not to grant such access because additional disclosures reasonably could be expected to cause serious damage to national security. *See* Public Steinbach Decl. ¶ 28; First Steinbach Decl. ¶ 37. Instead, the Government designed and afforded Plaintiffs a balanced, considered process that provided a summary of information on which the No-Fly determinations were based, consistent with national security. *See id.*; *see also* Moore Decl. ¶¶ 16-17, 19 (Dkt. No. 252) (May 28, 2015).[5]

[5] As noted, courts have reviewed classified information *ex parte*, *in camera* in civil litigation, and courts have also rejected demands for access to classified information by plaintiffs' counsel. *See Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003); *Global Relief Found. v. O'Neill*, 315 F.3d 748, 754 (7th Cir. 2002); *Jifry*, 370 F.3d at 1182 (*ex parte* review of classified information); *Stillman v. CIA*, 319 F.3d 546, 548-49 (D.C. Cir. 2003) (district court abused its discretion in ordering that plaintiff's counsel be granted access to classified information before undertaking *ex parte* review of classified declaration in challenge to

In addition, as reflected in the Steinbach Declarations submitted herewith, the Government has responded to the Court's instruction to address information that could be deemed exculpatory. In terms of what may be said publicly, Mr. Steinbach explains that exculpatory information often was disclosed in the context of summarizing the unclassified information provided to Plaintiffs, but that additional material exculpatory information, to the extent any such information exists, was properly withheld and cannot be disclosed to Plaintiffs without risking significant harm to the national security and/or to law enforcement activities or interests. Public Steinbach Decl. ¶ 29.

Finally, if the Court were to find that a particular Plaintiff did not receive due process in some respect under the revised DHS TRIP procedures, such an error would not be grounds for judgment against Defendants. Instead, absent a showing that any error was prejudicial and that additional steps would have changed the Government's ultimate No Fly determination, the as-applied procedural due process claim fails. *See AHIF II*, 686 F.3d at 989-90 (conducting harmless-error analysis); *see also* Defs.' Summ. J. Mem. at 51-52.

Dated: May 5, 2016

Respectfully submitted,

BENJAMIN C. MIZER

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classification decisions); *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1077 n.3 (9th Cir. 2010) (*en banc*) (declining to consider use of "protective procedures" in district court where state secrets privilege asserted); *see also El-Masri v. United States*, 479 F.3d 296, 311 (4th Cir. 2009); *Sterling v. Tenet*, 416 F.3d 338, 348 (4th Cir. 2005); *Ellsberg v. Mitchell*, 709 F.2d 51, 61 (D.C. Cir. 1983); *Halkin v. Helms*, 598 F.2d 1, 7 (D.C. Cir. 1978) (rejecting access by plaintiffs' counsel to information subject to state secrets privilege assertion); *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (*en banc* order reversing panel decision which suggested that private counsel would have a "need to know" classified information and should be cleared by the Government); *cf. Gen. Dynamics Corp. v. United States*, 563 U.S. 478, 482 (2011) (noting that disclosure of sensitive information to a limited number of lawyers led to "unauthorized disclosure of military secrets").

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion was delivered to all counsel of record via the Court's ECF notification system.

/s/ Brigham J. Bowen
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