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.

JOSEPH R. BIDEN, President of the United States, *et al.*,

Defendants.

No. 2:17-cv-00094-RAJ

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO SEAL DEFENDANTS' REPLY IN SUPPORT OF CROSS MOTION FOR SUMMARY JUDGMENT, AND SUPPORTING DOCUMENTS

NOTE FOR MOTION CALENDAR:
July 23, 2021

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I. INTRODUCTION

Defendants fail to provide compelling reasons, supported by specific facts, to hide Defendants' Reply to Defendants Cross Motion for Summary Judgment and supporting exhibits ("Reply") from the public. The public has a presumptive right to access Defendants' dispositive brief, especially given the weighty constitutional and statutory issues at stake. Defendants have not offered sufficient evidence to rebut the presumption to open court records and satisfy their burden. Defendants simply invoke the specter of "national security" without providing any specific threats, supporting evidence, or declarations from law enforcement or intelligence agencies. And Defendants offer only unsupported speculation of the alleged grave risk to national security, solely through attorney argument. Moreover, Defendants simultaneously overstate the nature of the information that they seek to protect while utterly failing to acknowledge the substantial body of information that Defendants now urge the Court to protect for national security reasons is already in the public sphere, in this case, in other cases, in news reports, in policy papers, and in response to Freedom of Information Act requests.

Defendants' remaining arguments likewise fall far short. The mere fact that Defendants chose to label discovery materials "Confidential" or "Attorney's Eyes Only" is meaningless. It is "ultimately up to the Court, not the parties, to decide whether materials that are filed in the record . . . should be shielded from public scrutiny." *Peters v. Aetna, Inc.*, No. 1:15-CV-00109-MR, 2018 WL 1040106, at *1–2 (W.D.N.C. Feb. 23, 2018). And contrary to Defendants' suggestion, the Court has made no such determination under the "compelling reasons" standard. Defendants' attempt to shield their Reply from the public record should be denied.

II. ARGUMENT

A. Legal Standard

This Court recognizes a "strong presumption in favor of access to courts," *Foltz v. State Farm Mutual Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003), under which documents should remain sealed "[o]nly in rare circumstances." LCR 5(g)(5). The preference for open court records "applies fully to dispositive motions, including motions for summary judgment and related attachments." *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1179 (9th Cir.

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2006). This long-standing practice is grounded in "the need for . . . the public to have confidence in the administration of justice." *Center for Auto Safety v. Chrysler Group, LLC*, 809 F.3d 1092, 1096 (9th Cir. 2016) (internal quotations omitted). Open court records promote the "interest[s] of citizens in 'keeping a watchful eye on the workings of public agencies.'" *Kamakana*, 447 F.3d at 1178 (quoting *Nixon v. Warner Commc'n., Inc.*, 435 U.S. 589, 597 n.7, 98 S. Ct. 1306 (1978)).

Defendants have the burden to overcome the "strong presumption" in favor of access to judicial records by meeting the "compelling reasons standard." *Kamakana*, 447 F.3d at 1178–79. The "compelling reasons" standard is a "stringent" one. *Center for Auto Safety*, 809 F.3d at 1096–97. "[Defendants] must articulate compelling reasons supported by specific factual findings that outweigh the general history of access and the public policies favoring disclosure, such as the public interest in understanding the judicial process." *Kamakana*, 447 F.3d at 1178–79 (cleaned up). And, Defendants must "articulate specific facts *with respect to each item sought to be sealed*." *See, e.g.*, *MD Helicopters Inc. v. United States*, No. CV-19-02236-PHX-JAT, 2019 WL 2415285, at *2 (D. Ariz. June 7, 2019) (cleaned up) (emphasis added); *Boy v. Admin. Comm. for Zimmer Biomet Holdings, Inc.*, No. 16-CV-197-CAB-BLM, 2017 WL 2868415, at *1 (S.D. Cal. Feb. 21, 2017) (defendants "must explain why any individual document within th[e] administrative record should be sealed").

"In turn, the court must conscientiously balance the competing interests of the public and the party who seeks to keep certain judicial records secret." *Kamakana*, 447 F.3d at 1179 (cleaned up). "After considering these interests, if the court decides to seal certain judicial records, it must base its decision on a compelling reason and articulate the factual basis for its ruling, without relying on hypothesis or conjecture." *Id.*

"[T]he strong presumption of access to judicial records applies fully to dispositive pleadings, including motions for summary judgment and related attachments," because "resolution of a dispute on the merits . . . is at the heart of the interest in ensuring the public's understanding of the judicial process and of significant public events." *Id.* "The 'compelling

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reasons' standard is invoked even if the dispositive motion, or its attachments, were previously filed under seal or protective order." *Id.*

B. Defendants Fail to Provide Compelling Reasons to Seal their Reply with Specific Facts

Defendants do not meet their burden to demonstrate how the standard is met for at least five reasons. First, Defendants rely on unsupported and general claims that public disclosure will undermine national security. Second, Defendants ignore and fail to distinguish CARRP policy and information that is already in the public domain through their own filings, the Freedom of Information Act, news reports, and other reviews. Third, Defendants cite no precedent that supports their extraordinary request. Fourth, the presence of a stipulated protective order in this case and Defendants' own designation of documents under that protective order are not compelling reasons to seal the Reply. Finally, the Court's prior orders shielding information in this case were made for discovery purposes and pursuant to the much lower "good cause" standard and should carry no weight to reach this much higher standard.

1. Unsupported and generalized assertions regarding national security are not compelling reasons.

Defendants fail to provide "compelling reasons" to seal their Reply in its entirety and supporting exhibits. Indeed, they provide no "specific factual findings" necessitating sealing, and instead, continue to rely on vague and unsupported invocations of "national security." As the Supreme Court has cautioned, "national-security concerns must not become a talisman used to ward off inconvenient claims." *Ziglar v. Abassi*, 137 S.Ct. 1843, 1862 (2017). Here, Defendants make broad claims of national security threats based on nothing but conjecture, without ever explaining what specific information requires sealing and why that information would present a national security threat if revealed. *See* LCR 5(g)(4) ("A party must minimize the number of documents it files under seal and the length of each document it files under seal."); *MD Helicopters Inc.*, 2019 WL 2415285 at *2 (the party seeking to seal documents must "articulate specific facts with respect to each item sought to be sealed.").

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Defendants fail to point to a single example of how their Reply and attached exhibits reveal sensitive law enforcement techniques or intelligence gathering operations, nor could they. Defendants did not file any classified information. *See Ground Zero Center for Non-Violent Action v. U.S. Dep't of Navy*, 860 F.3d 1244, 1262 (9th Cir. 2017) ("[T]he fact that the documents are not classified" is relevant to the assessment of whether nondisclosure to the public is justified). And Defendants withheld as law enforcement privileged substantial portions of the submitted policy documents and A-Files. Following discovery litigation, the Court permitted Defendants to withhold all material containing third-party information, third-party communications, and inter-agency coordination as law enforcement privileged. *See* Dkts. 320; 451. As a result, there is no unredacted information that reveals any of the information Defendants seek to hide from the public or that they claim exists in the Reply. Yet, Defendants still claim that unsealing the Reply will "harm beneficial, collaborative communication and coordinate between USCIS and [law enforcement] agencies." Dkt. 564 at 4. Defendants' argument is simply meritless. Aside from lacking merit, their subsequent citation to and quotation from a prior Court order is entirely misleading. *Id.* (citing Dkt. 274 at 5). In that order, the Court allowed Defendants to withhold law enforcement agency information from *Plaintiffs* during discovery. Since that information was withheld as privileged, there is no risk to unsealing the Reply. It is entirely revealing that Defendants do not cite *a single example*, even to a page in their Reply or support exhibit, of sensitive third agency information that would undermine national security if revealed.

Next, Defendants claim that the Reply must be sealed because it would reveal the criteria USCIS uses to identify a person as a "national security concern" and how it vets applicants for such concerns. Dkt. 514 at 4-5. But those categories of information are already the subject of public knowledge. This too is reason enough to deny Defendants' motion. *Ground Zero*, 860 F.3d at 1262 ("the extent to which the information [was] already. . . publicly disclosed" is relevant to whether nondisclosure to the public is justified).

Even so, "vague" implications of national security, *see id.*, and reference to "general investigative procedures, without implicating specific people or providing substantive details"

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are insufficient to meet the compelling reasons standard. *United States ex. Rel. Lee v. Horizon W., Inc.*, No. C 00–2921 SBA, 2006 WL 305966, at *2 (N.D. Cal. Feb. 8, 2006) (emphasis added) (the "Government's bare assertion that the disclosure of its extension requests would reveal pieces of the government's investigatory techniques, decision-making processes, research, and reasoning that apply in hundreds of similar cases" was not "a compelling showing" sufficient to prevent the court from lifting seal on the entire record) (internal quotations omitted). And even when the "rare circumstances" involving highly sensitive national security information arise, courts are directed to "minimize the extent of sealed proceedings" to uphold the public's right to access. *Polaris Innovations Ltd. v. Kingston Tech. Co.*, No. SACV 16-00300-CJC(RAOx), 2017 WL 2806897, at *5 (C.D. Cal. Mar. 30, 2017).

Here, the Reply is highly generalized in nature, especially with respect to the program itself. Defendants don't attach a single training manual or policy document in support of their Reply and they do not cite any specific indicators of national security either. Of course, none of the information implicates specific people, reveals investigative secrets, or provides substantive details such that its disclosure would harm national security. Defendants have already shielded that type of information from Plaintiffs as privileged. *See, e.g.*, Dkt. 274 (denying, in part, Plaintiffs' motion to compel and allowing Defendants to redact privileged information from certain documents originating from third party agencies). Defendants' now repetitive attempt to assert "national security" as a reason to seal does not satisfy this Court's precedent as meeting the compelling reasons standard. To the contrary, this information is precisely the type of information to which citizens should have access "to keep a watchful eye on the workings of public agencies." *Nixon*, 435 U.S. at 598. Defendants fail to meet the compelling reasons standard to seal their Reply.

At bottom, USCIS is not a law enforcement or intelligence agency, and it makes no effort to explain how it is competent to assess threats to national security. Nor is CARRP a law enforcement program. Defendants offer no declaration from law enforcement or intelligence agency officials—or even its *own* officials—to support its claim of national security risks. Defendants put forward only their counsel's argument to support their claims.

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Finally, Defendants' national security rationale is purely speculative. Dkt. 564 at 4 ("could be used for improper purposes … could result in adverse consequences"); *id.* at 1 ("could cause specific harms"). Defendants' conjecture is not a compelling reason to keep their dispositive motion out of public view.

2. Publicly available documents should not be sealed.

Second, no compelling reasons exist for this Court to seal information that is already in the public domain. *See, e.g.*, *Ibrahim v. Dep't of Homeland Security*, 62 F. Supp. 3d 909, 935 (N.D. Cal. 2014) (plaintiff challenged inclusion on the No-Fly list, and court emphasized that despite "the legitimacy of protecting SSI and law enforcement investigative information," court is less likely to protect information that has been already made publicly available). Sealing such information directly refutes the strong presumption in favor of access to court records. *See, e.g.*, *id.* at 936 ("public release of this entire order will reveal very little, if any, information about the workings of our watchlists not already in the public domain").

Much of the information that Defendants try to shield from the public eye was obtained pursuant to the Freedom of Information Act ("FOIA") or is information that would be subject to FOIA. *See, e.g.*, Muslims Need Not Apply, ACLU of Southern California (Aug. 21, 2013), available at https://www.aclusocal.org/en/publications/muslims-need-not-apply (extensive reporting on CARRP based on information obtained via FOIA request); CARRP FOIA Documents, https://www.aclusocal.org/carrp (USCIS produced dozens of CARRP documents through FOIA, including training guides, workflows, and statistics); *see also* Dkt.555-1 (brief filed by amici Creating Law Enforcement Accountability & Responsibility, Asian Americans Advancing Justice–Asian Law Caucus, and the National Immigration Project of the National Lawyers Guild relying on entirely on information available to the public.). This includes Plaintiffs' A-Files. Dkt. 470 Ex. 75 (Wagafe A-File obtained through the Freedom of Information Act).

Defendants now argue that publicly available information is subject to the Protective Order and should remain under seal. But that argument falls flat: it is completely undermined by the fact that much of this information is already in the public eye or readily obtainable by the

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public. *See, e.g.*, *Al Otro Lado, Inc. v. Wolf*, No. 3:17-cv-2366-BAS-KSC, 2020 WL 3487823, at *4 (S.D. Cal. June 26, 2020) (public could request documents via FOIA, which undermined "[d]efendants' assertion that the information in these records is particularly sensitive and should be protected from disclosure"). If the information were "confidential," as Defendants suggest, it would not be available via FOIA—nor already in Plaintiffs' hands via FOIA, for that matter. And even if Defendants could argue that certain information would be exempt under FOIA, that alone is not a compelling reason for the Court to order that information sealed. *See, e.g.*, *Moussouris v. Microsoft Corp.*, No. 15-cv-1483 JLR, 2018 WL 1159251, at *9 (W.D. Wash. Feb. 16, 2018) ("The fact that the documents are exempt under FOIA is not support for sealing documents on the court docket under a compelling reasons standard."); *Bryan v. U.S.*, No. 2010-0066, 2017 WL 1347681, at *5–7 (D.V.I. Jan. 27, 2017) (unsealing, in part, certain TECS records about Plaintiffs which the Government had disclosed).

Defendants themselves submitted CARRP policy documents as part of the publicly filed certified administrative record ("CAR") in this case that reveal the very information Defendants claim should be shielded from public view. For example, Defendants complain that unsealing their Reply would harm national security by "revealing publicly what constitutes an indicator of a national security concern." Dkt. 564 at 4. But, "indicators" that USCIS uses to determine whether someone is a national security concern, including those originating from FBI security checks, appear in Defendants' own publicly filed CAR. *See* Dkt. 286-3 ECF pages 31-32. But more significantly, dozens of core CARRP documents—the operative policy memoranda and guidance documents, as well as various training modules—have been produced through FOIA requests and litigation, and been the subject of public scrutiny for more than a decade, prompting policy reports, news and law review articles, and litigation around the country.[1] The operative

[1] *See, e.g.,* Dkt. 27 ¶4; CARRP, Wikipedia, https://en.wikipedia.org/wiki/CARRP; Jennie Pasquarella, *Muslims Need Not Apply: How USCIS Secretly Mandates the Discriminatory Delay and Denial of Citizenship and Immigration Benefits to Aspiring Americans*, ACLU of So. Calif. (Aug. 21, 2013), shorturl.at/nrR89; Katie Traverso, *Practice Advisory: USCIS's CARRP Program*, ACLU of So. Calif., shorturl.at/qtzGS; Nermeen Saba Arastu, *Aspiring Americans Thrown Out in the Cold*, 66 UCLA L. Rev. 1078 (2019); Ming Chen, *Citizenship Denied: Implications of the Naturalization Backlog for Noncitizens in the Military*, 97 Denv. L. Rev. 669 (2020); Diala Shamas, *A Nation of Informants: Reining in Post-9/11 Coercion of Intelligence Informants*, 83 BKNLR 1175 (2018); *Jafarzadeh v. Nielsen*, 321 F.Supp. 3d 19 (D.D.C. 2018); *Ghadami v. United States Dep't of Homeland Sec.*,

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core guidance document listing indicators of a "national security concern" in CARRP, known as "Attachment A," has been public for years. *See* Dkt. 286-3 at 29-37; CARRP Attachment A, shorturl.at/oBIZ9. *See also* CARRP FOIA Documents, https://www.aclusocal.org/carrp (USCIS produced dozens of CARRP documents through FOIA, including training guides, workflows, and statistics). Based on these disclosures, applicants and their attorneys have long been able to determine whether USCIS views them as a "national security concern."

USCIS's public disclosure of CARRP information is significantly more widespread than a one-off disclosure that Defendants' counsel has previously asserted to have been inadvertent. To the contrary, pursuant to FOIA, USCIS has made hundreds of disclosures to immigration attorneys, news agencies and advocacy organizations. *See, e.g.,* Dkt. 243 ¶¶8-21 (Plaintiffs' expert Jay Gairson describing USCIS disclosures of CARRP information in hundreds of A-Files received); Dkt. 97 ¶¶4-6 (same); CARRP FOIA Documents, https://www.aclusocal.org/carrp (documents obtained through two FOIA requests); *ACLU of Southern California v. USCIS*, 133 F.Supp.3d 234 (D.D.C. 2015) (FOIA litigation); Daniel Burke, "He applied for a green card. Then the FBI came calling," CNN, Oct. 3, 2019 (obtaining CARRP statistics from USCIS); Yesenia Amaro, "Little-known law stops some Muslims from obtaining US citizenship," Las Vegas Review-Journal (Apr. 16, 2016) (obtaining CARRP statistics from USCIS). In other litigation, USCIS filed CARRP policy memoranda on the public record too. *Jafarzadeh v. Nielsen*, 321 F. Supp. 3d 19, 41–44 (D.D.C. 2018) (Dkt. 33-1). Defendants' reliance on *Ground Zero* is misplaced because the Ninth Circuit did not hold that the inadvertently disclosed document could remain sealed. *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1193-1202 (9th Cir. 2007), is similarly unavailing because that case involved a "Top Secret" classified document where the government invoked the states secret privilege. None of the documents at issue here are classified at any level and Defendants have not invoked the states secret privilege over any of these materials.

2020 WL 1308376 (D.D.C. Mar. 19, 2020); *Siddiqui v. Cissna*, 356 F.Supp.3d 772 (S.D. Ind. 2018); *Al-Saadoon v. Barr*, 973 F.3d 794, 803–04 (8th Cir. 2020).

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Defendants offer the Court no specific evidence to show how the documents Defendants ask to keep under seal now are any different or reveal any *additional* sensitive information from those already in the public domain. It is Defendants' burden, not Plaintiffs' burden, to demonstrate to the Court how any of the nonpublic information at issue in Defendants' Reply is any different than the policy and statistical information already in the public domain. Defendants fail to meet this burden.

3. The existence of a stipulated protective order is not a compelling reason.

Defendants cite no precedent that supports their extraordinary request to shield from the public a significant government policy that, as Plaintiffs allege, has denied thousands of people their statutory and constitutional rights, because there is none. The cases Defendants cite only confirm that the government must make a far more specific showing to justify sealing than they have done here. In *Ground Zero*, 860 F.3d at 1262, for example, the Court held it was "not enough that . . . the documents *implicate[d]* national security in some vague sense." *Id.* (cleaned up). Rather, any restrictions had to be "justified by specific facts showing that disclosure of particular documents would harm national security." *Id.* (emphasis added). Likewise, in *United States v. Ressam*, 221 F. Supp. 2d 1252 (W.D. Wash. 2002), the court rejected the government's argument that continued non-disclosure of protective orders sealed in connection with the Classified Information Procedures Act (CIPA) was required to protect national security. *Id.* at 1263. The court redacted only the name of an individual and nine other words that would immediately implicate the government's ability to gather intelligence. *Id.* at 1264. Similarly, in *United States ex rel. Kelly v. Serco, Inc.*, No. 11CV2975 WQH-RBB, 2014 WL 12675246, at *4 (S.D. Cal. Dec. 22, 2014), the court allowed the sealing of a single exhibit only because it revealed the specific locations of surveillance towers along the border and "a variety of sensitive technical information related to the installed technology and sensor capabilities" of the towers. *Id.*

4. The existence of a stipulated protective order is not a compelling reason.

The parties' Protective Order has no bearing on whether the Court should find "compelling reasons" to seal documents. *See Kamakana*, 447 F.3d at 1183 (purported reliance

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on the parties' stipulated protective order was not a "compelling reason" to seal summary judgment motion); *see e.g.*, *Orthopaedic Hosp. v. DJO Glob., Inc., No. 19-CV-970 JLS (AHG)*, 2020 WL 7129348, at *2 (S.D. Cal. Dec. 4, 2020); *CH2O, Inc. v. Meras Eng'g, Inc.*, No. LACV1308418JAKGJSX, 2016 WL 7645595, at *1 (C.D. Cal. Mar. 3, 2016). Although a protective order is generally "good cause" to seal such documents during discovery, a higher standard is warranted for dispositive motions. *Kamakana*, 447 F.3d at 1180. When a dispositive motion becomes part of the judicial record, "the public is entitled to access by default," which "sharply tips the balance in favor of produc[ing]" the document without a seal. *Id.*; *see also Rushford v. The New Yorker Magazine*, 846 F.2d 249, 252 (4th Cir. 1988) ("once the [sealed discovery] documents are made part of a dispositive motion . . . they lose their status of being raw fruits of discovery" and are not protected "without some overriding interests in favor of keeping the discovery documents under seal") (internal quotations omitted). "It is not enough that the documents could have been protected from disclosure in the first instance." *Ground Zero Center for Non-Violence Action v. U.S. Dep't of Navy*, 860 F.3d 1244, 1262 (9th Cir. 2017) (emphasis added). Defendants cannot rely on the parties' Protective Order as evidence of "compelling reasons" to keep the Reply under seal.

5. Reliance on prior sealing orders carries no weight as they were considered under the "good cause" standard.

Any purported reliance on prior favorable sealing orders carries no weight here. The Court's only sealing orders to date applied the lower "good cause" standard, not the much higher "compelling reasons" standard that applies here.

III. CONCLUSION

For all the foregoing reasons, the Court should order Defendants' Reply and the supporting exhibits unsealed.

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Respectfully submitted,

DATED: July 19, 2021

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