UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ADHAM AMIN HASSOUN,

Petitioner,

Case No. 1:19-cv-370-EAW

v.

JEFFREY SEARLS, in his official capacity as Acting Assistant Field Office Director and Administrator, Buffalo Federal Detention Center,

Respondent.

OPPOSITION TO PETITIONER'S MOTION TO COMPEL

In accordance with the Court's scheduling order (ECF No. 71), Respondent files this opposition to Petitioner's motion to compel (ECF No. 91).

I. The Court Should Reject Petitioner's Motion to Compel the Names of Confidential Informants

First, Petitioner argues that the government must disclose the identities of all confidential informants, and that the government should disclose collateral information that Petitioner never requested in discovery. Pet'r's Memo. of Law at 5-6 ("[T]he Court should order the government to disclose [] criminal/immigration histories, *at a minimum*, of all informants on whose statements it intends rely, or has previously relied, to satisfy its burden in this case, as well as records that would tend to undermine their credibility, that tend to contradict the allegations of other witnesses, or that would otherwise be considered exculpatory evidence in a criminal case."). Currently Respondent is not asserting the confidential informant privilege in the

documents it has produced.[1] Regardless of whether Respondent is asserting this privilege over its current production, Respondent maintains the right to assert the confidential informant privilege in this matter over informants not already produced, on whose statements it intends rely, or has previously relied, to satisfy its burden in this case. In the event that the government elects to introduce evidence related to an individual not already produced over whom it asserts the privilege, Respondent provides the following response.

Petitioner's argument ignores that this Court has already squarely rejected his call that Respondent disclose all informants. In response to Petitioner's argument that the government be required to disclose the witnesses against him, *see* Pet'r's Memo. of Law Regarding Parameters of Evidentiary Hr'g at 18-20 (ECF No. 60), this Court concluded that

> Respondent is not categorically required to identify all of its witnesses' identities. "[T]he Government has a legitimate interest in protecting sources and methods of intelligence gathering," and the Supreme Court has directed district courts to "use [their] discretion to accommodate this interest to the greatest extent possible." Indeed, even in the criminal context, the government has a qualified "privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law." This privilege not only applies in civil cases but is "arguably greater . . . since no all constitutional guarantees which inure to criminal defendants are similarly available to civil defendants."

Jan. 24, 2020 Order at 17 (ECF No. 75) (internal citations omitted). Petitioner's attempt to relitigate this issue should be rebuffed under the law of the case doctrine. *See Johnson v. Holder*, 564 F.3d 95, 99 (2d Cir. 2009) ("The law of the case doctrine commands that 'when a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case' unless 'cogent and compelling reasons militate otherwise.'"). Petitioner's

[1] On March 9, 2020, Respondent informed Petitioner that he will be promptly reproducing Volume 2, in which the government had previously asserted the confidential informant privilege, *see* Pet'r's Exs. 3, 4, to reflect that the government was no longer asserting the confidential informant privilege at this time.

argument offers no legitimate reason to upend the Court's decision that the government is not required to disclose the identity of informants. *See also infra* section II (explaining why, apart from the Court's prior order, this is not a criminal case entitling Petitioner to certain rights).

Petitioner also insists that disclosure of informant identities is necessary as the government is required to produce records "that would otherwise be considered exculpatory evidence in a criminal case." Pet'r's Memo. of Law at 6. But this too has already been ruled on, with this Court recognizing that this case is not a criminal case. Jan. 24, 2020 Order at 14 ("[A]s Petitioner acknowledges, this proceeding is 'not a criminal trial' and the 'fact that a proceeding will result in loss of liberty does not Ipso facto mean that the proceeding is a 'criminal prosecution' for purposes of the Sixth Amendment."). As a result, as this Court already held, Petitioner's rights "are not coextensive with those applicable in criminal trials."[2] *Id.*

Here, Petitioner bears a "heavy burden" to show disclosure of the informants' names are both relevant and essential to his case. *United States v. Skeens*, 449 F.2d 1066, 1070 (D.C. Cir. 1971). This burden is not met by "mere speculation that the informer might possibly be of some assistance." *Id.*; *see United States v. Mangum*, 100 F.3d 164, 172 (D.C. Cir. 1996). Petitioner once again does not meet his heavy burden, as Respondent is not asserting the privilege over any individuals currently.

Finally, the government would be remiss if it did not recognize that Petitioner's motion appears in part an attempt to force premature trial witness disclosure. Specifically, the Local Rules mandate that the government disclose trial witnesses in its pretrial statement or pursuant to court order. *See* LCvR 16(e). This Court previously recognized that the government could

[2] Assuming, *arguendo*, that Petitioner's rights are coextensive with those in a criminal case, this Court has already concluded that even in the criminal context, the government retains its right to assert an informant privilege. Jan. 24, 2020 Order at 17.

maintain the informant privilege, but that it would not extend to witnesses testifying at trial, and that the government would have to disclose such witnesses shortly before trial in accordance with the Local Rules. *Reich v. Great Lakes Collection Bureau*, 172 F.R.D. 58, 62 (W.D.N.Y. 1997); *see also Mitchell v. Roma*, 265 F.2d 633 (3d Cir. 1959) (allowing the government to maintain the informant privilege, while recognizing that with respect to informers that testified, the government would likely have to disclose their identities at trial). This Court already advised on January 17, 2020, that it would set a deadline for disclosure of final witness lists at the hearing on March 16, 2020. Jan. 21, 2020 Order at 2, ECF No. 71. With respect to any informant that the government will introduce as an evidentiary hearing witness, any dispute over confidentiality of that informant is premature. *See In re United States*, 565 F.2d 19, 24 (2d Cir. 1977) ("In this case, which probably will be tried without a jury, a decision as to the need for discovery of much privileged matter can be deferred safely until more fundamental issues, perhaps dispositive of the need, are decided on trial.") (internal citation omitted).

II. Respondent Has Properly Invoked the Law Enforcement and Investigatory Files Privilege

Next, Petitioner argues that "Respondent has failed to properly invoke the law enforcement investigatory files privilege." Pet'r's Memo. of Law at 13. Petitioner argues that (1) the government cannot invoke the investigatory files privilege in this case because it is allegedly is "quasi-criminal;" and (2) even if it could, the government purportedly did not follow all of the procedural requirements to invoke the privilege. *Id.* at 14. Neither contention has merit.

A. This Is Neither a Criminal Nor "Quasi-Criminal" Proceeding, and the Government May Invoke the Investigatory Files Privilege Here

Petitioner begins by rehashing an argument he has made repeatedly, and unsuccessfully, throughout this litigation: that this is a criminal case entitling him to the protections and procedures available to criminal defendants. *See id*.

The law enforcement privilege protects from dissemination information contained in both criminal and civil investigatory files. *See Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1136, 1341 (D.C. Cir. 1984). The privilege acknowledges the strong public interest in safeguarding the integrity of investigations, *In re Sealed Case*, 856 F.2d 268, 272 (D.C. Cir. 1988), and it may be invoked to protect the ongoing or future effectiveness of investigatory techniques, *see Ass'n for Women in Sci. v. Califano*, 566 F.2d 339, 343 (D.C. Cir. 1977). "The privilege serves to preserve the integrity of law enforcement techniques and confidential sources, protects witnesses and law enforcement personnel, safeguards the privacy of individuals under investigation, and prevents interference with investigations." *Tuite v. Henry*, 181 F.R.D. 175, 176 (D.D.C. 1998), *aff'd*, 203 F.3d 53 (D.C. Cir. 1999).

Petitioner resists the privilege's application here by calling this habeas action a "quasi-criminal proceeding." Pet'r's Memo. of Law at 14. He then argues that the privilege "has limited applicability in the criminal context," *id.*, and suggests that context is similar enough to a "quasi-criminal proceeding" such that the government should not be able to invoke it here. Crucially, Petitioner provides no citation for his assertion that this is a criminal case. *See* Pet'r's Memo. of Law at 14. He is wrong, as this is a civil case and the investigatory files privilege is plainly available in civil cases.

Again, the Court has already held that this is not a criminal case. *See supra* section I. That result holds not only in the context of the confidential informant privilege, but also in the

context of the investigatory files privilege. "As with all petitions for habeas corpus, these are not criminal proceedings, and simply analogizing to the rights of criminal defendants is inapt." *Mousovi v. Obama*, 916 F. Supp. 2d 67, 74 (D.D.C. 2013). The D.C. Circuit has rejected Petitioner's exact argument that immigration habeas proceedings are "quasi-criminal": "[C]ounsel for the [detained individuals] contends that habeas corpus is a 'semicriminal' or 'quasi criminal' proceeding which 'humiliates, disgraces, and interferes with the liberty and freedom of the party.' We think that habeas corpus is a civil proceeding . . ." *Kabadian v. Doak*, 65 F.2d 202, 205 (D.C. Cir. 1933); *In re Guantanamo Bay Detainee Litig.*, 630 F. Supp. 2d 1, 9 (D.D.C. 2009) ("A petition for a writ of habeas corpus is a civil proceeding."). This result accords with the Supreme Court's commentary that "the writ of habeas corpus is a 'civil remedy for the enforcement of the right to personal liberty' not 'a stage of' a criminal proceeding.'" *Dhiab v. Trump*, 852 F.3d 1087, 1092 n.8 (D.C. Cir. 2017) (quoting *Fay v. Noia*, 372 U.S. 391, 423 (1962)).

That result does not change because this is an immigration habeas case. Detention pending removal is neither criminal nor punitive. *Zadvydas v. Davis*, 533 U.S. 679, 690 (2001); *see, e.g.*, *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952) (deportation has been "consistently classified as a civil rather than a criminal procedure"); *Galvan v. Press*, 347 U.S. 522, 530-31 (1954) (because deportation is not criminal punishment, the procedural protections of criminal trial do not attach).

Accordingly, many procedural rights available in the criminal context are not "directly relevant to the habeas setting." *Al-Bihani v. Obama*, 590 F.3d 866, 879 (D.C. Cir. 2010). Again, to use an example from this very case, the Court has already rejected Petitioner's request to apply the Sixth Amendment right to confrontation, another right that "does not attach in civil

commitment proceedings." Jan. 24, 2020 Order at 14 (quoting, *e.g.*, *Carty v. Nelson*, 426 F.3d 1064, 1073 (9th Cir. 2005), and citing Petitioner's admission that this is "not a criminal trial"). The Court has also rejected Petitioner's request to apply the full due process rights available in criminal trials. Jan. 24, 2020 Order at 15. This is not a criminal case.

In civil, non-criminal cases, the government routinely invokes the law enforcement investigatory files privilege. *See, e.g.*, *Friedman*, 738 F.2d at 1343; *In re Sealed Case*, 856 F.2d at 271; *Collins v. Shearson/Am. Exp., Inc.*, 112 F.R.D. 227, 228 (D.D.C. 1986). This being a non-criminal case, the privilege may be used here. The Court should treat the privileges implicated by Respondent just as in any other non-criminal case. *See Al-Bihani*, 590 F.3d at 879. Therefore, the Court should reject the notion that the law enforcement investigatory files privilege is unavailable in this case.

B. Respondent Properly Logged His Privileges

1. Second Circuit Law Applies to the Adequacy of a Privilege Log

Next, Petitioner argues that Respondent failed to follow the requirements to log the government's privileges. As a threshold matter, Petitioner is wrong to rely on the law of the D.C. Circuit to argue that Respondent has failed to meet certain discovery obligations. This distinction matters because to claim the privilege in the D.C. Circuit, "(1) there must be a formal claim of privilege by the head of the department having control over the requested information; (2) assertion of the privilege must be based on actual personal consideration by that official; and (3) the information for which the privilege is claimed must be specified, with an explanation why it properly falls within the scope of the privilege." *In re Sealed Case*, 856 F.2d at 271. In contrast, here in the Western District of New York and in the Second Circuit, there is no such requirement for a formal claim of privilege. Rather, only a privilege log is needed, which must

state "(a) the type of document, i.e., letter or memorandum; (b) the general subject matter of the document; (c) the date of the document; and (d) such other information as is sufficient to identify the document for a subpoena duces tecum, including, where appropriate, the author of the document, the addressees of the document, and any other recipients shown in the document, and, where not apparent, the relationship of the author, addressees, and recipients to each other . . . ." LCvR 26(d)(1)(B)(i). Further, a redaction-by-redaction privilege log is unnecessary; "when asserting privilege on the same basis with respect to multiple documents, it is presumptively proper to provide the information required by this rule by group or category." LCvR 26(d)(4). As explained below, the latter body of law, not D.C. Circuit law, applies.

The USA PATRIOT Act states, "The law applied by the Supreme Court and the United States Court of Appeals for the District of Columbia Circuit shall be regarded as the rule of decision in habeas corpus proceedings described in paragraph (1)." 8 U.S.C. § 1226a(b)(4). The key phrase to interpret is "rule of decision." As the Court previously remarked, this provision means that D.C. Circuit's substantive law applies. Order, ECF No. 75 at 6 n.2 ("Throughout this Decision and Order, the Court has, as it is required to do, applied the *substantive* law of the District of Columbia Circuit.") (emphasis added) (citing 8 U.S.C. § 1226a(b)(4)).

That remark accords with the general usage of the term "rule of decision." First, the historical meaning of "rule of decision" refers to substantive law, as the U.S. Supreme Court has remarked. *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 378 (2012). Second, that meaning accords with the term as it was used when § 1226a was passed: "A rule, statute, body of law, or prior decision that provides the basis for deciding or adjudicating a case." *Rule of Decision*, *Black's Law Dictionary* (7th ed. 1999). Third, it accords with the usage of the term in other statutes, such as the Rules of Decision Act, 28 U.S.C. § 1652. By singling out rules of decision

and not simply referring to "all law," the Rules of Decision Act, like § 1226a, presupposes that some laws applicable to a case are *not* the "rule of decision," establishing that its scope is not plenary. *See, e.g.*, *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010) (differentiating between rules of decision and other laws applicable to a case). Collectively, this means that a "rule of decision" is simply the law that is the basis for deciding a case, and does not apply to mere housekeeping measures.

The method by which a privilege must be claimed and identified—as distinct from the legal availability of a privilege—is neither substantive, nor evidence, nor a dispositive matter. *Cf.* Fed. R. Evid. 501 (treating the *substantive* law of the privilege itself differently; noting that where state supplies the "rule of decision," the state's privilege law governs in lieu of federal privilege law). Rather, a privilege log or method of claiming a privilege is a mechanism. It is merely a device to organize privilege assertions and to give notice to the court and to opposing parties. The law of privilege-claiming methods is, like other discovery rulings on privilege issues, a non-dispositive matter. *Steuben Foods, Inc. v. Nestlé USA, Inc.*, No. 13-cv-892, 2016 WL 6094285, *1 (W.D.N.Y. 2016) (Wolford, J.) (quoting *Eisai Ltd. v. Dr. Reddy's Labs., Inc.*, 406 F. Supp. 2d 341, 342 (S.D.N.Y. 2005)); *accord Woodworth v. United States*, 287 F. Supp. 3d 345, 348 n.2 (W.D.N.Y. 2017). Consequently, the method of logging and claiming privileges is a matter of procedural law. *See, e.g.*, *Progressive Cas. Ins. Co. v. FDIC*, 298 F.R.D. 417, 421-22 (N.D. Iowa 2014) (in a diversity case where Iowa state law necessarily provided the rule of decision per the Rules of Decision Act, applying the federal *law of the forum* to the adequacy of a privilege log).

The law governing how a privilege must be claimed and identified is thus not a "rule of decision." Section 1226a(b)(4) is not applicable to this circumstance, and D.C. Circuit law does

not apply here. Rather, the default law of the Second Circuit and the Western District of New York applies. *See* 28 U.S.C. § 41; LCvR 1.1.

Petitioner's only argument to the contrary is to say, "Congress enacted 8 U.S.C. § 1226a(b)(3) to avoid circuit splits of the type that would be created if this Court were to apply Second Circuit law to determine whether a claim of privilege is properly invoked." Pet'r's Memo. of Law at 15 n.9. Petitioner provides zero authority for this nonobvious proposition. If Congress wished to pursue uniformity in all aspects of all terrorism habeas cases, it would not have limited the application of D.C. Circuit law to the "rule of decision," 8 U.S.C. § 1226a(b)(4), and would have instead instructed courts simply to apply all D.C. Circuit law. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) ("Congress 'says in a statute what it means and means in a statute what it says there . . . .'"). In any event, the "circuit splits" Petitioner fears are no different from normal divergences that arise in circuits' treatment of privilege logs in mine-run cases. Therefore, Second Circuit law applies here. Moreover, even if D.C. Circuit law applies, Respondent has properly invoked the privilege.

2. Respondent Properly Logged His Privileges

Respondent has asserted the law enforcement investigatory files privilege, as evidenced in the various privilege logs it has provided to Petitioner. Petitioner argues that Respondent "has failed to properly invoke the law enforcement investigatory files" because "the government has failed to provide [P]etitioner with adequate privilege logs." Pet'r's Memo. of Law at 13. To the contrary, Respondent's logs comport with the local and federal rules.

Petitioner takes issue only with the Volume 2 Privilege Log (Pet'r's Exs. 2, 3), Volume 3 Privilege Log (Pet'r's Ex. 6), and Volume 4 Privilege Log (Pet'r's Ex. 7). Pet'r's Memo. of Law at 16-17. Petitioner fails to specify his exact problems with the logs, other than claiming the

descriptions were insufficient and not unique. Within these voluminous logs, Petitioner has made no attempt to identify specific entries that he contests, except as to six specific documents:

1.) DEF-00000680 (Pet'r's Memo. of Law at 19) – email from Kenneth Oliver to George Harvey and Eric Parucki with the subject line "RE: HASSOUN"

2.) DEF-00000690 (*id.*) – email from Christopher Lemmo to William Kirchmeyer et al. with the subject line "RE: Hassoun Witness"

3.) DEF-00006833 (*id.*) – email from Cornelius O'Rourke to Justin Leone with the subject line "Polygraph Interview Information"

4.) DEF-00009370 to -00009375 (*id.* at 18) – photographs and charts regarding investigations, prepared by Cornelius O'Rourke

5.) DEF-00009442 to -00009452 (*id.* (referencing call translations)) – report regarding translation of Petitioner's phone calls, authored by David Peacock

6.) DEF-00009467 to -00009487 (*id.* (referencing call translations)) – call translations of Petitioner's calls, authored by Ashley Maison

Respondents' privilege logs comply with the federal and local rules.[3] A party asserting a privilege must provide, for documents:

> (a) the type of document, *i.e.*, letter or memorandum; (b) the general subject matter of the document; (c) the date of the document; and (d) such other information as is sufficient to identify the document for a subpoena duces tecum, including, where appropriate, the author of the document, the addressees of the document, and any other recipients shown in the document, and, where not apparent, the relationship of the author, addressees, and recipients to each other . . . .

LCvR 26(d)(1)(B)(i); *accord* Fed. R. Civ. P. 26(b)(5). The information must be logged, although the parties are "encouraged" to use "[e]fficient means of providing information regarding claims

[3] Petitioner has claimed that the privilege logs are deficient. Respondent has produced amended logs in response to some of Petitioner's concerns.

of privilege." LCvR 26(d)(2), (4); *see also Burns v. Imagine Films Entm't, Inc.*, 164 F.R.D. 589, 594 (W.D.N.Y. 1996) (Foschio, M.J.) ("The summary should be specific enough to permit the court or opposing counsel to determine whether the privilege asserted applies."). However, while a log must "enable other parties to assess the claim," it need not "reveal[] information itself privileged or protected." Fed. R. Civ. P. 26(b)(5); *accord* LCvR 26(b)(1)(B) (requiring a party to provide descriptions "unless to divulge such information would cause disclosure of the allegedly privileged information").

Respondent's privilege logs contain all of the required information, and more, while permissibly refraining from disclosing privileged information. Specifically, the six challenged documents are referenced on privilege logs generally containing the following information: (1) Begin Bates number; (2) End Bates number; (3) From; (4) To; (5) CC; (6) BCC; (7) Subject; (8) Filename; (9) Date Time Sent; (10) Date Time Rcvd; (11) Privilege Identity; (12) Privilege Description. Pet'r's Exs. 2, 3, 6, 7.

The information withheld and marked as privileged would divulge the privileged information itself in all six documents. *See* Ex. A (ECF No. 96-1), Unclassified Decl. of Brian T. Gilhooly, and Motion for Leave to Submit a Classified Declaration *Ex Parte, In Camera* (ECF No. 97) (Classified Decl. of Brian T. Gilhooly, lodged *ex parte* for *in camera* review). Deputy Assistant Director of the Federal Bureau of Investigation's Counterterrorism Division, Brian T. Gilhooly, has exhaustively explained, often document by document, how the withheld information would compromise national security investigations, divulge classified information, and harm our relationships with foreign partners. Ex. A. He explains the particular categories of national security information covered by the privilege and apparent in these documents. *Id.* He expands on these representations in his classified declaration. This information is therefore

properly withheld, as expressly permitted by the Federal and Local Rules. *See* Fed. R. Civ. P. 26(b)(5); LCvR 26(b)(1)(B).

Despite the detailed nature of Respondent's "privilege descriptions," Petitioner claims that the privilege logs are deficient for five meritless reasons. Petitioner suggests that the privilege logs are insufficient because they contain a "boilerplate entry that merely restates the privilege." Pet'r's Memo. of Law at 17.[4] That representation is inaccurate, and his argument is without merit. Many of the near identical entries on one privilege log are identical for a reason—they are all part of a single investigative file. Indeed, the latter three documents (DEF-00009370 to -00009375, DEF-00009442 to -00009452, and DEF-00009467 to -00009487) stem from a single investigative file. The description of privilege is the same for all of the documents because the documents are all part of the same original file and were merely disaggregated for production. Pet'r's Ex. 6.

Petitioner also confuses the adequacy of the privilege log with the completeness of the underlying production. He complains that one of the documents, DEF-000068333, refers to a polygraph test, "but Petitioner has been unable to find any mention of such a test in the privilege log nor any documents disclosing the results of that interview." Pet'r's Memo. of Law at 19. Whether or not a document exists, however, is completely collateral to whether a *related* document was properly *logged*.

[4] Petitioner asserts, "Respondent's counsel responded that they believed that the generic, all-purpose invocation was sufficient (at least until Mr. Hassoun filed a motion to compel)." Pet'r's Memo. of Law at 4. That is not accurate. During the meet-and-confer on February 25, 2020, Respondent's counsel responded that the privilege log they had produced was sufficient—without any regard to whether and when Petitioner filed a motion to compel. But Respondent did *not* represent or concede that his log contained a "generic, all-purpose invocation."

Overall, Respondent has taken great care to ensure that their privilege logs not only meet the minimum standards, but that they include greater detail than required, listing a separate entry for each document as opposed to listing categories of the documents.[5] *See* LCvR 26(d)(4) ("[W]hen asserting privilege on the same basis with respect to multiple documents, it is presumptively proper to provide the information required by this rule by group or category . . . ."); Fed. R. Civ. P. 26(b)(5) advisory committee note to 1993 amendments ("[d]etails concerning time, person, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories."); *In re Imperial Corp. of Am.*, 174 F.R.D. 475, 479 (C.D. Cal. 1997) (finding that "Fed. R. Civ. Pro. 26(b)(5) does not require the production of a document-by-document privilege log."). With that information, the Court can engage in the requisite assessment of the privilege. *See, e.g.*, *Alexander v. FBI*, 186 F.R.D. 154, 167 (D.D.C. 1999); *In re Sealed Case*, 856 F.2d at 272.

In light of the specific categories and amount of information provided to Petitioner in Respondent's privilege logs, this Court should reject both Petitioner's non-particularized global attack on the sufficiency of such logs, and his specific attack on the six documents.

3. Respondent Is Not Required to Submit a Declaration from an Agency Head until He Formally Invokes the Privilege

Petitioner's generalized attack on Respondent's claim of the law enforcement privilege is also based on a fundamental misunderstanding of the requirement for a declaration by the head of the agency. Petitioner argues that Respondent must submit "(1) a formal claim of privilege by the head of the department having control over the requested information; (2) assertion of the

[5] Respondent reserves the right to list categories of documents on future privilege logs.

privilege based on actual personal consideration by that official; and (3) a detailed specification of the information for which the privilege is claimed with an explanation why it properly falls within the scope of the privilege." Pet'r's Memo. of Law at 15-16, 17-18 (citing *In re Sealed Case*, 856 F.2d at 271).

Petitioner is mistaken. Simply put, there is no such requirement in the Second Circuit, and he provides no authority that there is. *See In re City of New York*, 607 F.3d 923, 944 (2d Cir. 2010) (discussing *In re Sealed Case* but declining to impose that case's affidavit requirement); *accord Club Level, Inc. v. City of Wenatchee*, 618 F. App'x 316 (9th Cir. 2015) (listing the general information needed for each document in a privilege log without mentioning the head of the department invoking the privilege).[6] Even if D.C. Circuit law applied to this issue—which it does not, *see supra* section II.B.1—a declaration setting out "a formal claim of privilege" is not necessary until a challenge to the privilege claim and a formal invocation before a court. *In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997) (finding no "obligation to formally invoke . . . privileges in advance of the motion to compel."). The requirement for an affidavit containing such information arises only after a challenge before a court. The requirement for a declaration by the head of the agency is to support a *formal* invocation of a privilege before a court; there is

[6] Petitioner claims that his choice-of-law problem is moot here, as the D.C. Circuit and Second Circuit supposedly use the same law. Pet'r's Memo. of Law at 15 n.9. In particular, Petitioner represents that the Second Circuit has "adopt[ed]" the test of the D.C. Circuit from *In re Sealed Case* for the investigatory files privilege. *Id.* (citing *In re City of New York*, 607 F.3d 923, 940 (2d Cir. 2010)). That representation is at odds with Petitioner's later admission that "the Second Circuit does not appear to require that the invocation be 'based on actual personal consideration' of the official invoking the privilege,'" *id.* at 18 n.11—one of the three prongs of *In re Sealed Case*. But more importantly, the Second Circuit conspicuously did *not* incorporate the three-pronged declaration requirement of the D.C. Circuit as Petitioner claims. *Id.* at 15 n.9. Rather, it cited the D.C. Circuit's *In re Sealed Case* opinion for the unremarkable proposition that "the party asserting the law enforcement privilege bears the burden of showing that the privilege applies to the documents in question." *In re City of New York*, 607 F.3d at 944.

no such requirement imposed at the initial stage of a claim of privilege. *See, e.g.*, *United States v. Reynolds*, 345 U.S. 1, 10-11 (1953) (accepting formal claim filed after order compelling production was issued because, "when the formal claim of privilege was filed by the Secretary of the Air Force, . . . there was certainly a sufficient showing of privilege to cut off further demand for the document on the showing of necessity for its compulsion that had then been made"); *SEC v. Downe*, No. 92-cv-4092, 1994 WL 23141, at *5 (S.D.N.Y. Jan. 27, 1994) (holding that the government is not required to provide affidavit in support of investigative files privilege "prior to formal motion practice"). The burden Petitioner advances presents an unworkable standard that would render senior government officials into mere functionaries of the civil discovery process. *See Fed. Housing Fin. Agency v. JPMorgan Chase & Co.*, 978 F. Supp. 2d 267, 279 (S.D.N.Y. 2013) (finding that party's contention that a certification must be included with a privilege log "is incongruent with the real-world practicalities of agency governance"). Because there is no requirement to provide an affidavit at the initial instance of claiming law enforcement privilege, Respondent's privilege logs cannot be insufficient as to the six challenged documents solely because they lack such information.

With Petitioner's motion to compel, the parties now have reached the operative procedural stage for formal invocation of the law enforcement privilege. In response to Petitioner's motion, and although not required by Second Circuit law, to aid resolution of this dispute Respondent hereby formally asserts the law enforcement privilege and submits herewith declarations in support of its assertion of this privilege.[7] *See* Ex. A (ECF No. 96-1), Unclassified Decl. of Brian T. Gilhooly, and Motion for Leave to Submit a Classified Declaration *Ex Parte*, *In*

[7] Contemporaneously with filing the instant document, Respondent will seek leave to lodge with the Court for its *ex parte, in camera* review two additional declarations containing law enforcement-sensitive information on behalf of the Federal Bureau of Investigation ("FBI").

Camera (ECF No. 97) (Classified Decl. of Brian T. Gilhooly, lodged *ex parte* for *in camera* review).

As a final point, Petitioner implies that the government has erred in its handling of the state secrets privilege. Petitioner alleges that on February 27, 2020, the government supposedly "notified Petitioner for the first time that it may invoke the state secrets privilege with respect to some documents it withheld on other grounds." Pet'r's Memo. of Law at 11-12 n.6. That is not accurate. Respondent first alerted Petitioner *three weeks earlier* that the government was pre-invoking the possible assertion of the state secrets privilege—as evidenced by Petitioner's own exhibits, some of which were sent as early as February 6, 2020. Pet'r's Exs. 4, 5, 6.[8] Petitioner also claims, "[t]o date, however, the government has not invoked that privilege or identified the precise information or documents to which it would apply." The government has moved to defer consideration of a possible formal assertion of that privilege, Mot. to Defer, ECF No. 90, but has indicated in the privilege logs where the privilege may be asserted. Pet'r's Exs. 4, 5, 6.

C. If the Court Finds the Privilege Logs Deficient on Their Face, It Should Review the Six Documents *in Camera* or Order the Government to Produce Amended Logs

If the Court determines that the privilege logs as to the six contested documents are facially deficient, then it should, consistent with Federal Rule 26(b)(5) and Local Rule 26(d)(1)(B), review the contested documents *ex parte* and *in camera*. *See In re Subpoena Duces Tecum Issued to Commodity Futures Trading Comm'n*, 439 F.3d 740, 751 (D.C. Cir. 2006) ("Where detailed description of the contested documents would undermine the claimed privilege,

[8] Petitioner also avers that Respondent sent him discovery on "February 7, 2020," one day late as to the deadline for that particular production. Pet'r's Memo. of Law at 3. That is not accurate. Respondent shipped that particular production, containing over 9,000 pages, via three identical FedEx parcels on February 6, 2020—the deadline for doing so.

the proponent's burden to describe with particularity can be met in other ways, such as *in camera* review by the court."); *see also* Pet'r's Memo. of Law at 21 (requesting this relief, although with respect to all privilege log entries, even those he has not challenged specifically). If, upon *in camera* review, the Court is still not satisfied that these privilege log entries are sufficient, then Respondent respectfully requests that the Court explain how the entries are deficient and give Respondent seven days to provide amended privilege logs to Petitioner. *See also id.* (asking the Court to "order the government to produce new logs," although with respect to all privilege log entries, even those he has not challenged specifically).

III. The Fifth Amendment Privilege Against Self-Incrimination Is Not Available to Petitioner Because this is a Civil Action

Both Petitioner and Respondent have listed Petitioner as a potential witness at the upcoming evidentiary hearing. Petitioner claims that he should be afforded the right "to testify in his own defense just as he would if the government had used the criminal process to prosecute him." Pet'r's Memo. of Law at 22. He asks the Court to "issue a protective order pursuant to Fed. R. Civ. P. 26(c) prohibiting the government from calling [him] as a witness and attempting to use his testimony." *Id.* Contrary to Petitioner's argument, Fifth Amendment protections against self-incrimination are not available to Petitioner because this is a civil action where the limited applicability of the privilege against self-incrimination is not uniformly available.

A. The Government Has Not Posed Incriminating Questions

The Court should deny Petitioner's motion for a protective order because the motion does not show that the government intends to pose incriminating questions that could lead to a further conviction and, therefore, would necessitate Fifth Amendment protections. In civil actions, protections under the Fifth Amendment against self-incrimination are not self-executing. Rather,

the Court must engage in a two-pronged analysis to determine whether Petitioner may invoke his Fifth Amendment privilege against self-incrimination.

"First, the court must determine whether the [requested] information is incriminating in nature, either on its face or in the context of the circumstances that the information is requested." *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951) (to sustain the privilege, it must be evident to the trial judge that a "responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result"). It is Petitioner's obligation to show that the government's questions call for incriminating information, either facially or under the circumstances of the case. *Hoffman*, 341 U.S. at 486 (a witness cannot be excused from answering questions "merely because he declares that in doing so he may incriminate himself;" it is for the court to decide whether assertion of privilege is valid); *United States v. Haldeman*, 559 F.2d 31, 94 (D.C. Cir. 1976) (en banc) (rejecting claim that Fifth Amendment embodies "absolute right of silence;" because only witness knows whether an apparently innocent disclosure will be incriminating, burden appropriately lies with witness to make timely assertion of privilege).

Petitioner claims that a habeas petition is a "quasi-criminal" proceeding and that the "government is pursuing allegations in this proceeding that plainly subject Mr. Hassoun to criminal jeopardy." Pet'r's Memo. of Law at 24. Petitioner fails to make the required particularized showing. He has not set forth a single incriminating question that the government either has asked or has indicated that it intends to ask at trial. Rather, Petitioner makes a generic claim that his "alleged 'dangerousness' could result in his indefinite, potentially lifelong, detention." *Id.* Notably, Petitioner fails to locate in the record a single allegation made by the government that would mandate the Court to reach such a conclusion. At bottom, Petitioner

notes his fear of a potential prosecution, yet he fails to direct the Court to a specific allegation that, on its face or under any circumstance at the evidentiary hearing, would show that all of the information sought by the government would be incriminating. In the absence of any such showing, the Court should conclude that Fifth Amendment protections are not herein available to Petitioner.

B. Petitioner Cannot Establish that His Apprehension Is Reasonable

Next, Petitioner fails to show that his apprehension against testifying at a hearing is reasonable. As the second part of the *Hoffman* test, a witness seeking Fifth Amendment protections must establish that his fear of incrimination is reasonable. That is, "short of uttering statements or supplying evidence that would be incriminating, a witness must supply personal statements under oath or provide evidence with respect to each question propounded to him to indicate the nature of the criminal charge which provides the basis for his fear of prosecution and, if necessary to complement non-testimonial evidence, personal statements under oath to meet the standard for establishing reasonable cause to fear prosecution under this charge." *In re Morganroth*, 718 F.2d 161, 169 (6th Cir. 1983); *see Am. Fed'n of Gov't Employees, AFL-CIO v. Dep't of Hous. & Urban Dev.*, 118 F.3d 786, 794-95 (D.C. Cir. 1997) ("There is no indication in the record that the employees have a reasonable basis for a fear of criminal prosecution based on their answers . . . ."). Statements under oath are important because "the present penalty of perjury may be the sole assurance against a spurious assertion of the privilege. Argument may be supplied by counsel but not the facts necessary for the court's determination." *In re Morganroth*, 718 F.2d at 169-70.

In a habeas proceeding in which Petitioner claims, in his own words, that he seeks "to prove his innocence" (Pet'r's Memo. of Law at 1), Petitioner lacks a reasonable fear of self-

incrimination. Petitioner, ignoring case law mandating that his apprehension must be reasonable, argues that he "is entitled to a blanket assertion of the privilege against self-incrimination." Pet'r's Memo. of Law at 30. Petitioner concludes that "any relevant question the government intends to compel Mr. Hassoun to answer is reasonably dangerous and could potentially incriminate him in a future criminal proceeding." *Id*. Petitioner would impermissibly preclude the government from asking him questions that would have no demonstrated likelihood of leading to further criminal charges.

Finally, to the extent that Petitioner is afforded any protections, the Court should not grant a "blanket" protection prior to the hearing. Petitioner argues that "any question the government intends to compel Mr. Hassoun to answer is reasonably dangerous" and that while "some questions might seem fairly innocuous," the question might "harbor hidden dangers for the unwary witness." Pet'r's Memo. of Law at 30. Notably, Petitioner is represented by counsel who can protect Petitioner's legal rights during the hearing. Petitioner's ample litigation team should alleviate concerns that he might inadvertently prejudice himself at the hearing by responding to an "innocuous" sounding question. Notably, Petitioner's motion is devoid of examples of supposed "innocuous" sounding questions that could criminally prejudice Petitioner. To the extent that Petitioner would not recognize the implications of answering a question with "hidden dangers," the Court should be able to expect that Petitioner's counsel will protect his interests and raise objections to specific questions posed to Petitioner.

C. To the Extent that Petitioner Is Permitted to Invoke the Privilege Against Self-Incrimination, Adverse Inferences Should be Permitted

To the extent that Petitioner does not testify (either in part or in full) to avoid self-incrimination, the Court should draw adverse inferences from his refusal to testify. Once again, this is a habeas proceeding, which is not a criminal action. *See supra*. Petitioner repeatedly cites

criminal procedure cases, where the Fifth Amendment normally bars an adverse inference, but the Self-Incrimination Clause does not apply in a habeas case like this one. *See Al-Bihani*, 590 F.3d at 879; *see also Boumediene v. Bush*, 553 U.S. 723, 783 (2008); Pet'r's Memo. of Law at 25-26.

To the contrary, a detainee's unwillingness to testify in court should be taken into account by the Court. *See Mitchell v. United States*, 526 U.S. 314, 328 (1999); *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) ("Failure to contest an assertion . . . is considered evidence of acquiescence . . . if it would have been natural under the circumstances to object to the assertion") (prison disciplinary proceeding); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1043-44 (1984) (immigration deportation proceedings); *Ohio Adult Parole Auth. v. Woodward*, 523 U.S. 272, 285-86 (1998) (clemency). As the Supreme Court has explained, when a defendant in a prison disciplinary proceeding "remained silent at the hearing in the face of evidence that incriminated him," that silence is entitled to "evidentiary value." *Baxter*, 425 U.S. at 318. Specifically, "the prevailing rule [is] that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them." *Id.*

Indeed, the D.C. Circuit has held that adverse inferences are permitted in habeas proceedings. *See Latif v. Obama*, 677 F.3d 1175, 1193 (D.C. Cir. 2011) (holding that adverse inferences can be made against habeas petitioners who choose not to testify). In *Latif*, a habeas petitioner detained in Guantanamo Bay argued that "it would make no sense to require an adverse inference in habeas cases in which the petitioner declines to testify while prohibiting such inference in criminal cases." *Id.* The Court of Appeals rejected this argument, stating, "This neglects the crucial point that the rule for criminal cases is based on the Fifth Amendment

privilege against self-incrimination. That privilege has no application outside the criminal context, and a Guantanamo habeas petitioner is not entitled to the same constitutional safeguards as a criminal defendant." *Id.* at 1193 (citations omitted).

Under *Latif*, the Court can draw adverse inferences from Petitioner's refusal to testify. Petitioner's primary argument against adverse inferences is that the government should be compelled to rely on its own witnesses to prove that Petitioner should not be released from detention. *See* Pet'r's Memo. of Law at 33. The government has a right to elicit Petitioner's testimony. The government has a vital interest in establishing that, to preserve the safety of the American people, Petitioner should remain in immigration detention. To the extent that the government does not explicitly ask Petitioner to testify with respect to prior criminal conduct that might implicate his privilege against self-incrimination, the Court should not limit the scope of the government's examination. Therefore, to the extent that Petitioner refuses to testify, the Court should take adverse inferences from his refusal to testify.

Conclusion

For the reasons above, Respondent respectfully asks the Court to deny Petitioner's motion to compel (ECF No. 91).

Date: March 9, 2020

Respectfully submitted,

JAMES P. KENNEDY, JR
United States Attorney
Western District of New York

/s/ *Daniel B. Moar*
DANIEL B. MOAR
Assistant United States Attorney
138 Delaware Avenue
Buffalo, New York 14202
Tel: (716) 843-5833
Email: daniel.moar@usdoj.gov

JOSEPH H. HUNT
Assistant Attorney General
Civil Division

WILLIAM C. PEACHEY
Director, District Court Section
Office of Immigration Litigation

TIMOTHY M. BELSAN
Chief, National Security & Affirmative Litigation Unit
District Court Section

/s/ *Anthony D. Bianco*
ANTHONY D. BIANCO
Senior Counsel for National Security

/s/ *Steven A. Platt*
STEVEN A. PLATT
Counsel for National Security
National Security & Affirmative Litigation Unit
District Court Section
Office of Immigration Litigation
Civil Division
U.S. Department of Justice
P.O. Box 868, Ben Franklin Station
Washington, D.C. 20044-0868
Tel: (202) 532-4074
Email: steven.a.platt@usdoj.gov

Attorneys for Respondent