The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

DONALD TRUMP, President of the United States, *et al.*,

Defendants.

No. 2:17-cv-00094-RAJ

DEFENDANTS' MOTION TO RECONSIDER ORDER OF OCTOBER 19, 2017

HON. RICHARD A. JONES

NOTED ON MOTION CALENDAR: November 2, 2017

UNITED STATES DEPARTMENT OF JUSTICE
Civil Division, Office of Immigration Litigation
District Court Section
Ben Franklin Station, P O Box 868
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On October 19, 2017, the Court issued an order granting in part and denying in part Plaintiffs' motion to compel production of certain documents. Defendants respectfully seek reconsideration of Part III.A of the Court's order, which concerns identification of class members. The Court erred in analyzing the law enforcement privilege in Part III.A. And Part III.A presents public-safety and national-security dangers, given the extreme sensitivity of the information at issue and the chilling effect it may have on information sharing within the Government. *See In re U.S. Dep't of Homeland Sec.*, 459 F.3d 565, 569 (5th Cir. 2006) ("in today's times the compelled production of government documents could impact highly sensitive matters relating to national security"); The 9/11 Commission Report, 416-17 & Executive Summary, 14 (2004) (finding that both lack of information sharing and less-than-full partnership of immigration agencies in the intelligence community contributed to the 9/11 attacks).

In brief, (1) the Court erroneously rejected Acting Director McCament's assertion of the law enforcement privilege as speculative, because all assertions of law enforcement privilege involve an assessment of potential future risk—and Acting Director McCament's invocation of the privilege otherwise meets the requisite standard; (2) the Court failed to identify and apply the correct standard—necessity—to overcome an assertion of the privilege; (3) even assuming Plaintiffs had demonstrated a necessity, the Court did not explain its balancing of Plaintiffs' interest in the information sought against the Government's and the public's interest in nondisclosure of sensitive law enforcement information; and (4) the Court improperly and speculatively relied on other means to protect the information at issue. Any one of these errors would justify reconsideration and vacatur of Part III.A of the Court's order. Accordingly, reconsideration is appropriate under Local Rule 7(h)(1).

1. Rejecting an Assertion of Law Enforcement Privilege as "Speculative" is Improper as All Assertions of Law Enforcement Privilege Involve a Prediction of Potential Future Harm

The Court dismissed the sworn statement of the head of USCIS that releasing a list of thousands of individuals who have articulable ties to terrorism and other national

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security grounds of inadmissibility and removability would impair national security. ECF No. 98 at 3-4. The Court termed the Acting Director's statement "vague" and "brief," and held that "mere speculation" and only "a hypothetical result" was insufficient to claim the law enforcement privilege over the identities of individuals in CARRP—including known or suspected terrorists and individuals who may be the subject of ongoing investigations. *Id.*; Answer ¶¶ 64 & 78.

The Court erred in rejecting the Acting Director's testimony as speculative and hypothetical. *Every* assertion of law enforcement privilege inherently involves a prediction of future risks. This does not make assertion of the privilege "mere speculation." *Black v. Sheraton Corp. of Am.*, 564 F.2d 531, 541 (D.C. Cir. 1977) (explaining that the privilege is "based primarily on the harm to law enforcement efforts which *might* arise from public disclosure of [Government] investigatory files") (emphasis and alteration added). The very purpose of the privilege is to prevent what *might* occur if the information is disclosed from actually occurring. The party invoking the privilege need not establish that any particular future event *will* occur; it is enough to show, through competent evidence, that disclosure risks that possibility. Defendants met that bar, and all other criteria to validly invoke the law enforcement privilege. *See Shah v. U.S. Dep't of Justice*, 89 F. Supp. 3d 1074, 1080 (D. Nev. 2015) (explaining that to invoke the privilege (1) the head of the Department must formally claim the privilege; (2) that claim must be based on personal consideration; and (3) the official must identify the information subject to privilege and explain why it is privileged). Here, the highest official at USCIS formally claimed the privilege in a sworn statement detailing how disclosure of the identities of individuals with an articulable link to national-security grounds of inadmissibility would threaten law enforcement interests. ECF No. 94-5. The Acting Director's declaration explained:

> Public confirmation that a particular individual is subject to CARRP would necessarily alert an individual that he/she may be the subject of an investigation, or at least that the government possess information that creates an articulable link to a national security ground of inadmissibility.

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> By alerting an individual that he or she is subject to an investigation and the types of records consulted, that individual might learn the focus of these investigations. The individual could then, for example, alter his or her behavior, conceal evidence of wrongdoing, or attempt to influence witnesses or adjust his or her means of communication or financial dealings to avoid detection of the very behavior that the law enforcement and intelligence communities have determined may be indicative of a national security threat, and which form the core of pending investigative efforts.

ECF No. 94-5, ¶ 18. To the extent the Court believed that the law requires additional certainty of what *would* result from disclosure, the Court erred. To require certainty and specificity in what harm *will* result from disclosure is to negate the law enforcement privilege entirely. Moreover, the declaration is neither vague nor brief—and, in any event, brevity is not a basis to reject a validly invoked privilege. The declaration was based on the Acting Director's personal knowledge of the facts contained therein and provided sufficient specificity to meet the requirement to "provide an explanation." *Shah*, 89 F. Supp. 3d at 1080-81 (providing similarly detailed reasoning).[1] Defendants met all of the criteria to validly invoke the law enforcement privilege. *Id.*

2. The Court Did Not Require Plaintiffs to Demonstrate a "Necessity" for the Identities of Class Members and Erred in Ordering Disclosure Only Upon a Showing of Relevance

Furthermore, the Court did not specify what burden Plaintiffs bore to overcome the privilege, or, indeed, acknowledge they had such a burden at all. *See* ECF No. 98 at 4 (moving directly from whether the privilege was validly asserted to balancing the party's interests without first considering whether Plaintiff's need was sufficiently great to overcome the presumption against lifting the privilege). The Supreme Court and the Ninth Circuit have held that evidence must be "essential," or meet an equally high threshold, to justify piercing the privilege. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 870 (1982) ("The *Roviaro* Court held that the informer's identity had to be disclosed, but only after it concluded that the informer's testimony would be *highly*

[1] Defendants continue to maintain that, given the nature of this case—a facial challenge to the lawfulness of CARRP, applicable nationwide to all class members—Plaintiffs have no need for the identities of the class members, and that disclosure of anonymous demographic information would be sufficient to meet the needs of the case.

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relevant") (emphasis added); *In re Perez*, 749 F.3d 849, 859 (9th Cir. 2014) (holding identifying information of whistleblowers must be "essential" to justify disclosure). Other courts have ruled similarly. *See Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1125 (7th Cir. 1998) ("It seems to us, however, and not only to us, that there ought to be a pretty strong presumption against lifting the privilege."); *Dole v. Local 1942, Int'l B'hood of Elec. Workers, AFL-CIO*, 870 F.2d 368-375 (7th Cir. 1989) ("The informer's privilege will yield upon a showing of substantial need"); *United States v. Cintolo*, 818 F.2d 980, 983-84 (1st Cir. 1987) (requiring showing of "necessity" to pierce privilege).

Plaintiffs have not met this "pretty strong presumption," nor explained why the identities of the class members are "necessary" or "essential" to their case rather than merely relevant. *In re Perez* involved an analogous request to disclose specific identities of whistleblowers which the requesting party could then associate with particular facts. The Ninth Circuit concluded that associating an identity with other evidence was not essential and did not justify piercing the privilege:

> The information the Secretary has not disclosed consists of *only* the identifying information in the 250 statements. While this information may meet the general standard for relevance under Federal Rule of Evidence 401, we are not convinced that its probative value is so great that it is "essential" to DSHS's defense. DSHS cannot force the Secretary to reveal the identities of the informants on such a weak showing.

749 F.3d at 859.

Here, as in *In re Perez*, the information Defendants seek to withhold consists *only* of identifying information. Plaintiffs specifically requested the name, A-number, age, sex, country of origin, country of citizenship, religion, race, ethnicity, date the relevant application was filed, and the current status of the relevant application. *See* ECF No. 94-1 at 18-19 (RFP No. 28). Defendants are willing to provide all of this information, to the extent it is known and stored in the relevant electronic system, other than the name and A-number. ECF No. 94 at 8. Because Plaintiffs have not, and cannot, establish a legitimate need for identifying information, there is no basis for releasing the names and other identifying information of those applicants with an articulable tie to national

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security grounds of inadmissibility. As in *In re Perez*, while individual identities may be "relevant" under Federal Rule of Evidence 401, they are not "essential" or "necessary," and, accordingly, Defendants' assertion of privilege should not be disturbed. Moreover, this case involves considerations of national security, public safety, and the integrity of ongoing investigations not present in *In re Perez*. Accordingly, this case presents a greater justification for withholding identities than the Ninth Circuit has already approved.

3. Even Assuming a Necessity, the Court Did Not Articulate Its Basis For Concluding the Plaintiffs' Litigation Needs Outweighed The Public Interest in Nondisclosure

Beyond this, the Court failed to balance the litigation needs of the Plaintiffs against the Government's and the public's interest in nondisclosure. Even assuming Plaintiffs had shown a "necessity" or "compelling need" for the names and A-numbers of the class members, that need must still outweigh the public interest in nondisclosure to justify piercing the privilege. *In re City of New York*, 607 F.3d at 948 ("If the presumption against disclosure is successfully rebutted (by a showing of, among other things, 'compelling need'), the district court must then weigh the public interest in nondisclosure against the need of the litigant for access. . . "); *In re Sealed Case*, 856 F.2d at 272. Here, the Court did not identify a relevant standard or explain its analysis in concluding that "the balance weigh[s] in favor of disclosure." ECF No. 98 at 4. This was error. Explicit balancing of the competing factors is required. *In re Sealed Case*, 856 F.2d 268, 272 (D.C. Cir. 1988) ("the failure to balance at all requires remand"). *In re City of New York*, 607 F.3d 943, 948 (2d Cir. 2010), and *Frankenhauser v. Rizzo*, 59 F.R.D. 339, 344 (E.D. Pa. 1973), contain illustrative lists of factors to be considered in determining the applicability of the privilege. Assuming that Plaintiffs could establish the requisite necessity, the Court must articulate how it is balancing the competing interests, and should conclude that the Government's and the public's interest in nondisclosure of the identities takes precedence over Plaintiffs' desire to associate names with information, jeopardizing ongoing law enforcement efforts.

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4. Courts Have Rejected Protective Orders as Insufficient to Guard Against Improper Disclosure of Law Enforcement Privileged Information

The Court also suggested that Plaintiffs' attorneys could supplement the protective order. ECF No. 98 at 4. Courts, including the Ninth Circuit, have routinely concluded that protective orders are insufficient in contexts implicating law enforcement privileged information, improper disclosure of which could threaten public safety. The Second Circuit, in perhaps the most extensive analysis of this subject, rejected similar procedures, concluding that inadvertent (or intentional) disclosure of law enforcement information was too great a risk, and the potential harm too difficult to remedy. *In re City of New York*, 607 F.3d at 935-39. Likewise, the Ninth and D.C. Circuits have similarly rejected an attorney-eyes-only remedy in cases involving national security interests in FOIA litigation. *Islamic Shura Council of So. Cal. v. FBI*, 635 F3d 1160, 1168 (9th Cir. 2011) (citing *Arieff v. U.S. Dep't of Navy*, 712 F.2d 1462, 1469-71 (D.C. Cir. 1983)). These courts have concluded that permitting access would "color public perception of the security of confidential information in government files." *Id.* The same analysis applies with equal force here. Once disclosed, the bell cannot be un-rung.

CONCLUSION

For these reasons, Defendants respectfully submit that the Court should grant Defendants' Motion to Reconsider.

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Dated: November 2, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that on November 1, 2017, I conferred with opposing counsel and thoroughly discussed the substance of this motion and in good faith attempted to reach an accord to eliminate the need for the motion.

s/ Edward S. White
EDWARD S. WHITE
U.S. Department of Justice

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 2, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participants:

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