

The Honorable Richard A. Jones

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IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*, on behalf of
himself and other similarly situated,

Plaintiffs,

v.

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

Defendants.

CASE NO. 2:17-cv-00094-RAJ

**DEFENDANTS’ OPPOSITION TO
PLAINTIFFS’ MOTION TO
COMPEL NAMED PLAINTIFFS’
A-FILE INFORMATION**

INTRODUCTION

In its July 9, 2019 Order, after multiple rounds of briefing, the Court upheld Defendants’ law enforcement privilege assertions over any “why” information that originates from law enforcement agencies external to United States Citizenship and Immigration Services (“USCIS”), as well as over any communications between USCIS and third-party law enforcement agencies relating to such information. Dkt. No. 274 at 3-5. Plaintiffs did not move to reconsider that Order. Thus, Plaintiffs’ claim that they are entitled to unredacted “why” information should be summarily rejected, and the Court should deny Plaintiffs’ motion to compel.

PROCEDURAL BACKGROUND¹

1
2 Defendants have reviewed and produced copies of the Named Plaintiffs' A-files on multiple
3 occasions. In the first production, Defendants asserted law enforcement privilege over information
4 pertaining to law enforcement checks performed on the Named Plaintiffs, regardless of whether such
5 information was purely internal to USCIS or originated from third-party law enforcement agencies,
6 as well as over records of communications and coordination between USCIS and third-party law
7 enforcement agencies. *See* ECF. No. 226-1 at 13-17. Most recently, Defendants re-reviewed and re-
8 produced lesser redacted versions of the Named Plaintiffs' A-files in faithful compliance with the
9 Court's July 9, 2019 Order on Plaintiffs' Motions to Compel and Defendants' Cross-Motion for a
10 Protective Order. *See* ECF. No. 274. Each Named Plaintiff's A-file was reproduced regardless of
11 whether it contained information relevant to the CARRP policy, and with certain redactions removed
12 so as to narrowly tailor the redactions that remained and maximize Plaintiffs' receipt of information.
13 Addressing Plaintiffs' motion to compel production of information relating to why the Named
14 Plaintiffs' immigration benefit applications may have been subject to review under the CARRP
15 process, the Court concluded that only information purely internal to USCIS regarding why the
16 Named Plaintiffs' benefit applications may have been subject to CARRP review, or regarding the
17 internal processing of the Named Plaintiffs' immigration benefit applications, was highly relevant to
18 Plaintiffs' claims and should be produced. *See* ECF. No. 274. The Court concluded "that disclosure
19 of certain information and methods originating from law enforcement agencies external to USCIS
20 immigration processing, such as the FBI or CBP . . . would not . . . offer much insight into the
21 alleged internal misuse of CARRP by USCIS and the harm of disclosure would outweigh the value
22 of this information." ECF No. 274 at 4-5. It therefore ruled that Defendants could properly redact
23 as law enforcement privileged any information showing that the Named Plaintiffs' applications were
24 subject to CARRP review because of information originating from third-party law enforcement
25

26 ¹ Defendants do not publicly confirm or deny whether any of the Named Plaintiffs' benefit applications was processed
27 pursuant to the CARRP policy. However, Defendants have disclosed this information to Plaintiffs' counsel, subject to
28 an attorney-eyes-only restriction. Furthermore, Defendants have previously disclosed to the Court "whether," and if so,
"why" the Named Plaintiffs' applications were processed pursuant to the CARRP policy. *See* March 6, 2019 *In Camera*,
Ex Parte Emrich Declaration at ¶¶ 18-49.

1 agencies, and also any communications between USCIS and third-party law enforcement agencies
2 concerning such information. *See* ECF No. 274 at 5.

3 Defendants reproduced the lesser redacted versions of the Named Plaintiffs' A-files on
4 September 26, 2019. *See* Exhibit A (email to Plaintiffs' counsel documenting transmittal of
5 Production Volume 039). On the evening of December 18, 2019, Plaintiffs first notified Defendants
6 of their intention to challenge the redactions to unspecified pages of the A-files in light of their belief
7 that "the government did not produce [the A-files] in the spirit of Judge Jones' Order (Dkt. 274)."
8 *See* Exhibit B. It was not until January 2, 2020, however, that Plaintiffs identified any of the
9 particular pages with redactions that they challenge in any of these documents produced months ago.
10 *See* Exhibit C. The government promptly re-reviewed those pages and notified Plaintiffs on January
11 8, 2020 that Defendants had confirmed that their law enforcement privilege redactions were proper
12 and that they would not further unredact the A-files. *See* Exhibit D.

13 ARGUMENT

14 The purpose of the law enforcement privilege is "to prevent disclosure of law enforcement
15 techniques and procedures, to preserve the confidentiality of sources, to protect witness and law
16 enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and
17 otherwise to prevent interference with an investigation." *In re Dep't of Investigation of City of New*
18 *York*, 856 F.2d 481, 484 (2d Cir. 1988). Courts have recognized that "law enforcement operations
19 cannot be effective if conducted in full public view," *Black v. Sheraton Corp. of America*, 564 F.2d
20 531, 542 (D.C. Cir. 1977), and thus the law enforcement privilege is available "to prevent disclosure
21 of information that might impede important government functions such as conducting criminal
22 investigations, securing the borders, or protecting the public from international threats." *In re U.S.*
23 *Dep't of Homeland Sec.* 459 F.3d 565, 571 (5th Cir. 2006). The law enforcement privilege is a
24 qualified one, *In re Sealed Case*, 856 F.2d 268, 272 (D.C. Cir. 1988), requiring courts to balance
25 "the public interest in nondisclosure . . . against the need of a particular litigant for access to
26 privileged information." *In re The City of New York*, 607 F.3d 923, 945 (2d Cir. 2010).

27 Plaintiffs claim an absolute entitlement to information in the Named Plaintiffs' A-files
28 concerning why USCIS allegedly determined that their applications raised a national security

1 concern warranting review pursuant to the CARRP policy. Yet, neither the Court’s prior order on
2 this issue nor Plaintiffs’ own, cursory motion supports their assertion. To the extent that any of the
3 Named Plaintiffs’ A-files contains “why” information, the Court has squarely ruled that the
4 government must only disclose such information if it “originated **solely** within USCIS.” Dkt. No.
5 274 at 5 (emphasis in original). Any “why” information derived from third-party law enforcement
6 agencies, the Court ruled, may properly be withheld as privileged. *Id.* This is largely because the
7 “disclosure of certain information and methods originating from law enforcement agencies external
8 to USCIS immigration processing . . . could cause harm to national security.” Dkt. No. 274 at 4.
9 But it is also because “details of past or current investigations by third-party law enforcement
10 agencies would not . . . offer much insight into the alleged internal misuse of CARRP by USCIS.”
11 Dkt. No. 274 at 4. As the Court made clear, third-party law enforcement agencies “are not
12 defendants in this case, and their internal processes are not at issue.” Dkt. 274 at 4.

13 Plaintiffs appear to argue that the government must produce any and all “why” information,
14 to the extent it exists, in the Named Plaintiffs’ A-files because the determination to refer an
15 application for CARRP review relates solely to USCIS and the internal processing of immigration
16 benefits. *See* Dkt. No. 316 at 3-4. While this may be true with respect to cases involving national
17 security concerns identified on the basis of solely USCIS-derived information, Plaintiffs’ argument
18 ignores the fact that information underlying a national security concern could also originate from one
19 or multiple third-party law enforcement agencies. *See* Dkt. No. 126-1, March 1, 2018 Declaration of
20 Matthew D. Emrich, ¶ 14 (“Any individual’s case may involve multiple pieces of information from
21 various sources, including multiple background check hits, establishing an articulable link between
22 the individual and a national security ground for inadmissibility or removal.”). In such cases, the
23 third-party agency information and the reasons why USCIS determined that CARRP review was
24 necessary are inextricably linked and, therefore, both must be protected from disclosure. To hold
25 otherwise would run contrary to the rationale of the Court’s July 9 Order, which properly recognized
26 that “why” information sourced from third-party law enforcement agencies is privileged because of
27 the dangers to national security and public safety that its disclosure would risk. Dkt. No. 274 at 4-5.
28 Indeed, the Court reaffirmed this conclusion in its recent order on Plaintiffs’ motion to compel

1 information from other documents that the government withheld as law enforcement privileged:
2 “the potential harms of disclosure of [third-party agency information relied upon to make CARRP
3 determinations] outweigh any interest Plaintiffs may have in accessing the information.” Dkt. No.
4 320 at 7.

5 Defendants have made clear in multiple declarations submitted to the Court that USCIS may
6 rely on information provided by third-party agencies as a basis for referring an application for
7 review under CARRP. *See, e.g.*, Dkt. No. 94-5, October 10, 2017 McCament Declaration, ¶17
8 (“[T]o determine whether an applications presents a national security concern, specifically to
9 determine whether an articulable link exists, a USCIS immigration services officer adjudicating an
10 immigration benefit application shall check and review the records held by law enforcement
11 agencies and/or the intelligence community”); Dkt. No. 126-1, March 1, 2018 Emrich
12 Declaration, ¶¶ 9-11 (describing multiple ways in which national security concerns can be identified
13 through third-party agency information); Dkt. No. 156-2, April 20, 2018 Renaud Declaration, ¶17
14 (“[D]isclosing why an individual is subject to the CARRP policy adversely affects USCIS’ law
15 enforcement and/or intelligence partners. Disclosure may disrupt a criminal investigation related to
16 terrorism or other national security issues.”). Notably, Plaintiffs never sought reconsideration of the
17 Court’s July 9 Order, which drew a clear distinction between third-party agency “why” information,
18 which is privileged, and “why” information originating solely within USCIS, which may not be.
19 The Court should reject Plaintiffs’ belated effort to circumvent its July 9 Order by baselessly
20 claiming an unequivocal entitlement to all “why” information, to the extent it exists.

21 In addition to misconstruing what type of information the Court has held they are entitled to,
22 Plaintiffs have also wrongly charged Defendants with failing to abide by the Court’s July 9 Order.
23 Plaintiffs’ primary basis for challenging the government’s privilege assertions is that large portions
24 of the Named Plaintiffs’ re-produced A-files remain redacted. *See* Dkt. No. 316 at 4-5. But the
25 presence of redactions alone, even when applied to an entire document within an A-file or to
26 multiple consecutive pages, is hardly sufficient to successfully challenge the government’s privilege
27 claims. First, Defendants have furnished Plaintiffs’ counsel with two sets of privilege logs
28 describing the bases for the law enforcement privilege redactions in the A-files. *See* Exhibit E

1 (March 16, 2018 email to Plaintiffs' counsel documenting transmittal of privilege logs and
2 declarations associated with the first A-file production); Exhibit F (November 22, 2019 email to
3 Plaintiffs' counsel documenting transmittal of privilege logs and declarations associated with the
4 second A-file production). Thus, Plaintiffs were on notice of the general bases for Defendants'
5 privilege assertions.²

6 Second, regardless of whether a particular application has been referred for CARRP review
7 or raises national security concerns, multiple declarations from third-party law enforcement agencies
8 submitted in this case have attested that privileged information their agencies own and which
9 implicates their equities frequently appears in A-files as a result of the various background and other
10 security checks routinely run in connection with immigration benefit applications. *See, e.g.*, Dkt.
11 No. 126-2, March 1, 2018 Eisenreich Declaration, ¶¶ 5, 7, 31, 32 (noting that numerous federal
12 agencies, including USCIS, rely on the FBI's National Name Check program to provide background
13 information on specific individual individuals and detailing why the results of such checks, whether
14 or not they reveal derogatory information, must remain privileged); Dkt. No. 126-3, March 1, 2018
15 King Declaration, ¶¶ 3-6 (stating that the Homeland Security Investigations ("HSI") branch of ICE
16 shares derogatory and investigative information about specific individuals with USCIS, and that
17 disclosing such information would reveal sensitive law enforcement information, techniques,
18 procedures); Dkt No. 226-2, March 7, 2019 Mejia Declaration, ¶10 (providing that "A-files may
19 include records and information that originate with [U.S. Customs and Border Protection ("CBP")],
20 including TECs records documenting inspections, border crossing information, copies of CBP forms
21 submitted by travelers, and records pertaining to targeting and law enforcement activities. Thus, it
22 should have come as no surprise to Plaintiffs that significant portions of the Named Plaintiffs' re-
23 produced A-files, which naturally contain such third-party agency information regardless of whether
24 their applications were referred for CARRP review, would remain redacted as law enforcement
25 privileged.

26 _____
27 ² Defendants also refer the Court to the March 6, 2019 Declaration of Matthew Emrich, submitted to the Court *in*
28 *camera* and *ex parte*, which discusses in greater detail the types of third party agency information contained in the
Named Plaintiffs' A-files that the government has redacted as law enforcement privileged. *See* March 6, 2019 *In*
Camera, Ex Parte Emrich Declaration at ¶¶ 14-17.

1 With respect to the four sealed documents Plaintiffs submitted as representative of the types
 2 of A-file documents they believe Defendants over-redacted, *see* Dkt. No. 318 (Sealed Exhibits C-F),
 3 Defendants have re-reviewed each document and confirmed that no law enforcement privilege
 4 redactions were applied improperly or, more specifically, as Plaintiffs speculate, applied to any
 5 “why” information originating solely within USCIS.³ *See* Dkt. No. 274 at 5. Rather, all of the law
 6 enforcement privilege redactions were applied to these and similar documents within the Named
 7 Plaintiffs’ A-files to protect information relating to the results of third-party law enforcement agency
 8 background security checks or to USCIS communications with third-party agencies regarding such
 9 information, and are therefore consistent with the Court’s July 9 Order. *See* Dkt. No. 318, Sealed
 10 Exhibit C (redacting information relating to the results of third-party law enforcement agency’s
 11 security checks); Dkt. 318, Sealed Exhibit D (redacting information relating to results of third-party
 12 law enforcement agency’s security checks and USCIS’s communications with third-party agency
 13 relating to those checks); Dkt. No. 318, Sealed Exhibit F⁴ (redacting information relating to results
 14 of third-party law enforcement agency’s security checks). This includes the “entire bodies of
 15 memoranda” Plaintiffs claim were redacted in disregard of the Court’s admonitions to be deliberate
 16 and exacting using the privilege. *See* Dkt. No. 316 at 4; Dkt. No. 318, Sealed Exhibit E. To the
 17 contrary, Defendants thoroughly re-reviewed each A-file to ensure full compliance with the July 9
 18 Order, and the entirety of the memorandum Plaintiffs cite relates to third-party agency information.
 19 *See* Dkt. No. 318, Sealed Exhibit E.

20 Finally, recognizing that the law enforcement privilege is qualified and may be lifted where a
 21 litigant shows that their need for access to the privileged information outweighs the interest in non-
 22 disclosure, *In re The City of New York*, 607 F.3d at 945, it bears noting that Plaintiffs’ motion does
 23 not even attempt to make such a showing. Defendants have previously submitted numerous
 24 declarations from third-party agencies spelling out the grave risks implicated by disclosure of the

25 ³ Defendants will facilitate, at the Court’s direction, *in camera* review of any or all of the A-file documents Plaintiffs
 26 allege are improperly redacted.

27 ⁴ Plaintiffs incorrectly state that Sealed Exhibit F is a document over which Defendants applied full page redactions to
 28 twelve consecutive pages. Dkt 316 at 4. Plaintiffs Sealed Exhibit F spans only two pages, with redacted information
 relating to third-party law enforcement agency security checks. To the extent Plaintiffs intended to instead cite Bates
 Nos. DEF-00421028-DEF421039 as Sealed Exhibit F, *see* Dkt. 317 at ¶ 9, Defendants have confirmed that these pages
 consist of information originating from a third party law enforcement agency, and were therefore properly redacted.

1 sensitive, privileged information Plaintiffs seek. *See, e.g.*, Dkt. No. 226-2, Exhibits A-F; Dkt. No.
2 228; Dkt. No. 226-1, Exhibits A-1-F. In two separate orders, this Court agreed that the harms of
3 disclosing such information outweigh any interest Plaintiffs have in accessing it, and upheld
4 Defendants' assertion of the law enforcement privilege to protect third-party agency-sourced
5 information. Dkt. No. 274 at 4-5; Dkt. No. 320 at 6-7. The Court should do so here as well.

6 **CONCLUSION**

7 For the foregoing reasons, the Court should deny Plaintiffs' motion to compel additional A-
8 file information.

9
10 DATED: January 21, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

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I hereby certify that on January 21, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

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