

The Honorable Richard A. Jones

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

ABDIQAFAR WAGAFE, *et al.*,

Plaintiffs,

v.

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

Defendants.

No. 2:17-cv-00094-RAJ

**DEFENDANTS’ RESPONSE TO
PLAINTIFFS’ MOTION TO SEAL
PLAINTIFFS’ MOTION FOR SUMMARY
JUDGMENT AND SUPPORTING
DOCUMENTS**

INTRODUCTION

This case concerns Plaintiffs’ legal challenges to the Controlled Application Review and Resolution Program (“CARRP”), a policy that United States Citizenship and Immigration Services (“USCIS”) employs to identify and process immigration benefit applications raising national security concerns. The case, by its nature, involves sensitive information that, if disclosed, could cause specific harms to national security. Preventing such harms undoubtedly establishes a compelling reason to shield the information – which Defendants have labeled as confidential and Attorneys’ Eyes Only – from public disclosure. Accordingly, to the extent that Plaintiffs’ Motion for Summary Judgment discusses such protected information, and because the

1 exhibits Plaintiffs filed in support of their Motion for Summary Judgment contain such protected
2 information, Plaintiffs' filing and supporting documents should remain sealed.

3 Plaintiffs' arguments in opposition to sealing are unavailing. Their dismissal of the
4 stipulated protective order (Dkt. No. 86) in this case as insufficient to warrant sealing ignores the
5 fact that much of the information at issue has been afforded greater protection under an
6 Attorneys' Eyes Only designation (Dkt. Nos. 183, 192, 274, 320). More importantly, Plaintiffs'
7 argument overlooks a key point that this Court itself has recognized: the confidentiality and
8 Attorneys' Eyes Only designations in this case plainly bear a nexus to protecting national
9 security. Similarly without merit is Plaintiffs' argument that sealing is not warranted where they
10 have obtained, or might be able to obtain, information and documents through FOIA. This is not
11 a relevant consideration when the compelling reason for sealing information is protecting
12 national security. Finally, Plaintiffs' attempt to blur the lines between privileged information
13 and information which should be filed under seal is misplaced. The Court's orders make clear
14 that although certain information may not be privileged, compelling reasons nevertheless exist to
15 protect it from public disclosure.

16 Ultimately, and as further detailed below, Defendants have presented a compelling reason
17 – preventing specific harms to national security – to seal the information and documents at issue.
18 Plaintiffs have not presented any valid argument to the contrary. Accordingly, the Court should
19 grant the Motion to Seal Plaintiffs' Motion for Summary Judgment and Supporting Documents.

20 LEGAL STANDARD

21 The strong presumption of public access to court records ordinarily requires a party
22 seeking to seal information and documents to provide compelling reasons in support of their

1 request to seal. *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006).
 2 “In general, ‘compelling reasons’ sufficient to outweigh the public’s interest in disclosure and
 3 justify sealing court records exist when such ‘court files might have become a vehicle for
 4 improper purposes.’” *Id.* at 1179. Potential harm to national security constitutes a compelling
 5 reason to shield information from public disclosure. *See Ground Zero Center for Non-Violent*
 6 *Action v. United States Department of Navy*, 860 F.3d 1244, 1262 (9th Cir. 2017) (“National
 7 security concerns can, of course, provide a compelling reason for shrouding in secrecy even
 8 documents once in the public domain.”); *United States v. Ressam*, 221 F.Supp.2d 1252, 1263
 9 (recognizing “national security” as a “compelling interest . . . unusual in its ongoing nature” and
 10 sufficient to justify continued nondisclosure); *see also United States ex rel. Kelly v. Serco, Inc.*,
 11 No. 11CV2975 WQH-RBB, 2014 WL 12675246, at *4 (S.D. Cal. Dec. 22, 2014) (granting a
 12 motion to seal various documents designated “For Official Use Only” by the United States
 13 government because “national security interests are a compelling reason for filing documents
 14 under seal”).

ARGUMENT

I. Protecting National Security Is A Compelling Reason To Seal Plaintiffs’ Motion For Summary Judgment And Supporting Documents.

17 Plaintiffs’ Motion for Summary Judgment contains information that, if publicly
 18 disclosed, could result in specific harms to national security. This is a compelling reason to
 19 protect this information from disclosure. In their Motion for Summary Judgment, Plaintiffs cite
 20 detailed information about CARRP policy and processing. Specifically, Plaintiffs rely on
 21 deposition testimony and internal USCIS trainings to discuss indicators of national security
 22 concerns, including information originating from third party law enforcement agencies. *See Pls’*
 23 *Mot. for Summary Judgment* at 10-14, 41-43. Plaintiffs’ Motion for Summary Judgment also

1 relies on deposition testimony and internal trainings to describe how USCIS gathers and vets
2 information related to national security indicators, including through consultation and
3 communication with third agencies; and to describe how USCIS processes applications in
4 CARRP. *See id.* at 5-8. Finally, relying substantially on A-Files produced by Defendants,
5 Plaintiffs describe in significant detail whether and why, in their assumption, specific
6 individuals' immigration benefit applications were processed in CARRP. *See id.* at 17-25, 29-
7 30.

8 With the aim of protecting national security and law enforcement interests, Defendants
9 have designated all of this information confidential, and much of it Attorneys' Eyes Only, in
10 accordance with the protective orders issued by this Court. *See* Dkt. Nos. 86, 183, 192. Such
11 information, if disclosed, could be used for improper purposes, which establishes a compelling
12 reason to seal the information. *See Kamakana*, 447 F.3d at 1179. Specifically, revealing
13 publicly what constitutes an indicator of a national security concern could influence an
14 immigration benefit applicant to change or conceal certain details about his behavior in an effort
15 to avoid USCIS's detection of a national security concern in his case. Additionally, publicly
16 disclosing details concerning USCIS's consultation and communication with third party law
17 enforcement agencies about CARRP cases risks damaging important information-sharing
18 relationships essential to protecting national security. Finally, disseminating information about
19 whether and why particular individuals' immigration benefit applications were processed in
20 CARRP could risk signaling to the specific individuals involved, as well as the general public,
21 whom the government deems a national security concern, and why. This could compromise
22 national security by informing investigative targets that they may be under investigation, and
23 encouraging behavior changes and information concealment by individuals intending to evade
detection. Ultimately, Plaintiffs are simply wrong to assert that Defendants raise only "[V]ague
implications of national security . . . insufficient to meet the compelling reasons standard." *See*

1 Pls' Mot. to Seal at 6. Based on the foregoing clearly articulated, specific harms to national
2 security that could result from the public disclosure of certain information in Plaintiffs' Motion
3 for Summary Judgment, Defendants have established a compelling reason to seal the motion.
4 *See Ground Zero*, 860 F.3d at 1262 (9th Cir. 2017); *Ressam*, 221 F.Supp.2d at 1263; *see also*
5 *Elhady v. Kable*, -- F.3d --, 2021 WL 1181270, at *3 (4th Cir. Mar. 30, 2021) (noting such
6 potential harms as reasons for the nondisclosure of information related to national security).

7 Protecting national security is also a compelling reason for sealing the exhibits Plaintiffs
8 use to support their Motion for Summary Judgment. These exhibits include internal USCIS
9 training slides, memoranda, and other documents detailing the types of CARRP policy and
10 processing information discussed above. Training slides and guidance documents, in particular,
11 provide direct insight into how USCIS identifies and vets national security concerns, including
12 through consultation and communication with third party law enforcement agencies. *See*
13 *Pasquarella Decl.* at Exhibits 16, 19-22, 27, 36, 39-40, 42-45, 48-50, 54-55, 58-59, 63-64, 67, 72-
14 73, 90, 94. The documents include fact patterns based on actual cases. *See id.* They also
15 include information about security checks run through the databases of third party law
16 enforcement agencies. *See, e.g., id.*; *see also id.* at Exhibits 18, 23-26, 41. In addition to being
17 designated as confidential or Attorneys' Eyes Only in accordance with the protective orders
18 issued by this Court, *see* Dkt. Nos. 86, 183, 192, all of the aforementioned training and guidance
19 documents, as well as additional exhibits attached to Plaintiffs' Motion for Summary Judgment,
20 were designated as "For Official Use Only" at the time of their creation and not in connection to
21 this litigation.

22 In support of their Motion for Summary Judgment, Plaintiffs also attach communications
23 between USCIS employees regarding CARRP policy and processing, including in specific cases,
see, e.g., id. at Exhibits 53, 66, as well as deposition testimony from USCIS personnel about
CARRP policy and processing, *see, e.g., id.* at Exhibits 1-2, 8, 10-12, 33, 68, 83, 91.

1 Additionally, Plaintiffs offer expert reports that consider and opine on the information discussed
2 in the aforementioned training and guidance documents. *See, e.g., id.* at Exhibits 9, 37, 56-57,
3 76, 88-89, 98. Altogether, the exhibits attached to Plaintiffs’ Motion for Summary Judgment
4 include thousands of pages – a majority of which are USCIS documents designated “For Official
5 Use Only” upon their creation – that provide a detailed roadmap of how USCIS, in coordination
6 with third party law enforcement agencies, identifies and vets national security concerns.
7 Allowing the public to view such a roadmap would necessarily implicate the risks of alerting
8 investigative targets that they may be under investigation and encouraging behavior changes and
9 information concealment by national security threats intending to avoid detection. As with
10 Plaintiffs’ Motion for Summary Judgment itself, this provides a compelling reason for sealing
11 the exhibits Plaintiffs’ attach in support of their Motion for Summary Judgment. *See Ground*
12 *Zero*, 860 F.3d at 1262 (9th Cir. 2017); *Ressam*, 221 F.Supp.2d at 1263; *see also Serco, Inc.*,
13 2014 WL 12675246, at *4 (S.D. Cal. Dec. 22, 2014) (granting the a motion to seal various
14 documents designated “For Official Use Only” by the United States Government because
15 “national security interests are a compelling reason for filing documents under seal”).

16 Furthermore, Defendants’ reason for seeking to protect information and documents from
17 public disclosure is perhaps most compelling in the context of individuals’ A-File pages, and
18 expert reports discussing these and other individuals’ specific cases, attached to Plaintiffs’
19 Motion for Summary Judgment. Pages taken directly from these A-Files discuss whether and
20 why particular individuals’ immigration benefit applications raised national security concerns,
21 and accordingly, were processed in CARRP. *See Pasquarella Decl.* at Exhibits 74, 77-78, 81-82,
22 84-89. Plaintiffs’ experts discuss the cases of specific individuals, and make assumptions, based
23 on the specific details of the cases, about whether and why they may have been deemed national
security concerns and subject to CARRP processing. *See Pasquarella Dec.* at Exhibits 76, 88-89.
As stated above, disseminating information about whether and why certain immigration benefit

1 applications were processed in CARRP involves the risk of signaling to the specific individuals
2 involved, as well as the general public, whom the government deems a national security concern,
3 and why, thereby compromising investigative techniques, alerting investigative targets that they
4 may be under investigation, and encouraging behavior changes and information concealment by
5 individuals intending to evade detection. Accordingly, a compelling reason – the prevention of
6 these adverse consequences – exists for maintaining A-File content, and documents discussing
7 A-File content, under seal in this case. *See Elhady*, -- F.3d -- , 2021 WL 1181270, at *3 (noting
8 such potential harms as reasons for the nondisclosure of information related to national security).

9 **II. The Court Has Recognized Protecting National Security As The Interest**
10 **Underlying Confidentiality and Attorneys’ Eyes Only Designations, And Sealing**
11 **Documents On The Basis Of These Designations, In This Case.**

12 The Court has entered various orders in this case directing that the types of information
13 and documents discussed above be designated as confidential or Attorneys Eyes Only, and
14 therefore filed under seal. *See, e.g.*, Dkt. No. 86, Dkt. No. 183 at 2; Dkt. No. 320 at 7-8.
15 Plaintiffs’ argument that “[t]he existence of a protective order is not a compelling reason [to
16 seal],” fails to recognize two important distinctions in this case. First, Plaintiffs fail to address
17 the fact that the Court has allowed various categories of information and documents to be
18 protected under an Attorneys’ Eyes Only designation. None of the cases Plaintiffs cite for the
19 proposition that “[t]he existence of a protective order is not a compelling reason [to seal],”
20 address information or documents afforded an Attorneys’ Eyes Only level of protection. *See*
21 *generally* Pls’ Motion to Seal at 4-5. And the Court’s orders addressing the Attorneys’ Eyes
22 Only designation indicate that it is intended to afford the documents a great degree of protection.
23 *See* Dkt. No. 183 at 2-3 (“Plaintiffs’ attorneys of record shall maintain [Attorneys’ Eyes Only]
information in a secure manner, i.e. in a locked filing cabinet (for any paper copy) or in a

1 password-protected electronic file to which only authorized persons have access, and shall not
2 transmit that information over any electronic mail or cloud-based sharing unless the method of
3 transmission employs point-to-point encryption or other similar encrypted transmission.”); Dkt.
4 No. 274 at 6 (“Plaintiffs’ counsel may not disclose [A-Files, designated Attorneys Eyes’ Only],
5 or the newly unredacted information contained therein (if applicable) to any other individual.
6 The Court expects strict compliance with this directive, and *will impose severe sanctions if the*
7 *parties do not follow it.*”) (emphasis added). Given the Court’s recognition that information and
8 documents designated Attorneys’ Eyes Only must be afforded the utmost protection from public
9 disclosure, Defendants submit that an Attorneys’ Eyes Only designation, in and of itself,
10 constitutes a compelling reason to seal.

11 Furthermore, the Court has indicated, in this case, that the purpose of both the
12 confidential and Attorneys’ Eyes Only protective orders is to shield information that, if released
13 publicly, could harm law enforcement interests or national security. For example, when
14 considering a prior motion to seal, the Court noted Defendants’ arguments that documents
15 designated confidential contained “sensitive but unclassified information about the investigative
16 techniques of USCIS officers to . . . combat threats to public safety and national security,” and
17 “that the public release of these [documents] could cause injury by allowing individuals to
18 modify their behavior to avoid detection by authorities.” *See* Dkt. No. 272 at 2. The Court then
19 agreed that protecting national security was a sufficient justification for keeping the documents
20 designated confidential under seal. *Id.* As another example, after reviewing a “sampling of case-
21 by-case determinations regarding individual national security threats as they appear on the class
22 list,” the Court ordered that the class lists be produced under an Attorneys’ Eyes Only

1 designation. *See* Dkt. No. 183 at 2. Likewise, when contemplating a production of A-Files that
2 would reveal whether and why particular individuals' applications were subject to CARRP, the
3 Court specified that such a production be designated Attorneys' Eyes Only. *See* Dkt. No. 274 at
4 5-6. Additionally, recognizing USCIS's interest in preventing disclosure of "internal vetting
5 procedures and methodologies for identifying [national security] risk," the Court has ordered that
6 such material bear an Attorneys' Eyes Only designation. *See* Dkt. No. 320 at 7-8. Perhaps most
7 tellingly, when the Court discussed, in a recently issued order, the types of protected information
8 addressed above, the Court sealed the order *sua sponte*. *See* Dkt. Nos. 451, 454-1. Clearly, in
9 this case, the designation of information and documents as confidential and Attorneys' Eyes
10 Only bears a nexus to protecting national security, and this constitutes a compelling reason to
11 seal. *See Ground Zero*, 860 F.3d at 1262 (9th Cir. 2017); *Ressam*, 221 F.Supp.2d at 1263.

12 To the extent that Plaintiffs' Motion for Summary Judgment contains information that is
13 not designated as confidential or Attorneys' Eyes Only, Defendants have no objection to such
14 information being filed publicly in a version of the motion containing appropriate redactions
15 over protected information. Likewise, Defendants also do not object to the public filing of
16 exhibits not designated as confidential or Attorneys' Eyes Only. *Cf.* Pls' Mot. to Seal at 8
17 (indicating that Plaintiffs filed under seal deposition testimony that Defendants did not designate
18 as confidential or Attorneys' Eyes Only). With regard to the exhibits that Defendants have
19 designated as confidential and Attorneys' Eyes Only on the bases discussed above, Plaintiffs
20 argue that Defendants "will be unsuccessful in meeting th[e] burden" of proving that "each
21 individual document creates a 'compelling reason' to be sealed." *See* Pls' Mot. to Seal at 6.
22 Defendants submit that the above analysis of Plaintiffs' Motion for Summary Judgment, and the
23

1 supporting documents attached thereto, successfully establishes a compelling reason to seal all
2 information, and each document attached to Plaintiffs' Motion for Summary Judgment,
3 designated as confidential or Attorneys' Eyes Only. On this point, all designated documents
4 attached to Plaintiffs' Motion for Summary Judgment bore their designations for at least several
5 months, and in a majority of cases, several years. Yet, Plaintiffs have never, including in their
6 instant motion to seal, pointed to any particular document as inappropriately designated under
7 the Court's relevant orders. *See generally* Pls' Mot. to Seal; *see also* Dkt. Nos. 86, 183, 192,
8 274, 320. Given the compelling interest demonstrated by Defendants in sealing the information
9 and documents discussed above, and in the absence of any substantive argument by Plaintiffs to
10 the contrary, Plaintiffs' half-hearted attempt to undermine the government's protective order
11 designations is unavailing, and the Court should reject it.

12 **III. The Fact That Plaintiffs May Have Obtained, Through Other Means,**
13 **Information Designated As Confidential and Attorneys' Eyes Only In This Case**
14 **Does Not Undermine The Compelling Reason To Seal The Information Here.**

15 Plaintiffs argue that "publicly available documents should not be sealed." *See* Pls' Mot.
16 to Seal at 5. Without citing any particular exhibit, Plaintiffs contend that if they have been able
17 to, or would theoretically be able to, obtain a document through FOIA, the document should not
18 be sealed. This is an improper benchmark, however, because, as Defendants have argued before,
19 documents can be (and have been in this case) inadvertently and improperly disclosed in FOIA.
20 *See, e.g.,* Dkt. No. 384, Braga Decl., at Exhibit N. The government's inadvertent disclosure of
21 information in one instance, separate and apart from this litigation, should not dictate its ability
22 to protect that information from public disclosure going forward, particularly when the interest of
23 preventing specific harms to national security is stake. *See Ground Zero*, 860 F.3d at 1262
("National security concerns, can, of course, provide a compelling reason for shrouding in
secrecy even documents once in the public domain."); *Al-Haramain Islamic Found, Inc. v. Bush*,

1 507 F.3d 1190, 1193 (9th Cir. 2007) (permitting the government to seal a document despite its
2 prior dissemination to the public).

3 **IV. Compelling Reasons Exist To Seal Information That Has Not Been Withheld As**
4 **Privileged In This Case.**

5 Plaintiffs argue that “[b]lanket assertions of privilege are not compelling reasons [to
6 seal].” Pls’ Mot. to Seal at 8. Notably, however, this Court has found that Defendants’ privilege
7 assertions are not vague. *See* Dkt. No. 320 at 3 (“The Government’s privilege logs are
8 sufficiently detailed.”). The Court has also conclusively ruled that Defendants’ privilege
9 assertions are justified. *See generally* Dkt. Nos. 274, 320, 451, 451-1. In any event, Defendants
10 *have disclosed* to Plaintiffs and Plaintiffs’ attorneys reams of documents – including those at
11 issue here – that, while not subject (or not entirely subject) to legal privilege, nevertheless do
12 contain highly sensitive information relating to the national security of the United States. This
13 Court has made clear that, even though certain information may not be withheld as privileged,
14 there may still be a compelling need to shield it from public disclosure. *See* Dkt. No. 274 at 6;
15 Dkt. No. 320 at 7-8. In a case such as this, where Plaintiffs challenge USCIS’s policy for
16 identifying and vetting immigration benefit applications presenting national security concerns, it
17 should not be surprising that the compelling interest of preventing specific harms to national
18 security will result in papers and documents being filed under seal. *See Ground Zero*, 860 F.3d
19 at 1262 (9th Cir. 2017); *Ressam*, 221 F.Supp.2d at 1263; *see also* Dkt. Nos. 272, 284, 295, 340,
20 352, 370, 409, 429 (orders granting prior motions to seal).

21 **CONCLUSION**

22 For the foregoing reasons, the Court should and grant the motion to seal Plaintiffs’
23 Motion for Summary Judgment and Supporting Documents.

1 Dated: April 5, 2021
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CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2021, 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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