

HONORABLE RICHARD A. JONES

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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.

CASE NO. C17-94 RAJ
ORDER

This matter comes before the Court on Plaintiffs’ Motions to Compel (Dkt. ##
109, 111) and on Defendants’ Motion for Protective Order (Dkt. # 126). For the
following reasons, the Court grants in part and denies in part the motions.

I. BACKGROUND

On June 21, 2017, the Court granted Plaintiffs' motion to certify two classes: a Naturalization Class and an Adjustment Class. Dkt. # 69. The parties have since been engaged in discovery. The parties have attempted to resolve their discovery disputes without court intervention but have reached an impasse. Plaintiffs now move the Court to compel the Government to produce certain documents. In addition, the Government requests that certain information be subject to a limited and more robust protective order.

II. LEGAL STANDARD

The Court has broad discretion to control discovery. *Hallett v. Morgan*, 296 F.3d 732, 751 (9th Cir. 2002); *see also Avila v. Willits Env'tl. Remediation Trust*, 633 F.3d 828, 833 (9th Cir. 2011), *In re Sealed Case*, 856 F.2d 268, 271 (D.C. Cir. 1988). That discretion is guided by several principles. Most importantly, the scope of discovery is broad. A party must respond to any discovery request that is not privileged and that is "relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1).

If a party refuses to respond to discovery, the requesting party "may move for an order compelling disclosure or discovery." Fed. R. Civ. P. 37(a)(1). "The party who resists discovery has the burden to show that discovery should not be allowed, and has the burden of clarifying, explaining, and supporting its objections." *Cable & Computer Tech., Inc. v. Lockheed Saunders, Inc.*, 175 F.R.D. 646, 650 (C.D. Cal. 1997).

III. DISCUSSION

A. Law Enforcement Privilege

The Government has claimed that the law enforcement privilege protects its documents for quite some time. *See, e.g.*, Dkt. ## 94 at 7-8, 94-5 at ¶ 7. The Court

1 addressed the issue and required the Government to produce privilege logs if it wished to
2 withhold documents based upon the privilege. The Government created privilege logs
3 and claimed the law enforcement privilege. *See, e.g.*, Dkt. # 110. The Government now
4 argues that it need not satisfy the requirements of this specific privilege unless it
5 “formally invoke[s]” the same. Dkt. # 119 at 8. This argument—that the Government
6 may somehow claim the privilege without actually claiming it—defies logic. The
7 Government’s actions and discovery tactics—including, for example, unjustified delays
8 and the questionable timing of affidavits—thus far have been nothing less than
9 obstructionist; such behavior is inappropriate and will not be tolerated.

10 To claim this privilege, the Government must satisfy three requirements: (1) there
11 must be a formal claim of privilege by the head of the department having control over the
12 requested information; (2) assertion of the privilege must be based on actual personal
13 consideration by that official; and (3) the information for which the privilege is claimed
14 must be specified, with an explanation why it properly falls within the scope of the
15 privilege. *In re Sealed Case*, 856 F.2d 268, 271 (D.C. Cir. 1988). This privilege is
16 qualified: “[t]he public interest in nondisclosure must be balanced against the need of a
17 particular litigant for access to the privileged information.” *Id.* at 272.

18 The Government did not properly claim this privilege because it refused to abide
19 by the first and second prongs; that is, a department head did not claim the privilege and
20 therefore did not assert such privilege based on actual personal consideration. This is
21 notable considering the Government cited the privilege at least as early as October 2017
22 and included a declaration from the agency head, Mr. Emrich, though not in support of
23 the privilege. Dkt. ## 94, 94-8. The Government now offers an affidavit of this same
24 agency head—more than four months later—to invoke the law enforcement privilege.
25 *See* Dkt. # 119-2. Tactics like this do nothing more than delay and frustrate the
26 fundamental concept of discovery.

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1 In his new affidavit, Mr. Emrich describes categories of withheld information and
2 the law enforcement interest in keeping the information withheld. *Id.* The compelling
3 portions of the affidavit relate to any documents “for applicants whom adjudicators have
4 determined pose a national security or public risk,” and the processes and checks utilized
5 to assess such applicants and related risks. *See, e.g., id.* at ¶ 21. Mr. Emrich states that
6 disclosure of this information “could provide aliens with a roadmap into the techniques
7 USCIS uses to uncover information that an individual may wish to hide, and the
8 techniques used to elicit information.” *Id.* But this type of information—the specific
9 process in which USCIS discovers a national security risk and the subsequent
10 investigation—is distinguishable from documents that “relate primarily to immigration
11 benefits processing, not law enforcement in the traditional sense[.]” *Am. Civil Liberties*
12 *Union of S. California v. United States Citizenship & Immigration Servs.*, 133 F. Supp.
13 3d 234, 245 (D.D.C. 2015).

14 Because this is an important distinction, and because the Court must view
15 USCIS’s withholding with more skepticism than it might with a different agency, *see id.*,
16 the Court requires the Government’s privilege log to reflect such precise distinctions.
17 This is to ensure that the Government’s blanket affidavit is not being used in an unbridled
18 sense; the Government must specifically identify the documents that fall within this
19 privilege. The Government’s privilege log is insufficient in this regard. For example,
20 most if not all of the Government’s law enforcement privilege descriptions relate only to
21 “procedures on the adjudication of an immigrant benefit application” as they pertain to
22 the “applicant’s eligibility for the immigration benefit.” *See, e.g., Dkt. # 11-* at 11. There
23 is no law enforcement concern here; the Government’s vague concern is that an applicant
24 may learn how eligibility was decided and this may somehow “risk circumvention or
25 evasion of the law.” *Id.* This description—repeated throughout the log—relates
26 primarily to immigration benefits processing and not to Mr. Emrich’s contention that the
27 individual document is related to law enforcement or national security concerns. Though

1 the Court accepts Mr. Emrich’s affidavit to claim the privilege, generally¹, the Court
2 requires the Government to use the privilege deliberately and will expect the Government
3 to be exacting with which documents fall within this privilege, stating its reasons for
4 withholding clearly in the privilege logs. *Am. Civil Liberties Union of S. California*, 133
5 F. Supp. 3d at 243–44 (“There is no explanation of how the information, if released,
6 could risk circumvention of the law, no explanation of what laws would purportedly be
7 circumvented, and little detail regarding what law enforcement purpose is involved (other
8 than vague references to ‘national security concerns’). This is not enough to justify
9 withholding records . . .”).

10 The Court will allow the Government to revise its privilege log. Based on its
11 review, the Court is hesitant to conclude that all of the currently claimed law enforcement
12 privileges are accurate. The Government has fourteen (14) days from the date of this
13 Order to revise its log and reproduce to Plaintiffs. The parties may file supplemental
14 briefing at that time to address the privilege’s balancing test for any documents that the
15 Government continues to withhold based upon the law enforcement privilege. The
16 Government must produce any documents over which it declines to claim the law
17 enforcement privilege.

18 The deadlines vacated pursuant to the parties’ stipulation, Dkt. # 136, remain
19 vacated pending the Government’s revised privilege log and resolution of the remaining
20 discovery issues addressed in this Order. The Government is warned that any further
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23 ¹ The Court is perplexed why this affidavit or specific claim of privilege was not asserted
24 months ago, thereby avoiding much of the delays that have occurred. Tactics like this only fuel
25 the notion that the Government’s intention is to purposely delay the discovery process in this
26 lawsuit. Nonetheless, the Court finds Mr. Emrich’s affidavit suitable for the issue at hand. This
27 does not alleviate the Government of its responsibility to provide additional affidavits from
heads of agencies for future productions in which the Government wishes to claim the law
enforcement privilege. This affidavit may not be sufficient to cover all discovery productions
during the course of litigation.

1 obstructionist behavior with regard to discovery production will not be met with such
2 leniency.

3 B. Production of Documents Responsive to RFPs 40, 41, and 44

4 Plaintiffs' Requests for Production ("RFP") Numbers 40, 41, and 44 are as
5 follows:

6 REQUEST FOR PRODUCTION NO. 40: All Documents
7 referring or relating to any interpretation or implementation of
8 the First EO or Second EO that would affect in any way the
9 adjudication of immigration benefits petitions, applications, or
10 requests of those individuals who are part of the Naturalization
11 Class, the Adjustment of Status Class, or the Muslim Ban
12 Class, including, but not limited to, all documents referring or
13 relating to the Extreme Vetting Initiative by the U.S.
14 Immigration and Customs Enforcement agency.

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16 REQUEST FOR PRODUCTION NO. 41: All Documents
17 referring or relating to "the suspension of immigration
18 petitions, applications, or requests involving Plaintiff Wagafe,
19 Plaintiff Ostadhassan, Plaintiff Bengezi, and members of the
20 Muslim Ban Class," pursuant to the First or Second Eos, as
21 described in the First and Second Claims for Relief outline in
22 Plaintiffs' Second Amended Complaint.

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24 REQUEST FOR PRODUCTION NO. 44: All Documents
25 referring or relating to any screening, vetting, or adjudication
26 program, policy, or procedure connection to Section 4 of the
27 First EO or Sections 4 or 5 of the Second EO, including, but

1 not limited to, all documents referring or relating to the
2 Extreme Vetting Initiative by the U.S. Immigration and
3 Customs Enforcement agency. This Request is limited to those
4 programs that apply or would apply to, or would affect in any
5 way the immigration benefit petitions, applications, or requests
6 of those individuals who are part of the Naturalization Class,
7 the Adjustment of Status Class, or the Muslim Ban Class.

8 Dkt. # 112 at 22-24, 25-26.

9 The parties disagree about the continued relevancy of the Muslim Ban Class (also
10 referred to as the Six Countries Class) and the propriety of producing records from ICE.
11 Plaintiffs referenced the Muslim Ban Class in their Second Amended Complaint. Dkt. #
12 47 at ¶ 237. But Plaintiffs did not seek certification of this class in their Amended
13 Motion for Class Certification “because, after the filing of the First Amended Complaint,
14 the Acting Director of USCIS issued a memorandum indicating that Section 3(c) of the
15 First EO would no longer operate to stop the processing of immigration benefits for those
16 already in the United States.” Dkt. # 49 at 9, n. 1. Plaintiffs reserved the “right to seek
17 certification of the additional class if circumstances change again.” *Id.*

18 Local Rule 23(i)(3) affords parties 180 days after filing a complaint to move for
19 class certification. Local Rules W.D. Wash. LCR 23(i)(3). “This period may be
20 extended on motion for good cause.” *Id.* Any such motion “should, whenever possible,
21 be filed sufficiently in advance of the deadline to allow the court to rule on the motion
22 prior to the deadline.” LCR 7(j). If a determination as to class certification is postponed,
23 “a date will be fixed by the court for renewal of the motion.” LCR 23(i)(3).

24 Plaintiffs have not pursued certification of the Muslim Ban Class. They claim that
25 RFP Nos. 40, 41, and 44 are pre-certification discovery requests, yet those requests were
26 propounded after the 180-day deadline had passed. Dkt. # 112 at ¶ 2 (Plaintiffs served
27 the RFPs in November 2017; the deadline to seek class certification on the Muslim Ban

1 Class was in October 2017). Plaintiffs did not seek an extension of any deadlines with
2 regard to pre-certification discovery or certifying the Muslim Ban Class. And, they fail
3 to offer any compelling reasons for failing to conduct such discovery or file such motions
4 within the 180-day window. Moreover, Plaintiffs' articulated reasons for not seeking
5 certification of the Muslim Ban Class related to whether certain portions of the First and
6 Second EOs would be implemented. Plaintiffs do not argue that circumstances have
7 changed to warrant such a request to now certify the Muslim Ban Class. Nor do
8 Plaintiffs argue that RFP Nos. 40, 41, or 44 seek to discover evidence of changing
9 circumstances such that this discovery would impact the decision to request class
10 certification. In fact, at the time of this Order, it is unclear whether Plaintiffs had even
11 contemplated filing a motion to certify the Muslim Ban Class. To follow Plaintiffs'
12 approach would relegate class certification to a moving target subject only to Plaintiffs'
13 control and completely ignore the established Local Rule of this Court.

14 Plaintiffs did not timely move to certify the Muslim Ban Class. However, this
15 does not affect their ability to pursue discovery as to the representative plaintiffs.
16 Whether the named plaintiffs' claims are moot has not been briefed before this Court, and
17 the Court will not entertain a motion to dismiss embedded in an opposition to a motion to
18 compel.

19 Defendants object to RFP Nos. 40, 41, and 44 on account of their allegedly broad
20 context and target of ICE records. Dkt. # 120 at 11-12. The Court disagrees that the
21 RFPs are too broad. Indeed, the RFPs are targeted at certain programs that may
22 encompass a successor program to CARRP. The Court finds that the information
23 requested in RFP Nos. 40, 41, and 44 is relevant and within the scope of litigation at this
24 stage in the proceedings, albeit not with regard to the Muslim Ban Class.²

26 ² The Court will not tolerate the Government using this Order to withhold swaths of
27 information that is discoverable. The Court notes that information relevant to the Muslim Ban
Class is most likely relevant to the two certified classes, as well as the named plaintiffs who

1 Defendants also object to these RFPs because they claim that searching for
2 documents at ICE “is not proportional to the needs of this case,” especially in light of
3 ICE’s non-party status. *Id.* at 13. But the RFPs do not ask Defendants to search for
4 records “at ICE.” *See* Dkt. # 112 at 21, 25-26; *see also* Dkt. # 122 at 9 (stating that
5 Plaintiffs are inquiring into documents that are in the possession, custody, or control of
6 DHS). Plaintiffs are seeking documents within Defendants’ control that reference certain
7 programs that are promulgated or maintained by ICE. Any relevant documents within
8 Defendants’ possession, custody, and control must be produced.

9 C. Protective Order

10 The Government argues that a more robust protective order must be in place
11 before it will produce the class list to Plaintiffs. Dkt. # 126. In support of its argument,
12 the Government contends that disclosure “risks prejudice to national security and
13 intelligence interests.” *Id.* at 3. But the risks cited by the Government are vague and
14 speculative—there is no evidence that any individuals on the class list are or were
15 subjects of investigations or are, generally, “bad actors.” *Id.* Furthermore, any sensitive
16 information on the class list is subject to the existing protective order. To be sure, the
17 Government creates scenarios in which Plaintiffs may violate the spirit of the protective
18 order. *Id.* at 6. The Court warns Plaintiffs that should they attempt to purposely and
19 improperly disclose information subject to the protective order, then the Court may issue
20 sanctions, which may include dismissal of this matter.

21 The Court does not find that the Government has supported its argument that the
22 class list, generally, must be subject to an “attorney eyes only” provision. However, the
23 Court recognizes that potential national security risks may exist as to specific individuals;
24 the burden is on the Government to make such case-by-case determinations. Any
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27 would have represented the Muslim Ban Class. Plaintiffs should not be forced to file yet another
motion to compel in the event that the Government purposely withholds such information.

1 determinations must be made with sufficient detail and specificity. Such determinations
2 and the individuals to which they apply must be protected by the “attorney eyes only”
3 protections described by the Government in its brief. Dkt. # 126. Any such
4 determinations must be produced to Plaintiffs’ counsel—with the understanding that this
5 information is considered “attorney eyes only”—within fourteen (14) days from the date
6 of this Order. The remaining portion of the class list must be produced at the same time,
7 subject to the existing protective order, Dkt. # 86.

8 D. Status Reports (Dkt. ## 124, 125, 130, 132)

9 The Court is in receipt of the parties’ status reports. Dkt. ## 124, 125, 130, 132.
10 The Court is concerned with the Government’s behavior in this matter. Based on the
11 record before it, the Court finds reason to believe that the Government is purposely
12 obstructing and hindering the discovery process in this lawsuit.

13 There is already a pending motion for sanctions in this matter regarding the
14 Government’s discovery behavior. Dkt. # 137. As previously noted, the Government
15 must cease its delay tactics in the discovery practice. These tactics do nothing more than
16 unduly delay the production of documents it is obligated to produce. Unless the
17 Government has a credible basis to assert a claim of privilege, it should fully abide by the
18 rules of timely disclosure.

19 The Court has repeatedly explained to the Government that orders from the federal
20 bench are mandatory, not voluntary. *See, e.g.*, Dkt. ## 115, 121 (hearing and hearing
21 transcript regarding discovery disputes). The executive branch does not stand alone in
22 the federal system; the Government may not usurp the judicial branch and decide for
23 itself when or if it will produce documents. The Court has no patience for Defendants’
24 apparent disregard for the discovery process and for its attorneys’ inappropriate actions in
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1 furthering and participating in such behavior.³ The Court hopes to proceed to the merits
2 in this matter rather than interminably remain in this morass of unnecessary delays and
3 discovery disputes.

4 **IV. CONCLUSION**

5 For the foregoing reasons, the Court grants in part and denies in part the motions.
6 Dkt. ## 109, 111, 126.

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8 Dated this 11th day of April, 2018.

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12 The Honorable Richard A. Jones
13 United States District Judge
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25 ³ Attorneys appearing in the Western District of Washington must be familiar with the
26 Washington Rules of Professional Conduct (“RPC”). Local Rules W.D. Wash. LCR 83.3(a)(2).
27 These include RPC 3.3 and 3.4, which aim to prevent “conduct that undermines the integrity of
the adjudicative process.” WA R RPC 3.3. Attorneys’ duty to advocate for their clients “is
qualified by the advocate’s duty of candor to the tribunal.” *Id.*