

The Honorable Richard A. Jones

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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. C17-00094RAJ

**NOTICE OF MOTION AND  
DEFENDANTS’ MOTION  
FOR LEAVE TO SUBMIT  
DOCUMENTS *EX PARTE*, *IN  
CAMERA***

(Note On Motion Calendar for:  
March 22, 2019)

Defendants respectfully request leave to submit to the Court, for its *ex parte, in camera* review in connection with Defendants’ opposition to Plaintiffs’ motion to compel, Dkt. 221, and Defendants’ cross-motion for a protective order, the declarations of Jay S. Tabb, Jr., Executive Assistant Director of the National Security Branch of the Federal Bureau of Investigation (“FBI”), Matthew D. Emrich, Associate Director of the Fraud Detection and National Security (“FDNS”) Directorate, U.S. Citizenship and Immigration Services (“USCIS”), Department of Homeland Security (“DHS”), and Matthew C. Allen, Assistant Director, Domestic Operations, Homeland Security Investigations (“HSI”), an agency in DHS. Defendants will lodge these documents with the

1 Department of Justice (“DOJ”) Classified Information Security Officer (“CISO”), pending the  
2 Court’s ruling on this motion for leave to submit the documents *ex parte, in camera*.

3 The Court’s consideration of these declarations is necessary to the Court’s full understanding  
4 of Defendants’ response to Plaintiffs’ motion to compel and Defendants’ cross-motion for a  
5 protective order. Defendants and non-party government agencies continue to formally assert  
6 relevant privileges, including the law enforcement privilege, as to the “why information” sought by  
7 Plaintiffs’ motion to compel in regards to the five named class plaintiffs.<sup>1</sup> In regards to Plaintiffs’  
8 request for 100 random A files, it is not possible at this time to make specific privilege claims as to  
9 the contents of any single file given the nature of the request. Defendants respectfully request that,  
10 should the Court order the production of some number of A files pursuant to Plaintiffs’ motion to  
11 compel despite Defendants’ objection, that Defendants be allowed to identify and withhold from  
12 production specific information in those files that is classified information and information as to  
13 which it claims privilege, and to thoroughly brief privilege issues before the Court makes any ruling  
14 on those issues.

15 The declarations Defendants seek leave to file *ex parte, in camera* contain sensitive  
16 nonpublic explanations of the harms and risks that can be expected to result if information  
17 Defendants have withheld from production were disclosed outside the U.S. government. That  
18 information cannot be filed on the public docket, or disclosed to Plaintiffs, without damage to the  
19 national interest. Defendants have endeavored to file information on the public docket where  
20 possible, which is why Defendants have also filed on the public docket, as exhibits to their brief in  
21 opposition to Plaintiffs’ motion to compel and in support of Defendants’ cross-motion for a  
22 protective order, other declarations which do not require *ex parte, in camera* handling. Nevertheless,  
23 some information must be disclosed only *ex parte, in camera*.

24  
25 \_\_\_\_\_  
26 1 Defendants and other government agencies reserve their right to assert the state secrets privilege, if applicable, over  
27 information otherwise discoverable in this case. Consistent with judicial guidance, we will invoke the privilege only as a  
28 last resort, as the privilege “is not to be lightly invoked.” See *United States v. Reynolds*, 345 U.S. 1, 7 (1953).  
Additionally, Department of Justice policy imposes strict procedures on the privilege’s assertion and Defendants must  
comply with those procedures prior to invoking the privilege. See <https://www.justice.gov/opa/pr/attorney-general-establishes-new-state-secrets-policies-and-procedures> (last visited March 6, 2019).

1 Defendants telephonically communicated their intent to seek leave to file these declarations  
 2 *ex parte* for *in camera* review by the Court to Plaintiffs’ counsel on December 19, 2018, and  
 3 followed up with Plaintiffs’ counsel by e-mail on February 28, 2019. Although this is not a motion  
 4 to seal, Defendants nonetheless considered the issues required by Local Civil Rule 5.2(g)(3)(A) and  
 5 the Court’s standing order (Dkt. 65). On Wednesday, March 6, 2019, Plaintiffs’ counsel indicated in  
 6 an e-mail message that they oppose this request.

### 7 ARGUMENT

#### 8 I. THE COURT HAS AUTHORITY TO RECEIVE AND REVIEW 9 CLASSIFIED AND PRIVILEGED DOCUMENTS EX PARTE AND IN CAMERA REGARDING PRIVILEGE ASSERTIONS

10 The Court has the authority—and perhaps even an obligation—to review *ex parte* and  
 11 *in camera* classified or otherwise privileged documents submitted in support of a privilege assertion.  
 12 It is also entirely consistent with judicial ethics: Canon 3(A)(4)(a) of the *Code of Conduct for United*  
 13 *States Judges* provides that a judge may “consider *ex parte* communications as authorized by law.”  
 14 Such is the case here. Submission of classified and otherwise privileged material to a court for its  
 15 *ex parte*, *in camera* review, particularly in support of a privilege assertion, is in full accord with  
 16 longstanding precedent in this Circuit and nationwide.

17 Article III courts have inherent authority to review material *ex parte* and *in camera*,  
 18 including classified material.<sup>2</sup> *See, e.g., Meridian Int’l Logis. v. United States*, 745 F.2d 740, 745  
 19 (9th Cir. 1991) (quoting *United States v. Thompson*, 827 F.2d 1462, 1469 (9th Cir. 1987) (“this court  
 20 has generally recognized the capacity of a district judge to ‘fashion and guide the procedures to be  
 21 followed in cases before him.’”); *Arieff v. Dep’t of Navy*, 712 F.2d 1462, 1469 (D.C. Cir. 1983) (“the  
 22 receipt of *in camera* affidavits . . . when necessary . . . [is] part of a trial judge’s procedural  
 23 arsenal.”<sup>3</sup>). Appropriate material for a court to receive *ex parte* includes classified information. *Al-*

24 \_\_\_\_\_  
 25 2 No Executive Branch entity can provide access to classified information to Plaintiffs’ counsel, Exec. Order  
 26 No. 13,526, 75 Fed. Reg. 707, §§ 4.1(a)(3) & 6.1(dd), and the Court cannot order the Executive Branch to provide such  
 27 access, *Dep’t of Navy v. Egan*, 484 U.S. 518, 527 (1988); *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1081–82  
 (9th Cir. 2010) (en banc); *Al-Haramain Islamic Found., Inc.*, 507 F.3d at 1203; *Dorfmont v. Brown*, 913 F.2d 1399, 1401  
 (9th Cir. 1990).

28 3 The court’s opinion in *Arieff* makes clear that the declaration at issue was reviewed by the court both *in camera* and  
*ex parte*. *Arieff v. Dep’t of Navy*, 712 F.2d at 1469.

1 *Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007); *Jifry v. FAA*, 370 F.3d  
2 1174, 1182 (D.C. Cir. 2004) (“The court has inherent authority to review classified material *ex parte*  
3 and *in camera* as part of its judicial review function”). This principle is not limited to classified  
4 information. See *Gilmore v. Gonzales*, 435 F.3d 1125, 1129 (9th Cir. 2008) (information protected  
5 by statute); *Torbet v. United Airlines, Inc.*, 298 F.3d 1087, 1089 (9th Cir. 2002) (information  
6 protected by statute); *Thompson*, 827 F.2d at 1469 (sensitive information not protected by statute).

7 In addition, the Ninth Circuit has specifically approved of the use of *ex parte* procedures to  
8 substantiate claims of privilege. *Kasza v. Browner*, 133 F.3d 1159, 1169 (9th Cir. 1998)  
9 (“Elaborating the basis for the claim of privilege through *in camera* submissions is  
10 unexceptionable.”); see also *In re City of New York*, 607 F.3d 923, 948–49 (2d Cir. 2010)  
11 (discussing propriety of *in camera*, *ex parte* presentation of materials for privilege assessment);  
12 *Wabun-Inini v. Sessions*, 900 F.2d 1234 (8th Cir. 1990) (affirming *ex parte*, *in camera* review of  
13 submissions to support law enforcement privilege); *Alexander v. FBI*, 186 F.R.D. 154, 169 (D.D.C.  
14 1999) (explaining that *in camera*, *ex parte* hearing was required to determine whether law  
15 enforcement investigatory privilege applied).

16 This is not surprising, because the factual basis for a privilege may itself be privileged. In  
17 the absence of *ex parte* review there would be no meaningful way for a court to evaluate a privilege  
18 assertion or a challenge to a privilege assertion without violating the very privilege at issue. By  
19 protecting the ability of parties to claim privileges even where the reasons for it are themselves  
20 privileged, *ex parte* review is a necessary component of the adversarial system. Congress, via the  
21 Rules Enabling Act and the Supreme Court, has codified this principle in Federal Rule of Civil  
22 Procedure 26(b)(5)(A)(ii), which permits a party to withhold information concerning privilege  
23 assertions where that information is “itself privileged or protected.” Fed. R.Civ. P. 26(b)(5)(A)(ii).  
24 Thus, relying on *ex parte* procedures to submit classified documents to substantiate a claim of  
25 privilege is well within long-standing precedent from the Ninth Circuit and elsewhere.

26 Moreover, the Ninth Circuit has rejected challenges to the use of *ex parte* procedures as  
27 contrary to due process. See *United States v. Ott*, 827 F.2d 473, 476-77 (9th Cir. 1987). In *Ott*, the  
28 Ninth Circuit explained that, despite a criminal defendant’s assertion “that the *ex parte*, *in camera*

1 proceeding violated due process, . . . Congress has a legitimate interest in authorizing the Attorney  
2 General to invoke procedures designed to ensure that sensitive security information is not  
3 unnecessarily disseminated to *anyone* not involved in the surveillance operation in question.” *Id.*  
4 (emphasis in original). Indeed, despite the Government’s heavier burden in criminal cases, it is the  
5 norm, where classified information is involved, to submit documents *ex parte*, and even to hold  
6 *ex parte* hearings. *United States v. Klimavicius–Viloria*, 144 F.3d 1249, 1261 (9th Cir. 1998)  
7 (“*Ex parte* hearings are generally disfavored. In a case involving classified documents, however,  
8 *ex parte*, *in camera* hearings in which government counsel participates to the exclusion of defense  
9 counsel are part of the process that the district court may use in order to decide the relevancy of the  
10 information.”).

11 In *ACLU v. Dep’t of Defense*, No. 09-cv-8071, 2012 WL 13075286, \*1 (S.D.N.Y. Jan. 24,  
12 2012), the Court recognized that the general reluctance to rely on *ex parte* proceedings “dissipates  
13 considerably when the case raises national security concerns” and noted that a court “may conduct  
14 an *in camera* review of *ex parte* agency affidavits after ‘attempt[ing] to create as complete a public  
15 record as is possible.’”. There, the court concluded:

16 Important as the right to due process and the judicial system’s dedication to an adversarial  
17 process are, protecting the national security would be a futile effort if those interests  
18 automatically trumped national security concerns. The law reflects these competing  
objectives and allows for some sacrifice of adversarial process in limited circumstances  
where national security concerns are implicated.

19 *Id.* at \*2. Here, the very presence of classified information necessarily means that national security  
20 concerns are implicated, because that is the only category of information that can be classified. See  
21 Exec. Order No. 13,526, 75 Fed. Reg. 707 §§ 1.2, 1.4 (Dec. 29, 2009) (enumerating the types  
22 information that can be classified). Moreover, because courts necessarily evaluate privilege claims  
23 *ex parte*, *see supra*, there is no additional concern raised when the information related to the  
24 evaluation of the privilege is classified information, and, therefore, must be reviewed *ex parte*.

25 Finally, “[i]n determining whether *ex parte* and *in camera* review is appropriate, the court  
26 must conduct an independent review of the contents of the classified submission . . . ‘accord[ing]  
27 substantial deference to agency affidavits that implicate national security.’” *ACLU*, 2012 WL  
28

1 13075286 at \*1 (quoting *Assoc. Press v. Dep't of Defense*, 498 F. Supp. 2d 707, 710 (S.D.N.Y.  
2 2007)).

3 **II. THE DEPARTMENT OF JUSTICE USES CLASSIFIED INFORMATION**  
4 **SECURITY OFFICERS TO TRANSMIT CLASSIFIED MATERIAL TO**  
5 **FEDERAL COURTS**

6 In cases where classified materials are submitted for review, Department of Justice  
7 regulations require government counsel to take all appropriate action to protect the information  
8 against unauthorized disclosure. See 28 C.F.R. § 17.17(a). These regulations set forth the minimum  
9 security measures necessary to protect classified information, and require the undersigned to ensure  
10 the Court's cooperation in adopting such measures. See 28 C.F.R. § 17.17(a)(2). In civil  
11 proceedings, the security procedures include the following:

12 1. Classified information is not to be disclosed or introduced into evidence without the prior  
13 approval of either the originating agency, the Attorney General, or the President. See 28 C.F.R.  
14 § 17.17(c)(2).

15 2. Attendance at any proceeding where classified information will be disclosed is to be  
16 limited to those persons with appropriate authorization to access this information, whose duties  
17 require knowledge or possession of the classified information to be disclosed. See 28 C.F.R.  
18 § 17.17(c)(3).

19 3. Although Article III judges are automatically eligible to access classified information  
20 pertaining to matters in litigation before them, access by other court employees is limited to those  
21 individuals who have been determined eligible for such access by the Department of Justice  
22 Classified Information Security Officer ("CISO")<sup>4</sup> and who have been fully advised of all pertinent  
23 safeguarding requirements and their liability in the event of unauthorized disclosure. See 28 C.F.R.  
24 §§ 17.17(c)(3) and (c)(10); *id.* § 17.46(c).

25 <sup>4</sup> The CISO is part of the Litigation Security Section ("LSS"), a component of the Department of Justice's Security and  
26 Emergency Planning Staff ("SEPS"). SEPS is responsible for developing policies, methods, and procedures for the  
27 implementation of security programs for the Department of Justice, and provides advice, technical assistance, and  
28 support to executive offices and personnel throughout the Department. The LSS is comprised of Security Specialists  
who work with federal Judges at all levels to serve as CISOs. The CISOs assigned to the LSS assist the courts primarily  
in connection with criminal cases where the Classified Information Procedures Act ("CIPA") is applicable. See  
18 U.S.C. App. III, § 9 & note. However, CISOs also provide litigation assistance in civil matters involving classified or  
otherwise sensitive information to assist in implementation of 28 C.F.R. § 17.17(a) and other relevant regulations.



1 4. Classified documents must be appropriately handled and stored. With regard to some  
2 National Security Information (“NSI”) materials, Department of Justice implementing directives  
3 require storage in approved areas and handling only by approved individuals, among other security  
4 controls.

5 5. In the event that the Court wishes to hear any testimony or oral argument which the  
6 government believes would include classified information, this testimony or argument is to be  
7 recorded and transcribed pursuant to the instructions of the CISO. See 28 C.F.R. § 17.17(c)(7).

8 6. Any notes or other documents prepared by the Court or its personnel that contain  
9 classified information are to be prepared, handled, and stored consistent with the directives of the  
10 Department of Justice Security Officer, see 28 C.F.R. § 17.17(c)(7), and retrieved at the close of the  
11 proceedings by the CISO for safeguarding or destruction, see 28 C.F.R. § 17.17(c)(9).

12 7. At the conclusion of the proceedings, all original classified information shall be returned  
13 to the Department of Justice or the originating agency, or placed under court seal for safekeeping by  
14 the CISO. See 28 C.F.R. § 17.17(c)(8).

15 Consistent with the Department of Justice’s practice in matters involving classified materials  
16 to be reviewed *ex parte* by a court, the documents will have been lodged with the U.S. Department  
17 of Justice CISO, and will be available to the Court upon request.

### 18 CONCLUSION

19 Should the Court grant Defendants leave to submit the identified declarations *ex parte, in*  
20 *camera*, Defendants’ counsel will coordinate with the DOJ CISO for the secure transmission of these  
21 declarations to the Court.

22 For the foregoing reasons, Defendants respectfully request the Court to grant them leave to  
23 submit the declarations of FBI Executive Assistant Director Jay S. Tabb, Jr., USCIS Associate  
24 Director Matthew D. Emrich, and HSI Assistant Director Matthew Allen *ex parte for in camera*  
25 review.

26 Dated: March 7, 2019.  
27  
28

1 JOSEPH H. HUNT  
Assistant Attorney General  
2 Civil Division  
U.S. Department of Justice

DANIEL E. BENSING  
Senior Trial Counsel  
Federal Programs Branch

3 AUGUST FLENTJE  
4 Special Counsel  
Civil Division

LEON B. TARANTO  
Trial Attorney  
Torts Branch

5  
6 ETHAN B. KANTER  
Chief, National Security Unit  
7 Office of Immigration Litigation  
Civil Division

ANDREW C. BRINKMAN  
Trial Attorney  
Office of Immigration Litigation

8  
9 DEREK C. JULIUS  
Assistant Director  
10 Office of Immigration Litigation  
Civil Division

/s/ Brendan T. Moore  
BRENDAN T. MOORE  
Trial Attorney  
Office of Immigration Litigation

11 BRIAN T. MORAN  
12 United States Attorney

LINDSAY M. MURPHY  
Counsel for National Security  
National Security Unit  
Office of Immigration Litigation

13 BRIAN C. KIPNIS  
14 Assistant United States Attorney  
Western District of Washington

Counsel for Defendants



**CERTIFICATE OF CONFERENCE**

1  
2 I HEREBY CERTIFY that on December 19, 2018, I participated in a telephonic conference  
3 call with opposing counsel at which the substance of this motion was thoroughly discussed and  
4 where a good faith effort was made to reach an accord to eliminate the need for the motion. Among  
5 those participating in this conference for Defendants was myself, Ethan Kanter, and a number of  
6 other DOJ lawyers. For plaintiffs, Sameer Ahmed and a number of other lawyers representing  
7 Plaintiffs were on the conference call. The reasons why Defendants foresaw the need to file certain  
8 information with the Court *ex parte* and *in camera* was fully explained during the telephone  
9 conference and reiterated in summary form in an e-mail message to Defendant's counsel from Ethan  
10 Kanter on February 28, 2019. On March 6, 2019, Mr. Ahmed, representing Plaintiffs, stated in an  
11 e-mail message that Plaintiffs opposed this motion and that Plaintiffs expected that Defendants  
12 would provide Plaintiffs a summary of the materials submitted *in camera* and *ex parte* in as much  
13 detail as possible without revealing the information that Defendants claim includes classified and  
14 law enforcement privileged information.

15 Dated: March 7, 2019

16  
17 /s/ Brendan T. Moore  
18 BRENDAN T. MOORE  
19 U.S. Department of Justice  
20  
21  
22  
23  
24  
25  
26  
27  
28