THE HONORABLE RICHARD A. JONES

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

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| ABDIQAFAR WAGAFE, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>DONALD TRUMP, President of the United States, et al.,<br><br>Defendants. | CASE NO. C17-00094RAJ<br><br>**DEFENDANTS' REPLY IN SUPPORT OF CROSS-MOTION FOR PROTECTIVE ORDER** |



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## INTRODUCTION

The arguments in Plaintiffs' Reply in Support of their Motion to Compel and Opposition to Defendants' Cross-Motion (Dkt. 241) rest upon an incomplete and inaccurate reconstruction of this case's procedural history and a baseless assertion that the Government "routinely" divulges law enforcement privileged information in civil litigation and pursuant to FOIA. These false premises must be rejected, along with Plaintiffs' other arguments.

Plaintiffs rely upon the flawed notion that Defendants waived privilege as to all A-file material and "why" information. But they overlook this Court's May 4, 2018 (Dkt. 181 at 2) and February 28, 2019 (Dkt. 223 at 8) Orders rejecting their efforts to compel production of privileged and sensitive national security information as to why particular individuals' applications may have been subjected to review under the CARRP process. Further, there has been no privilege waiver as to Plaintiffs' request for 100 random A-files, which Defendants objected to immediately when first made.

Notwithstanding Plaintiffs' "expert's" unsubstantiated opinion, Defendants' vast apparatus designed to protect sensitive law enforcement information from public disclosure is so well known as to be within the province of judicial notice. The notion that Defendants "routinely" disclose this type of information in civil discovery and FOIA is absurd. That such information might become public either inadvertently, or as required by statute, rule, or court order, simply does not equate to a policy of "routine" disclosure.

In summary, Defendants have shown that Plaintiffs' effort to compel production of 100 random A-files of unnamed class members and highly sensitive and classified information as to why any named plaintiffs' applications may have been processed pursuant to the CARRP policy is unwarranted under the law and the unique facts of this case. The same holds true for Plaintiffs' attempt to modify the existing protective order to allow their public notice for communications with class members. Accordingly, Plaintiffs' Motion should be denied, and Defendants' cross-motion granted.



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## ARGUMENT

### I. Plaintiffs Are Not Entitled to the Production of 100 A-files

Plaintiffs argue that Defendants should produce 100 or "fewer" random A-files not because of demonstrable need but instead based on their incredible claim that the Government "routinely" discloses sensitive national security and law-enforcement privileged information in other settings and thus must do so here. Not only do Plaintiffs fail to show that the Government routinely discloses such privileged material, they also fail to address Defendants' showing of the enormous burden that producing this material would present, the bases for the privilege claims established by multiple declarations, or why the extensive data and information produced on class members and on how CARRP operates in policy and practice does not eliminate or drastically undermine Plaintiffs' "need" for this privileged material.

As Defendants previously established (Dkt. 226-1), the production of even one A-file of a class member poses an unnecessary burden. The Court's own *in camera* review of a randomized sample of A-file information on 50 class members has shown that such files contain third-agency, highly sensitive and potentially classified information regarding such individuals, all translating into a cumbersome but necessary process of review, coordination, and control. Thus, it is manifest that Plaintiffs' request for 100 A-files, if allowed, will impose a grossly disproportionate burden on Defendants. Plaintiffs seek these 100 A-files to extract individual information despite having obtained class action certification on the very claim that the CARRP policy is unlawful regardless of any class member's individual circumstances. Dkt. 49 at 14-15 ("[T]he gravamen of Plaintiffs' Second Amended Complaint is not focused on how CARRP was specifically applied to any given individual seeking immigrant benefits, but rather how USCIS's overall decision to implement CARRP and its subsequent application to Plaintiffs and others similarly situated violates federal statutory and constitutional law."). As this Court observed in granting class certification, "[t]he answer to th[e] question [of whether CARRP is lawful] will not change based on facts particular to each class member . . . ." See Dkt. 69 at 25. As Plaintiffs do not refute, their request would force the Government to conduct multi-agency, multi-level, page-by-page, and line-by-line, review and redaction of each and every A-file requested before any single file could be produced. Dkt. 226-1 at



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3-4. This process would surely take many months. And ultimately, the A-files will have to be so redacted before handed over to Plaintiffs that they would be devoid of any information of use in advancing their claims.

Not surprisingly, Plaintiffs make no effort to carry their co-equal burden of establishing that their request is proportionate to the needs of the case. *See In re Bard IVC Filters Prod. Liab. Litig.*, 317 F.R.D. 562, 564 (D. Ariz. 2016). Instead, Plaintiffs respond with vague and speculative assertions that putting the Government through the exercise of producing these files might help their cause. However, this action, as pled and prosecuted by Plaintiffs, is one that seeks to establish the illegality of the CARRP program at conception and, hence, by definition, its unlawfulness as to everyone. Indeed, even assuming Plaintiffs were to discover, in reviewing 100 heavily-redacted A-files, something they consider untoward in the handling of any individual class member's case – a proposition that is entirely speculative – that information would not help show the policy is unlawful as applied to everyone. Thus, given the disproportionate burden that producing any additional A-files places on Defendants, Plaintiffs' motion should be denied and Defendants cross-motion granted.

**II. "Why" Information Disclosure is Not Required By Court Order or Law**

Plaintiffs fail to demonstrate any need for additional A-files or for "why" information – assuming it exists – in the named Plaintiffs' A-files, because they wholly ignore the voluminous data and aggregate class-wide information produced to them relating to CARRP policy and practice. Instead, Plaintiffs argue that this material must be produced based on two fictions: that Defendants are under a court order to produce this material despite their privilege claims, and that the Government routinely produces such material in other settings and thus it cannot be deemed privileged. Neither argument is supportable and the Court should reject them.

<u>Defendants Are Not In Violation of a Prior Court Order</u>. Plaintiffs repeat their erroneous claim that Defendants are in violation of the Court's October 19, 2017 Order, Dkt. 98, to produce the "why" information. Contrary to Plaintiffs' assertion, Defendants' motion for a protective order is not "a belated attempt to file another motion to reconsider the Court's prior order." Dkt. 241 at 4. The issue was resolved in Defendants' favor when the Court denied production of A-file information



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in its May 4, 2018 Order, Dkt. 181 at 2, and again, on February 28, 2019, Dkt. 223 at 7-8, where the Court declined to compel production, reserving ruling on privilege claims for the present cross motions. Accordingly, Plaintiffs' assertion that the merits of Defendants' privilege claims over "why" information were ultimately resolved in Plaintiffs' favor is simply incorrect. In sum, Plaintiffs' insistence that the Court has ruled on the "why" information privileges, when it has not, cannot mask their inability to show a need for more randomized A-files of "why" information, or rebut the declarative support establishing the material's privileged nature.

Disclosure of "Why" Information is Not Required by Statute or Regulation. Rather than address the multiple agency declarations establishing the privileged nature of the material they seek, Plaintiffs argue that the Government is "routinely" required to disclose "why" information pursuant to statute and regulation. But Plaintiffs misread and misconstrue the law, which does not – as they claim – require the Government to "disclose information similar to what Plaintiffs seek here." Dkt. 241 at 8. The cited law provides only that an applicant receive notice of the basis for a decision denying an application. 8 C.F.R. 103.2(b)(16)(i)-(iv). Nothing requires disclosures concerning or during an adjudication's initial vetting phase. While decisions on applications require disclosure of evidence sufficient to satisfy the legal requirement for lawful final agency action, 5 U.S.C. § 706, the initial review is a pre-adjudicative, information-gathering phase not requiring such disclosures. Plaintiffs' demand for documents reflecting USCIS's determination to initiate certain vetting, as distinguished from documents providing the basis for a final adjudication, is entirely unsupported by legal authority.

Similarly, Plaintiffs' reliance on the requirement that the Government provide evidence to support a removal charge is unrelated to the investigations and deliberations preceding a removal. *See Kwong Hai Chew v. Colding*, 344 U.S. 590, 597–598 (1953). The Government is not similarly required to provide a notice that it is investigating the alien.

Plaintiffs also incorrectly assert that information CARRP-trained officers may use to make an articulable link determination "would be similarly or less consequential to USCIS" than information used and disclosed to support a final determination of eligibility. Dkt. 241 at 9. The articulable link determination merely establishes the existence of a relationship between the applicant and a national



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security ground for removal. The *extent* of that relationship and whether information should and can be ultimately relied upon in a decision, must be examined before the Government can reach a final determination on the application. But the source of the national security concern prompting the inquiry is still likely to implicate law enforcement sensitivities. For example, if an applicant were determined to be a national security concern based on a relative's status as a Known or Suspected Terrorist (KST), this information would be withheld as privileged and, far from inconsequential, its disclosure could cause significant harm to public safety or national security.

After reaching an adverse decision based on derogatory information of which the applicant is unaware, USCIS provides the individual with this derogatory information. 8 C.F.R. § 103.2(b)(16)(i). This disclosure appropriately occurred in the two examples Plaintiffs cite. Dkt. 241 at 9 (Hamdi's denial for failure to disclose donations to a terrorist organization); Dkt. 241 at 9-10 (Muhanna's denial based on membership and/or support of a terrorist organization). It also occurred in relation to Plaintiff Mehdi Ostadhassan. USCIS disclosed derogatory information in a Notice of Intent to Deny. Dkt. 91, at 3. This regulation is inapplicable to the other four Named Plaintiffs, whose applications were approved.

Disclosing information supporting the basis of a final adverse decision for an immigration benefit application is not the equivalent of Plaintiffs' demand for "why" information that may or may not ultimately affect USCIS' adjudication (but may be highly sensitive, privileged, or even classified). At the very least, disclosure at this point would be premature and could undermine the integrity of the adjudication. Dkt. 94-5 ¶ 15. For the Named Plaintiffs, if any derogatory information existed that was not relied upon in reaching a decision, it has been withheld where privileged or potentially classified. Such information could remain sensitive post-adjudication if, for instance, it relates to ongoing investigations of other individuals.

Finally, the equivalency Plaintiffs draw between the "why" information and the No Fly List disclosure requirements is similarly flawed. A determination that a national security concern exists represents a threshold finding that a benefit application warrants investigation, and thus triggers the CARRP process. By contrast, an individual afforded notice of "No Fly" status and the reasons for being placed on that list receives that information only after the person is placed on the list, has



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experienced travel difficulties, and files for administrative redress. The information is not provided at the time the agency is considering whether to add the person to the no fly list. *See Latif v. Lynch*, No. 3:10-CV-00750-BR, 2016 WL 1239925, at *4–5 (D. Or. Mar. 28, 2016).

**III. Sensitive National Security Information Is Not "Routinely" Disclosed**

Plaintiffs' core argument, the astonishing assertion that USCIS "routinely produces" privileged information in a variety of contexts, is groundless. Specifically, Plaintiffs rely upon disclosures made by the Government (1) through FOIA responses, or (2) pursuant to court order in distinct circumstances in unrelated litigation. Plaintiffs mischaracterize the disclosures made, and fail to provide the necessary context.

Plaintiffs' offer attorney Gairson's declaration (Dkt. 243), which the Court should reject as wholly unreliable for several reasons. First, the source of Gairson's statistical analysis and conclusions is a 600-case "random sampling" of FOIA responses for which he provides no explanation of his selection methodology, *id.*, ¶ 8, or a foundation to offer statistical conclusions and opinions. Additionally, Gairson concedes that he intentionally included all named plaintiffs and an additional case that is the subject of unrelated litigation in the "random sampling," demonstrating that his selection was not random at all. *Id.* ¶¶ 12; 15. Moreover, Gairson opines as to reasons a certain individual's "case was held for fraud or national security reasons," and subjected to "extreme vetting," but it is unclear to which processes he refers. Gairson Decl., ¶¶ 2, 4, 5. Finally, Gairson claims he found "41 example sets" of cases where "no information was redacted," but included exhibits for only 23 cases, with no explanation why he included some and excluded others. And because Gairson does not identify the redactions or omissions he deems problematic or explain why he believes that is so, his exhibits are without context and essentially meaningless.

With respect to previous FOIA disclosures Gairson discusses (Dkt. 243), Plaintiffs repeatedly conflate the Government's disclosure of unprivileged portions of law enforcement records with disclosure of privileged content from that record. Even beyond Gairson's numerous methodological flaws noted above, he simply does not demonstrate that the Government "routinely discloses" privileged information. Plaintiffs rely on Gairson for the proposition that "out of 600 FOIA responses, attorney received substantial FBI data in 201 cases and name check records in 475 cases."



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Dkt. 243, ¶¶ 8-10. The cited cases reveal only that the Government responded to some 600 FOIA requests with heavily redacted information, not that the Government released any privileged information for those requests. Moreover, certain FBI information, such as Name Check and NCIC responses that do not indicate any result, may be released. Eggleston Decl., at ¶ 20, (filed concurrently). Gairson does not claim that the 475 name check responses revealed name check results. Similarly, FBI RAP sheets with criminal background check results are also releasable to the subjects themselves under certain circumstances with some exceptions, including for certain information such as an FBI agent's name, not exempt from release. *Id*. *See also* 28 U.S.C. § 534, 28 C.F.R. §§ 16.30 *et seq*. Despite Gairson's numerous and confusing allegations, he ultimately concedes that "[g]enerally in the FOIA responses with TECS, FBI, and fingerprint, or name check records, segregable information was redacted . . ." Dkt 243, ¶ 11. Thus, even Plaintiffs' "expert" concedes that in FOIA releases, the Government always endeavors to protect its privileged law enforcement information.

More important, in those instances where privileged information was improperly disclosed, disclosure was inadvertent and/or contrary to agency policy and practice. *Id*., ¶¶ 24, 30. The Government's mistaken "release of a document only waives these privileges for the document or information specifically released, and not for related materials." *See Smith v. Cromer*, 159 F.3d 875, 880 (4th Cir. 1998) ("disclosure of factual information does not effect a waiver of sovereign immunity as to other related matters"); *Commonwealth of Puerto Rico v. United States*, 490 F.3d 50, 66 (1st Cir. 2007). It certainly does not constitute a blanket waiver in entirely unrelated litigation.

To be sure, federal agencies' FOIA offices sometimes fail to make all necessary redactions when disclosing information. *See* Eggleston Decl., Dkt. 94-7, ¶ ¶ 14-26 (acknowledging that certain content in Wagafe's case summary, Dkt 27-1, Ex. E, ¶. 124-127, should have been redacted as exempt from release under FOIA). Plaintiffs, however, provide no larger context for the FOIA processing errors that may occur. They essentially argue that previous mistaken disclosures in other circumstances serve as a *de facto* waiver of Defendants' privilege assertions in this case as to other documents. The courts have rejected this incredible assertion. *See e.g. Smith*, 159 F.3d at 880. If anything, the reality that such mistakes occur only serves to underscore the risk attendant to the



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broad release of sensitive law enforcement information to Plaintiffs sought by their motion.

Plaintiffs heavily rely upon disclosures made in the *Hamdi* litigation, *Hamdi v. U.S. Citizenship and Immigration Services*, EDCV 10-0894-VAP (DTBx) (C.D. Cal., Nov. 16, 2011), arguing that the Government routinely discloses A-file information in other settings that Defendants here assert is privileged. See Dkt. 241 at 9, 12, 14-16, and Dkt 245 (sealed Exhibits G and K to Ahmed Decl.). Their arguments fail for several reasons. First, USCIS denied Hamdi's naturalization application based on a national security ground and thus was required to disclose the derogatory information used as the basis for denying the application. Thus, the Government properly disclosed that Hamdi's application was denied because he failed to disclose donations to an organization financing terrorism. Dkt. 241 at 9. Second, the USCIS officer's isolated disclosure that Hamdi's application was subject to the CARRP policy was inadvertent and contrary to agency policy. Dkt. 94-5, ¶ 19 (Decl. of James W. McCament).

Finally, and most critically, the further disclosures by a USCIS officer in *Hamdi* were not made by USCIS voluntarily. Rather, they were only made pursuant to court order compelling discovery upon finding that the agency had not established that the information at issue was law-enforcement privileged. *Hamdi*, Dkt. 89 at 7-9 (compelling deposition testimony whether Mr. Hamdi was a national security case, "why he was a CARRP case"), Ex. A, hereto; see also *Hamdi*, Dkt. 78 at 8 (rejecting law enforcement privilege claim where the Defendants "did not properly invoke it"), Ex. B, hereto.

Likewise misplaced is Plaintiffs' reliance upon a disclosure associated with *Muhanna v. U.S. Citizenship and Immigration Services*, No. 14-cv-05995 (C.D. Cal., July 31, 2014), where an applicant alleged he was denied naturalization based on USCIS's determination that he was a member of or associated with an organization that supported terrorism. *See*, Dkt. 241 at 9-10. Plaintiffs suggest that in *Muhanna*, USCIS voluntarily disclosed "why" information claimed to be privileged in the present litigation by producing "a detailed discussion of Muhanna's alleged ties" to the organization supporting terrorism. Dkt. 241 at 9-10, citing Ahmed Decl., Exh. F (submitted under seal). However, the record in that case indicates that USCIS provided Muhanna with



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derogatory information relied upon to reach the decision on his application, but released no privileged "why" information.

In the present litigation, by contrast, six detailed public declarations and three *ex parte/in camera* declarations firmly and indisputably establish that the class member A-files are replete with law-enforcement privileged (and sometimes classified) material. Dkt. 226-2 (Declarations of Tracy L. Renaud, Luis Mejia, Douglas Blair, Matthew C. Allen, Deborah A. Crum and Jay S. Tabb, Jr.); *ex parte/ in camera* Declarations of Matthew D. Emrich, Tabb, and Allen, referenced in Dkt. 227 (Defendants' Motion for Leave to Submit Documents *Ex Parte* and *In Camera*). Plaintiffs make no serious effort to refute these Declarations, barely mentioning only one of them – in a footnote. Dkt. 241 at 11, n. 2.

**IV. Plaintiffs Have Not Overcome the Government's Assertions of Privilege**

When Plaintiffs finally shift from their "routine disclosure" argument to addressing the merits of Defendants' privilege assertions, their arguments fall short. First, Plaintiffs attempt to discredit Defendants' argument that disclosing "why" information could result in individuals inferring that they are or were subjects of law enforcement scrutiny, by contending that all the named Plaintiffs have already inferred as much. But Plaintiffs fail to recognize that the reasons why any individual is placed under CARRP review often implicates activities of many more people. Indeed, CARRP review often involves examining the nature and extent of ties the applicant may have to a bad actor or group of bad actors. Thus, it is the inferences available to individuals in a class member's network, rather than simply the particular class member himself, that risks compromising the integrity of investigations and accordingly is privileged. *See* Renaud Decl., Dkt. 226-2 at ¶¶ 43, 47.

Furthermore, the negative ramifications of such revelations extend not only to investigations of those subjects, but also future investigations. As ICE's Assistant Director of Homeland Security Investigations explains, "individuals who learn that they are being investigated can often deduce the methods the Government is using to monitor them, or the sources the Government used to uncover their terrorist or criminal activity." Dkt. 226-2, Allen Decl., ¶ 18.



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More brazenly, in response to Defendants' concern that investigative records such as those contained in TECS tend to reveal law enforcement's confidential standards for launching an investigation, Plaintiffs contend such exposure by producing "why" information is "precisely the point." Dkt. 241 at 13. But revealing the types of conduct which may trigger an investigation could allow bad actors to alter their behavior to evade detection, while also implicating "the methods and processes used" to gather that evidence. *See* Allen Decl., ¶ 18; *see also In re The City of New York*, 607 F.3d 923, 941 n.18 (2d Cir. 2010).

Thus, in declarations and briefing, Defendants have detailed substantial justifications for their privilege assertions. Dkt 226-1 at 3-4, 6-7, 11-22; Dkt. 226-2 (Renaud Mejia, Blair, Crum, Allen, and Tabb Declarations); Dkt. 227 (Defendants' Motion for Leave to Submit Documents *Ex Parte*, *In Camera*, including classified Tabb and Emrich Declarations, and Allen Decl.); Dkt. 126-1 (Emrich Decl.). Defendants must withhold the implicated law enforcement records and related communications to "prevent disclosure of information that might impede important Government functions, such as conducting criminal investigations, securing the borders, or protecting the public from international threats." *In re U.S. Dep't of Homeland Security*, 459 F.3d 565, 571 (5th Cir. 2006). Plaintiffs' feeble efforts have failed to rebut the Government's privilege and proportionality arguments.[1]

**V. Plaintiffs Do Not Need "Why" Information to Determine How CARRP Operates**

Plaintiffs assert that their need for "why" information outweighs any burden because they "intend to use this evidence to demonstrate patterns across cases in how CARRP is being applied in practice." ECF 241 at 6. However, Plaintiffs' "need" obviously must be assessed in relation to whether the information already produced reveals such "patterns." Indeed, Plaintiffs fail to acknowledge that Defendants have provided extensive evidence of CARRP's operation in practice. For example, Plaintiffs ignore the extensive data Defendants provided on the demographics of class members (country of birth, nationality, religion), and on CARRP processing times and application pendency in relation to various demographic factors, KST status, *etc.*, for each of five fiscal years.

1 As noted in prior submissions, Defendants and other government agencies reserve the right to assert the state secrets privilege over information otherwise discoverable in this case. Consistent with judicial guidance, Defendants will invoke that privilege only as a last resort, as it "is not to be lightly invoked." *United States v. Reynolds*, 345 U.S. 1, 7 (1953).



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Dkt. 226-1 at 7-8. Cumulatively, this data provides far more information on CARRP's operations in practice than Plaintiffs could possibly derive from isolated A-files. See Dkt. 226-2 (Renaud Decl., ¶ 17).

Indeed, two documents which Plaintiffs submitted to the Court contain guidance for officers to identify a national security concern, including hypothetical fact patterns and instructions on whether the hypothetical applicant would be identified as a national security concern and thereby subjected to the CARRP process. *See* Dkt. 246, 247. This information, which lays out the metes and bounds of USCIS' policy and guidance, is relevant to the lawfulness of CARRP as a whole. Conversely, the reasons why any specific individual was identified as a national security concern "will not change" the answer to the question of whether CARRP is lawful as a whole. There are other avenues of relief for specific individuals who believe that their particular applications have been unlawfully delayed or denied.

Moreover, the reason why 100 class members and/or the five named Plaintiffs' claims were referred to CARRP (assuming they were) cannot possibly provide any probative evidence of how CARRP is applied to the approximately 5,866 class members as of December, 2018 (the date of the most current class list). The Ninth Circuit has recognized that "statistical evidence derived from an extremely small universe . . . has little predictive value and must be disregarded." *Aragon v. Republic Silver State Disposal, Inc.*, 292 F.3d 654, 663 (9th Cir. 2002), *quoting Sengupta v. Morrison-Knutsen Co.*, 804 F.2d 1072, 1076 (9th Cir. 1986).

## VI. An AEO Protective Order Will Not Cure The Government's Privilege Concerns

Plaintiffs argue that an "attorney eyes only" ("AEO") protective order can address "any remaining law enforcement concerns," associated with the release of the "why" information, Dkt. 241 at 16, but Plaintiffs fail to address, or even acknowledge, the leading precedent, *In re City of New York*, 607 F.3d 923, 938 (2d Cir. 2010), holding that using an AEO protective order in the law enforcement context is a "deeply flawed procedure." *Id.* at 935, n. 12. Plaintiffs offer no reason why it would not be equally flawed here. Indeed, Plaintiffs' proposed AEO Protective Order provision could ultimately extend to a wide range of "why" information sought in discovery by Plaintiffs, and hence the inherent limitations of such an order would apply here far beyond the



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documents immediately at issue. As the Second Circuit explained, an AEO protective order in the law enforcement context is a flawed procedure because, unlike in ordinary civil litigation, the occurrence of an unauthorized disclosure is likely to be unapparent to law enforcement, its source far more difficult to identify, and its consequences "severe" and "far more difficult to remedy." *In re City of New York*, 607 F.3d at 936.

**VII. Plaintiffs Have Not Established a Justification for Publication of Class Notice**

Finally, Plaintiffs' minimal effort to support their Class Notice proposal all but concedes that it is unworkable and fraught with risk to the thousands of national security investigations underlying the Class List. Defendants have already identified several ways Plaintiffs' public notice proposal could result in inadvertent releases of protective order information. Dkt. 226-1 at 9 – 10. Plaintiffs' only response is to offer assurance their counsel "have diligently complied with the Court's protective order." Dkt. 241 at 17. Defendants do not question counsel's diligence. As *In re City of New York* explains, risk cannot be eliminated and mistakes are inevitable. Given the enormous number of documents subject to the protective order as well as the equally large scope of material in the public domain and the importance of the information, the potential for inadvertent and unintentional disclosure of the existence of CARRP processing as to certain individuals is magnified. The integrity of those vetting processes should not depend upon such an untested mechanism.

Similarly, Plaintiffs' assertion that "the content of the notice . . . would not provide any class member with knowledge or suspicion that they are subject to an investigation," Dkt. 241 at 17, also misses the point. The text of the notice itself is not the concern; rather the risk is of accidental disclosure during direct communications with hundreds or potentially thousands of class members. Finally, Plaintiffs have no response to an important case management issue. If their proposed class notice has the effect they suggest, Plaintiffs' counsel will have to repeatedly seek to extend or reopen discovery as newly-identified class members come forward in response to the notice, and request more A-files and other documents from Defendants. See Dkt. 226-1 at 11–12. As with Plaintiffs' request for 100 A-files, the burden on Defendants will be disproportionately magnified and discovery indefinitely prolonged for no apparent purpose.



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**CONCLUSION**

Wherefore, the Court should deny Plaintiffs' Motion to Compel and grant the Defendants' Motion for Protective Order.

Dated: April 4, 2019

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 4, 2019, 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.

/s/ Brendan T. Moore
BRENDAN T. MOORE



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