THE HONORABLE RICHARD A JONES

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

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

Plaintiffs,

v.

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

Defendants.

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

DEFENDANTS' REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR LEAVE TO SUBMIT DOCUMENT *EX PARTE, IN CAMERA*

I. INTRODUCTION

On April 11, 2019, Plaintiffs filed a Motion to Compel, asking the Court to order Defendants to produce unredacted versions of 25 documents that Defendants had produced in redacted form subject to claims of law enforcement and deliberative process privilege. Dkt. 260. In support of Defendants' opposition (Dkt. 266), Defendants asked the Court to consider *in camera and ex parte* the declaration of Timothy P. Groh ("Groh"), Deputy Director for Operations of the Terrorist Screening Center ("TSC") of the Federal Bureau of Investigation ("FBI"), because it contained law enforcement sensitive information regarding the Terrorist Screening Database ("TSDB") and watchlisting processes used by the FBI. Dkt. 267. Plaintiffs opposed Defendants' motion, arguing that the FBI failed to properly assert the law enforcement privilege in the first instance, that *ex parte*, *in camera* review of the declaration is unfair to Plaintiffs, and that Defendants fail to meet the high burden for *ex parte*, *in camera* review. Dkt. 270. Plaintiffs' contentions lack merit, and the Court should grant Defendants' motion and consider the Groh declaration in determining whether the law enforcement privilege protects against disclosure of the information Plaintiffs seek.

II. ARGUMENT

A. Defendants have not waived any privileges.

In this litigation, Plaintiffs have repeatedly asserted that Defendants have waived privilege by failing to provide supporting affidavits before responding to a motion to compel. *See*, *e.g.*, Dkt. 180, 5-6, Dkt. 269 at 7. Similarly here, Plaintiffs assert that the FBI waived any law enforcement privilege claims over the 25 documents at issue by "failing to raise the law enforcement privilege at an earlier juncture." *See* Dkt. 270 at 2-3. Plaintiffs' argument lacks merit. Complying with Fed. R. Civ. P. 34(b)(2), Defendants timely objected to Plaintiffs' discovery requests seeking privileged information. Furthermore, Defendants provided privilege logs asserting privileges over specific documents in compliance with Fed. R. Civ. P. 26(b)(5). *See* Dkt. 266-1, Ex. B, C. Finally, for documents produced following the Court's April 11, 2018 orders, concurrent with delivery of the privilege logs, Defendants provided Plaintiffs with declarations from a high-level agency official who formally asserted privilege over certain categories of information contained in the document production, including the information contained in the 25 documents at issue here. *See* Dkt. 266-1,

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Ex. A-1 to A-3. A declaration from a high-level agency official formally asserting privilege for documents at issue produced prior to April 11, 2018 was filed with the Court on February 20, 2018. Dkt. 119-2. That declaration was provided in response to a motion to compel and the Court "accept[ed] . . . the claim to privilege, generally." Dkt. 148 at 5. Thus, Defendants did not waive any privileges. To the contrary, Defendants went to great lengths to protect their privilege claims while complying with their obligations under the Federal Rules.

In opposition to Plaintiffs' motion to compel, the Government provided four declarations in addition to the affidavits formally claiming the privileges at issue here which were previously submitted with the privilege logs. The issue thus is not about whether the Government properly asserted privileges or may have waived any privileges. Rather, it is about what the Court may consider in deciding the validity of those privilege claims in the context of a motion to compel. Plaintiffs advance the novel and wholly unsupported position that the Court's assessment should be artificially constrained by the privilege log and anything submitted along with it. To the contrary, Courts have generally placed no limits on information they may consider in ruling on a motion to compel. *See, e.g., Al-Kidd v. Gonzales*, No. CV 05-093-EJL-MHW, 2007 WL 4391029, *1, *7 (D. Idaho Dec. 10, 2007) (reviewing declarations filed in response to a motion to compel in order to ascertain whether assertions of privilege applied). Indeed, although in this case Defendants invoked the privilege upon submission of the privilege logs, it is customary to formally claim such privileges for the first time in response to a motion to compel. *See, e.g.*, *Fed. Housing Fin. Agency v. JPMorgan Chase & Co.*, 978 F. Supp. 2d 267, 279 (S.D.N.Y. 2013) (finding that party's contention that a certification must be included with a privilege log "is incongruent with the real-world practicalities of agency governance"); *In re Sealed Case*, 121 F.3d 729, 741 (D.C. Cir. 1997) (holding White House had no obligation to formally invoke privilege in advance of motion to compel; it was sufficient to state in response to subpoena a "belie[f] the withheld documents were privileged"); *Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615 (D. Nev. 2013) (indicating that it is not necessary for a defendant to produce an affidavit supporting the privilege for every document in advance of a formal challenge to its assertion for specific documents); *SEC v. Downe*, No. 92 Civ. 4092, 1994 WL 23141, at *5 (S.D.N.Y. Jan. 27, 1994) (holding government not required to provide

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affidavit in support of investigative files privilege "prior to formal motion practice"); *see also Maria Del Socorro Quintero Perez v. United States*, No. 13- cv-1417, 2016 WL 362508, *3 (S.D. Cal. Jan. 29, 2016) ("Defendants[']' failure to provide Plaintiffs with a declaration in support of the law enforcement privilege at the same time they provided the privilege log did not result in an automatic waiver of the privilege."). Thus, it was entirely proper for Defendants to submit additional affidavits in response to Plaintiffs' Motion to Compel in order to support previously-asserted privileges. *See, e.g.*, *United States v. Reynolds*, 345 U.S. 1, 10-11 (1953) (accepting formal claim filed after order compelling production was issued because, "when the formal claim of privilege was filed by the Secretary of the Air Force, . . . there was certainly a sufficient showing of privilege to cut off further demand for the document on the showing of necessity for its compulsion that had then been made"); *Tri-State Hosp. Supply Corp. v. United States*, 226 F.R.D. 118, 134 n.13 (D.D.C. 2005) ("[T]he government had no obligation to formally invoke the privilege in advance of the motion to compel."). Indeed, Plaintiffs' restrictive interpretation of what the Court may consider in deciding a motion to compel would greatly increase the volume of material necessary for a formal assertion of privileges at the outset of discovery, notwithstanding the fact that those privileges might not even be challenged in court, making routine assertion of privilege tantamount to full-blown litigation. Moreover, under Plaintiffs' construction, even as here, where privilege claims have been asserted and supporting affidavits provided upon delivery of the privilege logs (or a motion to compel for documents produced prior to April 11, 2018), the additional input of national security officials would be unreasonably (and without any grounding in the Federal Rules and applicable law) excluded from being heard by the Court at the very time when that input is most relevant and essential.

The Government has abided by this Court's order to provide declarations from Defendants formally asserting law enforcement and deliberative process privileges at the time privilege logs are provided to Plaintiffs. Thus, waiver of those privileges is not the issue. In any case, Plaintiffs' waiver authorities are inapposite. Plaintiffs' reliance on *United States v. $43,660.00 in United States Currency*, No. 1:15CV208, 2016 WL 1629284 (M.D.N.C. Apr. 22, 2016) (Dkt. 270 at 2), is misplaced since that case involved a party's failure to respond to production requests, a motion to compel, and a court order directing a party to respond to the requests or face sanctions. Likewise,

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Applied Sys. v. N. Ins. Co., No. 97 C 1565, 1997 WL 639235 (N.D. Ill. Oct. 3, 1997) (Dkt. 270 at 2), bears no resemblance to the circumstances in this case since the defendant in *Applied Sys.* produced nothing in the months following plaintiff's discovery requests, and asserted no objections based on privilege or the work product doctrine until after a hearing was conducted on plaintiff's motion to compel. Neither case suggests that the party opposing a discovery request is required to submit declarations supporting privilege claims when responding to a discovery request and well before a motion to compel discovery is filed.

In sum, Defendants have not waived any privileges over the documents. To the contrary, Defendants have gone to great lengths to protect any privilege claims while complying with their obligations under the Federal Rules and, with the submission of the additional affidavits, have marshalled relevant and essential additional information bearing on the Court's determination of those claims.

B. The Court should review the FBI's declaration *in camera* and *ex parte* because it contains law enforcement sensitive information, and it provides the Court with the necessary context to understand the Government's privilege claims.

The Ninth Circuit has specifically approved of the use of *ex parte* procedures to substantiate claims of privilege. *Kasza v. Browner*, 133 F.3d 1159, 1169 (9th Cir. 1998) ("Elaborating the basis for the claim of privilege through *in camera* submissions is unexceptionable."); *see also In re City of New York*, 607 F.3d 923, 948–49 (2d Cir. 2010) (discussing propriety of *in camera*, *ex parte* presentation of materials for privilege assessment); *Wabun-Inini v. Sessions*, 900 F.2d 1234 (8th Cir. 1990) (affirming *ex parte, in camera* review of submissions to support law enforcement privilege); *Alexander v. FBI*, 186 F.R.D. 154, 169 (D.D.C. 1999) (explaining that *in camera, ex parte* hearing was required to determine whether law enforcement investigatory privilege applied). This is not surprising, because the factual basis for a privilege may itself be privileged. In the absence of *ex parte* review, there would be no meaningful way for a court to evaluate a privilege assertion or a challenge to a privilege assertion without violating the very privilege at issue.

Plaintiffs' assertion that Defendants have not met their burden to establish that *ex parte*, *in camera* review is appropriate is without merit. *See* Dkt. 270 at 3-7. Plaintiffs' reliance on *United*

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States v. Libby, 429 F. Supp. 2d 18 (D.D.C. 2006), *opinion amended on reconsideration*, 429 F. Supp. 2d 46 (D.D.C. 2006), is unavailing. The Court in *Libby* expressly rejected the view that Plaintiffs implicitly urge here—that the Government is required to establish exceptional circumstances before proceeding *ex parte*. *Libby*, 429 F. Supp. at 24-25.

Plaintiffs further argue that Defendants should be required to use "mitigation measures" rather than resort to "blanket withholdings based on generalized national security claims," *see* Dkt. 270 at 4, but Plaintiffs ignore that Defendants have in fact employed mitigation measures by providing a public declaration by Timothy P. Groh that includes most of the information contained within his *ex parte, in camera* declaration, as well as several other declarations filed on the public docket. *See* Dkt. 266-1. Defendants also did not rest upon generic and nonspecific claims of national security, but explained that the *ex parte* declaration "contains sensitive nonpublic explanations of the harms and risks" to the national interest "that can be expected to result if the information that Defendants have withheld regarding the [TSBD] and watchlisting processes is disclosed outside of the U.S. government." Dkt. 267 at 1-2. Defendants have further explained that "[i]n the absence of *ex parte* review there would be no meaningful way for a court to evaluate a privilege assertion without violating the very privilege at issue." Dkt. 267 at 3. Thus, Plaintiffs are incorrect in stating that they have "no ability to challenge defendants' assertions [of privilege]." Dkt. 270 at 3.

Plaintiffs' reliance on numerous other cases in opposing Defendants' motion is misplaced. *See* Dkt. 270 at 4-7. They cite *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986), for a proposition that the case did not address or embrace—specifically that an *ex parte* declaration cannot be submitted or considered to assess a privilege claim. *See* Dkt. 270 at 4-5. The *Abourezk* Court's expressed concern was with "reliance upon *ex parte* evidence to decide the merits of a dispute." 785 F.2d at 1061. Here, Defendants do not ask this Court to rely on *ex parte* evidence to resolve the merits of the case. Instead, Defendants only ask the Court to consider the *ex parte* declaration to resolve a privilege claim. Plaintiffs also cite *Arieff v. U.S. Dep't of Navy*, 712 F.2d 1462, 1469 (D.C. Cir. 1983), *see* Dkt. 270 at 5, but *Arieff* instead supports Defendants, as that court squarely held that when an affidavit contains information exempt from disclosure, the district court can receive the

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affidavit *ex parte* and *in camera* where necessary. "That necessity exists when (1) the validity of the government's assertion of exemption cannot be evaluated without information beyond that contained in the public affidavits and the records themselves, and (2) public disclosure of that information would compromise the secrecy asserted." *Id.* at 1471. This is the precise situation that applies here.

Plaintiffs' reliance upon *United States v. Abuhamra*, 389 F.3d 309 (2d Cir. 2004) is also unavailing. *See* Dkt. 270 at 5-6. *Abuhamra* involved a criminal defendant's due process challenges to *ex parte* submissions during a bail hearing, where the *ex parte* submission directly impacted the defendant's liberty interest. *See Abuhamra*, 389 F.3d at 317-32. Here, Plaintiffs have no similar basis for a due process challenge because the *ex parte* declaration merely addresses the privileged nature of documents that Plaintiffs seek in civil discovery. Furthermore, Plaintiffs rely on *Greyshock v. U.S. Coast Guard*, 107 F.3d 16, 1997 WL 51514 (9th Cir. 1997), which instead supports Defendants. In *Greyshock*, the Ninth Circuit squarely rejected challenges to the Government's submission of an *ex parte, in camera* declaration on which the district court relied in applying the national security exemption in the Freedom of Information Act. *See Greyshock*, 1997 WL at *3. The Ninth Circuit affirmed that "a court may examine an agency declaration *in camera* and *ex parte* when release of the declaration would disclose the very information that the agency seeks to protect. *Id*. (citing *Pollard v. F.B.I.*, 705 F.3d 1151, 1153-54 (9th Cir. 1983)).

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III. CONCLUSION

For the foregoing reasons, the Court should grant Defendants' motion for leave to submit the declaration *in camera*, *ex parte*.

Dated: May 17, 2019

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 17, 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.

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