

The Honorable Richard A. Jones

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**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’ REPLY BRIEF AND  
SUPPORTING DOCUMENTS**

**INTRODUCTION**

On June 11, 2021, Plaintiffs moved to seal their reply brief in support of their motion for summary judgment (“Reply”), along with certain supporting documents, pursuant to Local Rule 5(g). Dkt. No. 544. Plaintiffs made their motion in accordance with Defendants’ request that any information designated under a protective order as Confidential (Dkt. No. 86) or Attorneys’ Eyes Only (Dkt. No. 183) be filed under seal. *See* Dkt. No. 544. Plaintiffs nevertheless assert that there are no compelling reasons to seal their Reply or any supporting documents. *See* Dkt. No. 544. Defendants respectfully disagree. The protective order designations in this case are intended to prevent specific harms to national security that could arise if the protected

1 information were released publicly. As detailed below, compelling reasons do exist for sealing  
2 Plaintiffs' Reply and supporting documents given the sensitive national security information at  
3 issue, and the Court should therefore grant Plaintiffs' motion to seal.

#### 4 LEGAL STANDARD

5 The strong presumption of public access to court records ordinarily requires a party  
6 seeking to seal information and documents to provide compelling reasons in support of their  
7 request to seal. *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006).  
8 "In general, 'compelling reasons' sufficient to outweigh the public's interest in disclosure and  
9 justify sealing court records exist when such 'court files might have become a vehicle for  
10 improper purposes.'" *Id.* at 1179. Potential harm to national security constitutes a compelling  
11 reason to shield information from public disclosure. *See Ground Zero Center for Non-Violent*  
12 *Action v. United States Department of Navy*, 860 F.3d 1244, 1262 (9th Cir. 2017) ("National  
13 security concerns can, of course, provide a compelling reason for shrouding in secrecy even  
14 documents once in the public domain."); *United States v. Ressam*, 221 F.Supp.2d 1252, 1263  
15 (W.D. Wash. 2002) (recognizing "national security" as a "compelling interest . . . unusual in its  
16 ongoing nature" and sufficient to justify continued nondisclosure); *see also United States ex rel.*  
17 *Kelly v. Serco, Inc.*, No. 11CV2975 WQH-RBB, 2014 WL 12675246, at \*4 (S.D. Cal. Dec. 22,  
18 2014) (granting a motion to seal various documents designated "For Official Use Only" by the  
19 United States Government because "national security interests are a compelling reason for filing  
20 documents under seal").

1 **ARGUMENT**

2 **I. Preventing Harm to National Security is a Compelling Reason to Seal Plaintiffs’**  
 3 **Reply Brief and Supporting Documents.**

4 Plaintiffs’ Reply brief and the supporting documents filed under seal contain information  
 5 that could compromise national security if disclosed publicly. The Reply cites details from A-  
 6 files regarding whether and why particular individuals’ benefit applications may have raised  
 7 national security concerns and were subject to CARRP. *See* Pls’ Reply at 2-3, 38. It also  
 8 includes references to protective-order-designated portions of the Rule 30(b)(6) deposition of  
 9 Kevin Quinn and of CARRP training materials that discuss how USCIS treats third party law  
 10 enforcement agency information relating to national security concerns. *See* Pls’ Reply at 16.  
 11 Sealed Exhibits 105 and 106 to the Second Declaration of Jennie Pasquarella (Dkt. No. 545,  
 12 548), as well as Sealed Exhibits A-D to the Declaration of Heath Hyatt (Dkt. Nos. 546, 549),  
 13 consist of CARRP training materials – all marked For Official Use Only – that provide direct  
 14 insight into how USCIS identifies and vets national security concerns. *See United States ex rel.*  
 15 *Kelly v. Serco, Inc.*, No. 11CV2975 WQH-RBB, 2014 WL 12675246, at \*4. For example, the  
 16 documents include information regarding USCIS’ consultation and communication with third  
 17 party law enforcement agencies (*see* Pls’ Ex. 105 at CAR001241-48) and fact patterns detailing  
 18 how USCIS handles specific types of national security concerns (*see* Pls’ Ex. 106 at DEF-  
 19 0093119-21). Sealed Exhibits 108 and 109 to the Second Declaration of Jennie Pasquarella are  
 20 expert witness reports that rely in part on CARRP policy and training materials – also marked  
 21 For Official Use Only – in rendering their assessments. *See* Pls’ Ex. 108 at 15, 19, 25, 26, 31,  
 22 32, 37, 44, 45 ,47; Pls’ Ex. 109 at 9-11.

23 Defendants have designated all of the aforementioned information Confidential or  
 Attorneys’ Eyes Only to protect national security and law enforcement interests. *See* Dkt. No.

1 86, 183, 192. If disclosed, such information could be used for improper purposes, which  
2 establishes a compelling reason to seal the information. *See Kamakana*, 447 F.3d at 1179. In  
3 particular, the public disclosure of Attorneys' Eyes Only information about whether and why a  
4 particular individual's immigration benefit application was processed in CARRP could risk  
5 signaling to the specific individuals involved, as well as the general public, whom the  
6 government deems a national security concern, and why. This could compromise national  
7 security by signaling to investigative targets that they may be under investigation, and  
8 encouraging behavior changes and information concealment by individuals intending to evade  
9 detection. Additionally, revealing publicly USCIS' process for handling specific types of  
10 national security concerns could influence an immigration benefit applicant to change or conceal  
11 certain details about his behavior in an effort to avoid USCIS' detection of a national security  
12 concern in his case. Furthermore, publicly disclosing details concerning USCIS' consultation  
13 and communication with third party law enforcement agencies about CARRP cases risks  
14 damaging important information-sharing relationships essential to protecting national security.  
15 Based on the clear risks to national security that could result from the public disclosure of certain  
16 information in Plaintiffs' Reply brief and supporting documents, Defendants have established a  
17 compelling reason for them to be sealed. *See Ground Zero*, 860 F.3d at 1262 (9th Cir. 2017);  
18 *Ressam*, 221 F.Supp.2d at 1263.

19 To the extent that Plaintiffs have requested to seal information in or supporting their  
20 Reply that is not designated as Confidential or Attorneys' Eyes Only, Defendants have no  
21 objection to such information being filed publicly in a version fully redacting protected  
22 information. *See, e.g.*, Exhibit 110 to the Second Declaration of Jennie Pasquarella (minimally  
23 redacted version already filed publicly at Dkt. No. 545); Exhibit 104 (deposition excerpt

1 containing only two pages with protective-order-designated information, neither cited in  
2 Plaintiffs' Reply). Defendants also have no objection to the Declaration of Liga Chia and its  
3 supporting Exhibit A (Dkt. No. 550) being publicly filed in its entirety.

4 The Court should reject Plaintiffs' argument that portions of the exhibits offered in  
5 support of their Reply brief should not be covered by any protective order designation. All  
6 designated documents attached to Plaintiffs' Reply bore their designations for many months, if  
7 not years. Yet, Plaintiffs never sought to overturn any of these designations. *See generally* Dkt.  
8 No. 544. Indeed, this Court has already agreed that the categories of information in these  
9 documents that Defendants have designated under protective orders are appropriately  
10 confidential or subject to Attorneys' Eyes Only. *See* Dkt. No. 86, 2(k)-(m), 183. Given the  
11 compelling interest demonstrated by Defendants in sealing the information and documents  
12 discussed above, and the absence of any substantive argument by Plaintiffs to the contrary, the  
13 Court should reject Plaintiffs' attempt to undermine the government's protective order  
14 designations at this late stage.

15 **II. The Court has Recognized that the Interest Underlying the Protective Order**  
16 **Designations in this Case is to Protect National Security, and it has Sealed**  
**Documents on this Basis.**

17 The Court has entered various orders in this case directing that the types of information  
18 and documents discussed above be designated as Confidential or Attorneys' Eyes Only and filed  
19 under seal. *See, e.g.*, Dkt. No. 86, Dkt. No. 183 at 2; Dkt. No. 320 at 7-8. Plaintiffs' argument  
20 that the existence of a protective order is not a compelling reason for filing documents under seal  
21 fails to recognize two important distinctions in this case. First, Plaintiffs fail to address the fact  
22 that the Court has allowed various categories of information and documents to be protected  
23 under an Attorneys' Eyes Only designation so as to afford the documents a greater degree of

1 protection. *See* Dkt. No. 183 at 2-3 (“Plaintiffs’ attorneys of record shall maintain [Attorneys’  
2 Eyes Only] information in a secure manner, i.e. in a locked filing cabinet (for any paper copy) or  
3 in a password-protected electronic file to which only authorized persons have access, and shall  
4 not transmit that information over any electronic mail or cloud-based sharing unless the method  
5 of transmission employs point-to-point encryption or other similar encrypted transmission.”);  
6 Dkt. No. 274 at 6 (“Plaintiffs’ counsel may not disclose [the Named Plaintiffs’ A-Files,  
7 designated Attorneys Eyes’ Only], or the newly unredacted information contained therein (if  
8 applicable) to any other individual. The Court expects strict compliance with this directive, and  
9 *will impose severe sanctions if the parties do not follow it.*”) (emphasis added). Given the  
10 Court’s recognition that information and documents designated Attorneys’ Eyes Only must be  
11 afforded the utmost protection from public disclosure, such a designation, in and of itself,  
12 constitutes a compelling reason to seal.

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

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

14 **III. That Plaintiffs May Have Obtained, Through Other Means, Information**  
15 **Designated as Confidential and Attorneys' Eyes Only in this Case Does Not**  
16 **Undermine the Compelling Reason to Seal the Information Here.**

17 Plaintiffs argue that publicly available documents should not be sealed. *See* Pls' Mot. to  
18 Seal at 4-5. Without identifying any particular documents, Plaintiffs contend that much of the  
19 information Defendants have designated as Confidential has been released through FOIA and  
20 therefore should not be sealed. *Id.* As Defendants have argued before, however, documents can  
21 be (and have been in this case) inadvertently and improperly disclosed through FOIA. *See, e.g.,*  
22 Dkt. No. 384, Braga Decl., at Exhibit N. The government's inadvertent disclosure of  
23 information in one instance, separate and apart from this litigation, should not dictate  
Defendants' ability to protect that information from public disclosure going forward, particularly

1 when the interest of national security is at stake. *See Ground Zero*, 860 F.3d at 1262; *Al-*  
2 *Haramain Islamic Found, Inc. v. Bush*, 507 F.3d 1190, 1193 (9th Cir. 2007) (permitting the  
3 government to seal a document despite its prior dissemination to the public).

4 **IV. Compelling Reasons Exist to Seal Information that has not been Withheld as**  
5 **Privileged in this Case**

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



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**CONCLUSION**

For the foregoing reasons, the Court should grant the motion to seal Plaintiffs' Reply brief and Supporting Documents.

Dated: June 28, 2021

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 28, 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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