UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

GULET MOHAMED,	)	
Plaintiff,	)	
v.	)	Case No. 1:11-CV-0050
ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States, *et al*.,	)	
Defendants.	)	

DEFENDANTS' RESPONSE TO COURT ORDER

In accordance with the Court's September 15, 2014 Order, ECF No. 139 ("Order"), in further support of the Government's Opposition to Plaintiff's Motion to Compel, ECF No. 102, and related Motion to Dismiss, ECF No. 104-105, Defendants are lodging with the Department of Justice's Classified Information Security Officer the requested set of documents—28 in total—as to which the Government has asserted the state secrets privilege and which are not specific to any individual, Order at 5,[1] as well as an additional declaration in support of the applicable privileges. Although the Court did not specifically request a public submission as well, in an effort to provide as much information as practicable on the public record, Defendants also submit this additional memorandum to explain publicly, to the extent possible, the applicability of privileges to those documents.

[1] Specifically, the Government has lodged "all documents in [their] privilege log that Plaintiff has requested and Defendants have refused to produce on the basis of an assertion of the state secrets privilege except those documents included in their response to Document Request 11, which relates to any documents specific to the plaintiff, and those portions of documents included in response to Document Requests 8 or 9 that identify or reveal information concerning specific individuals by name." Order at 5.

I. The 28 Documents Ordered to be Produced *Ex Parte, In Camera* to the Court Are Properly Protected by the State Secrets Privilege.

A. Each of the 28 Documents Falls within One or More Categories of Information over Which the Attorney General Has Asserted the State Secrets Privilege.

Defendants identified twenty-eight documents responsive to the Court's September 15 order for an *in camera, ex parte* production.[2] In addition to the state secrets privilege, each of these documents is also subject to the Government's assertion of the law enforcement privilege, and a subset of these documents contain Sensitive Security Information" ("SSI") and are therefore subject to the applicable statutory and regulatory restrictions regarding the disclosure of that type of information. As described in the attached Declaration of Michael Steinbach, Assistant Director of the Counterterrorism Division of the Federal Bureau of Investigation ("FBI"), these documents include the Watchlisting Guidance, as well as other documents that are derived in substantial part from the Watchlisting Guidance; these include policies and procedures related to watchlisting or internal training about the Guidance or the related policies and procedures. Steinbach Decl. ¶ 8, attached as Exhibit A. As such, these documents are subject to the Attorney General's assertion of the state secrets privilege. *See* Declaration of Eric H. Holder, Jr., ECF No. 104-1, ¶ 14 (describing the assertion of the state secrets privilege over the Watchlisting Guidance).[3] With regard to documents that are derived in substantial part from the Watchlisting Guidance, disclosure of this information would effectively reveal the contents of the Guidance, and therefore could reasonably be expected to cause the same significant harm to national security. *See* Steinbach Decl. ¶¶ 8, 16; *see generally id.* (submitted categories of

[2] Defendants' privilege log was submitted to the Court *ex parte* and *in camera*. Although the total number of documents on Defendants' privilege log is classified, the documents not specific to the Plaintiff (without confirming whether any such information about Plaintiff exists) can be discussed in general terms publicly.

[3] Defendants' original *ex parte* submission in support of the assertion of the state secrets privilege provides further explanation and detail on this point.

documents include the Watchlisting Guidance, Watchlisting Guidance Training and Policy Documents, Watchlisting Nomination Forms, Standard Operating Procedures of the Nominations and Data Integrity Unit, Standard Operating Procedures of the Terrorist Review and Examination Unit, Standard Operating Procedures of the Redress Unit, and a classified version of a GAO Report).

Many of these documents contain other information subject to the assertion of the state secrets privilege in this matter, such as information identifying the subjects or particulars of an investigation, substantive derogatory information, or other information revealing of intelligence sources and methods. *Id*. ¶ 8; Holder Decl. ¶¶ 8-13. Such information sometimes appears, for example, in training documents used to illustrate application of the watchlisting criteria to particular circumstances. Steinbach Decl. ¶ 16. As such, all twenty-eight of these documents are properly subject to the state secrets privilege and must not be produced in discovery or used in this litigation. *See generally* Defs' Opp. to Motion to Compel, at 4-14.[4]

B. The Government's Assertion of the State Secrets Privilege Is Proper.

As reflected in the Government's opposition to Plaintiff's Motion to Compel, and in its Motion to Dismiss, the assertion of the state secrets privilege in this case is proper, and the appropriate consequence of the assertion of the privilege is dismissal of Plaintiff's case. The

[4] There are other documents on the Defendants' privilege log over which the Attorney General has not asserted the state secrets privilege, but these documents are subject to the law enforcement privilege and/or subject to withholding as Sensitive Security Information. Defendants do not separately address these other documents in this filing in light of the scope of the Court's order, but Defendants maintain that those documents are properly withheld as privileged information, as demonstrated in their opposition to Plaintiff's motion to compel. *See generally* Defs' Opp. to Motion to Compel, at 17-34.

Court's September 15 Order contained some additional discussion of the state secrets privilege, *see* Order at 5 n.1,[5] with which Defendants respectfully disagree.

First, any suggestion that the state secrets privilege assertion in *Reynolds v. United States*, 345 U.S. 1 (1953) was shown to be improper after documents relevant to that assertion were later declassified, *see* Order at 5 n.1, is incorrect. In fact, over fifty years after the assertion in *Reynolds*, federal courts reaffirmed the validity of the *Reynolds* assertion. The Supreme Court found the matters at issue to be properly privileged in 1953. After documents at issue were later declassified, and the privilege assertion in that case was challenged as a fraud on the court, a district court and the Third Circuit Court of Appeals examined the declassified documents at issue. Both courts rejected the contention that the *Reynolds* materials were not properly privileged. *See Herring v. United States*, No. 03-cv-5500, 2004 WL 2040272, *6 (E.D. Pa. Sept. 10, 2004) ("Review of the accident investigation report indicates that though it offers no thorough exploration of the secret mission, it does describe the mission in question [. . . and] provides a detailed account of the technical requirements imposed by the Air Force to remedy engine and mechanical difficulties. . . . Details of flight mechanics, B-29 glitches, and technical remedies in the hands of the wrong party could surely compromise national security."), *affirmed*, 424 F.3d 384 (3d Cir. 2005). In *Herring*, the plaintiffs opined, approximately fifty years after-the-fact, that the information in the Air Force report appeared innocuous and thus was not

[5] The Court noted:

> The government's assertion of the state secrets privilege in certain cases has been less than reassuring. *See Reynolds v. United States*, 345 U.S. 1 (1953), in which it became apparent years later, after the claimed state secrets document was declassified, that it did not implicate state secrets; and *Ibrahim v. Dep't of Homeland Security*, 3:06-cv-545, in which the government sought dismissal of similar No Fly List claims based on alleged state secrets, only to concede at trial, after the motion to dismiss was denied, that the plaintiff in that case was mistakenly placed on the No Fly List. *See also Islamic Shura Council of S. Cal. V. F.B.I.*, 779 F. Supp. 2d 1114 (C.D. Cal. 2011), a Freedom of Information Act case in which the government justified in the name of national security falsely representing to the court that only a limited number of responsive documents had been located.

Order at 5 n.1.

properly privileged, but the court rejected this hindsight lay opinion as a basis for questioning the assertion of the state secrets privilege. *Id*. at *9 ("disclosure of this now seemingly innocuous report would reveal far more than the negligence Plaintiffs read; it may have been of great moment to sophisticated intelligence analysts and Soviet engineers alike"). In light of this holding—over fifty years after the *Reynolds* decision—the suggestion that the privilege assertion in *Reynolds* lacked a proper basis is mistaken.

Second, the Court's Order incorrectly describes both the Government's state secrets assertion and the outcome in *Ibrahim v. Dep't of Homeland Security*, 3:06-cv-545 (N.D. Cal.). The Court seems to imply that the Government asserted state secrets in an effort to avoid revealing that the plaintiff was not on the No Fly List, *see* Order at 5 n.1, but that is not correct. In fact, the Government in *Ibrahim* disclosed in discovery that the denial of boarding resulted from a mistake, *see* ECF No. 682 (Findings of Fact) at 9 (recounting disclosure of the error during discovery). In addition, the Government never asserted that the Plaintiff's status with respect to the No Fly List was a state secret. Rather, during discovery, the Government asserted the state secrets privilege over other, classified national security information, *see* ECF No. 471-72 (declarations asserting state secrets privilege to exclude material). The *Ibrahim* court upheld the Government's state secrets assertion *in its entirety*. *See* ECF No.462 (upholding first assertion of state secrets); 682 (Findings of Fact) (recounting assertion and upholding of state secrets privilege). Later in the case, after it appeared from summary judgment briefing that the trial would place the state secrets information at issue, the Government moved to dismiss on the basis of the privilege, *see* ECF No. 534 (Defs' Motion for Summ. J. at 23-25). The Court denied that motion, finding that state secrets information could be excluded from the trial without requiring dismissal, *see* ECF No. 682 at 6-7, and ultimately, the *Ibrahim* court proceeded to enter

a final judgment on issues that did not require the disclosure of the information subject to the state secrets assertion. The Court did not find that the Government asserted the state secrets privilege to prevent disclosure of the error concerning plaintiff's No Fly status.

Finally, the Court's reference to a Freedom of Information Act ("FOIA") case not involving the state secrets privilege is wholly inapposite to the Government's assertion of the privilege in this case. *See* Order at 5 n.1 (citing *Islamic Shura Council of S. Cal. v. FBI*, 779 F. Supp. 2d 1114 (C.D. Cal. 2011)). In *Islamic Shura Council*, the issue was the timing of the Government's *in camera* submission, and whether the Government should have informed the court about national security information relevant to plaintiffs' FOIA request in an *in camera, ex parte* submission at an earlier stage in the litigation. Regardless of whether or when the Government was under an obligation to make such an *ex parte* explanation, that case had nothing to do with an assertion of the state secrets privilege. Moreover, and notably, shortly after the FOIA decision in *Shura Council*, the same presiding judge upheld an assertion of the state secrets privilege by the Government over FBI investigative information. *See Fazaga v. FBI*, 884 F. Supp. 2d 1022 (C.D. Cal. 2012).

In sum, there is no authority cited by the Court that undercuts the propriety of the Government's assertion of the state secrets privilege in this case. As detailed in the Government's state secrets submission, the Government asserts the state secrets privilege only after careful consideration by the Attorney General. Under the governing policy, the U.S. Department of Justice will defend an assertion of the state secrets privilege, and seek dismissal of a claim on that basis, "only when doing so is necessary to protect against the risk of significant harm to national security." *See* Exhibit 1 to Holder Declaration (State Secrets Policy); *see also Mohamed v. Jeppesen Dataplan, Inc,* 614 F.3d 1070, 1077 (9th Cir. 2010) (*en banc*) (discussing

Policy). Moreover, "[t]he Department will not defend an invocation of the privilege in order to: (i) conceal violations of the law, inefficiency, or administrative error; (ii) prevent embarrassment to a person, organization, or agency of the United States government; (iii) restrain competition; or (iv) prevent or delay the release of information the release of which would not reasonably be expected to cause significant harm to national security." State Secrets Policy at 2. The Government takes seriously its policy to invoke state secrets privilege only when necessary and appropriate, and it has properly determined the necessity of the privilege's invocation in this matter.

II. The 28 Documents Are Protected by the Law Enforcement Privilege.

The 28 documents submitted to the Court *ex parte* and *in camera* are subject to the Government's assertion of the law enforcement privilege, and Defendants continue to object to any disclosure of these documents on that basis. *See* Defs' Opp. to Motion to Compel at 26-31. As described in both the Giacalone and Steinbach Declarations, these documents are protected by the law enforcement privilege for some of the same reasons why they are subject to the state secrets privilege, as well as for their own reasons. These 28 documents describe or contain detailed policies and procedures related to watchlisting that would provide an adversary with valuable insight into the internal workings of the Government's watchlisting process, including the type, quality, and amount of information needed to watchlist an individual, as well as how that information is received, vetted, and disseminated throughout the intelligence community. Steinbach Decl. ¶ 11. For example, many of these documents contain detailed information about how and why the Government selects individuals for watchlisting, as well as how this information is vetted and shared throughout the intelligence community and across law enforcement agencies. *Id.* ¶¶ 11, 16. Disclosure of such information would undermine ongoing

investigative efforts, as well as the viability of certain law enforcement techniques. *Id.* ¶ 16. In some instances, the documents also include substantive information about particular individuals and investigations, the disclosure of which would cause similar harms. *Id.* ¶ 8.

Independent of the applicability of the state secrets privilege, Defendants continue to object to disclosure of these documents, even under an attorney's eyes only protective order.[6] As explained in Defendants' opposition to the motion to compel, such protective orders are a "deeply flawed procedure that cannot fully protect the secrecy of information," and should be avoided, especially in matters of national security. *See* Def's Opp. to Motion to Compel at 27-29 & n. 20-21 (quoting *In re Dep't of Investigation of City of N.Y.*, 856 F.2d 481, 484 (2d Cir. 1988)). Disclosure pursuant to a protective order is particularly inappropriate in this case at this time because, if the pending motion to dismiss is granted, there is no balancing of the interests that could possibly justify disclosure under a protective order because disclosure cannot advance the litigation. *See City of N.Y.*, 856 F.2d at 484. Moreover, release of this information would risk circumvention of the law and cause harm to national security because it would provide a roadmap to the specific ways in which the Government identifies persons for watchlisting, as well as the ways in which that information is shared both inside and outside of the United States Government. Revealing this kind of information would weaken the Government's ability to

[6] After the Court ordered disclosure of some privileged documents subject to protective orders, Defendants proposed a protective order that would govern certain law enforcement sensitive documents and information that can be shared with Plaintiff's counsel. Plaintiff did not agree to one part of the proposed order, and the parties jointly proposed to the Court that the magistrate judge may be able to assist in resolving the remaining dispute. *See* Joint Status Report, ECF No. 131, at 1. Defendants' proposed protective order should not be construed as consent to the disclosure of any particular information, other than the very limited subset of privileged information identified by Defendants that may be shared with Plaintiff's counsel pursuant to appropriate protective orders. Moreover, Defendants continue to object to the production of non-state-secrets-privileged material on the privilege log at this time because those documents are protected by the law enforcement privilege and/or are subject to the statute protecting SSI. If the motion to dismiss were denied, Defendants would only then produce to Plaintiff's counsel, pursuant to appropriate protective orders, the aforementioned limited subset of such non-state-secrets-privileged documents.

proactively and effectively identify persons who should be watchlisted. *See generally* Def's Opp. to Motion to Compel at 27-29.

III. Some of the 28 Documents Contain Sensitive Security Information for Which Plaintiff Cannot Demonstrate a Substantial Need.

The Transportation Security Administration reviewed these twenty-eight documents and determined that 21 of the 28 documents contain sensitive security information within the meaning of the applicable statute and regulations. *See* Steinbach Decl. ¶ 13; Defs' Opp. to Motion to Compel at 31-34 (describing SSI statute and regulations). That determination is not reviewable by this Court. *See* 49 U.S.C. § 46110(a); *Lacson v. DHS*, 726 F.3d 170, 172 (D.C. Cir. 2013); *Robinson v. Napolitano,* 689 F.3d 888 (8th Cir. 2012); *MacLean v. DHS,* 543 F.3d 1145, 1149 (9th Cir. 2008); *Elec. Privacy Info. Ctr. v. DHS*, 328 F. Supp. 2d 139, 146-47 (D.D.C. 2013) ("[D]istrict courts may not review TSA orders that designate materials as sensitive security information."). Moreover, although some sensitive security information could be produced to counsel under an eyes-only protective order in an appropriate case, this is not currently such a case. *See* Section 525(d) of the DHS Appropriations Act, 2007, Pub. L. 109-295, § 525(d), 120 Stat. 1355 (Oct. 4, 2006), as reenacted, ("Section 525(d)"). Entry of an SSI Protective Order does not automatically entitle Plaintiff's counsel to all SSI in the record; rather he still bears the burden of demonstrating a "substantial need" for relevant SSI in the preparation of his case and that he would be unable without undue hardship to obtain the substantial equivalent of the information by other means. *Id*. Plaintiff cannot demonstrate a "substantial need" for the documents, as required by statute, when his claims are subject to dismissal.

Dated: October 17, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following counsel of record:

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