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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RAHINAH IBRAHIM,
Plaintiff,

No. C 06-00545 WHA

v.

DEPARTMENT OF HOMELAND
SECURITY, et al.
Defendants.

**ORDER REGARDING
PLAINTIFF'S
MOTION TO COMPEL
UNDER SEAL AND EX PARTE**

INTRODUCTION

In this civil rights action, plaintiff moves to compel certain documents the federal government deems classified. To the extent below, defendants are ordered to show cause as to why certain withheld documents should not be produced.

ANALYSIS

While it is true “[t]he Supreme Court has recognized that courts must act in the interest of the country’s national security to prevent disclosure of state secrets[.]” (Opp. at 20 (citing *United States v. Reynolds*, 345 U.S. 1 (1953))), the extension of the state secrets privilege is not a given, nor an absolute. Under *Reynolds*, analysis of a state secrets privilege claim has three steps:

[First, a court must] “ascertain that the procedural requirements for invoking the state secrets privilege have been satisfied.” Second, [it] must make an independent determination whether the information is privileged.... Finally, “the ultimate question to be resolved is how the matter should proceed in light of the successful privilege claim.”

1 *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1080 (9th Cir. 2010) (en banc) (quoting
2 *Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190 (9th Cir. 2007)).

3 **1. PROCEDURAL REQUIREMENTS FOR INVOKING**
4 **THE PRIVILEGE HAVE BEEN SATISFIED.**

5 “To ensure that the [state secrets] privilege is invoked no more often or extensively than
6 necessary . . . ‘[t]here must be a formal claim of privilege, lodged by the head of the department
7 which has control over the matter, after actual personal consideration by that officer.’”

8 *Jeppesen*, 614 F.3d at 1080 (quoting *Reynolds*, 345 U.S. at 7–8). The sworn declarations
9 appended to defendants’ opposition qualify as formal claims of the privilege from the heads of
10 the respective departments, and they demonstrate that each actually and personally considered
11 the matter. Therefore, defendants meet the procedural requirements for invoking the privilege
12 here.

13 **2. AN INDEPENDENT EXAMINATION REVEALED**
14 **SOME DOCUMENTS THAT COULD BE PRODUCED.**

15 Once the procedural requirements for invoking the privilege are met, courts proceed to
16 independently determine whether the information is privileged. According to our court of
17 appeals:

18 The court must sustain a claim of privilege when it is satisfied, from
19 all the circumstances of the case, that there is a *reasonable* danger
20 that compulsion of the evidence will expose . . . matters which, in
21 the interest of national security, should not be divulged. *If* this
22 standard is met, the evidence is absolutely privileged, irrespective
23 of the plaintiffs’ countervailing need for it. [E]ven the most
24 compelling necessity cannot overcome the claim of privilege if the
25 court is ultimately satisfied that [state] secrets are at stake.

26 *Jeppesen*, 614 F.3d at 1081 (internal quotations and citations omitted) (emphasis added).

27 After a careful review of the classified materials by the Court, this order concludes that a
28 few documents could potentially be produced with little or no modifications to them. *First*, any
correspondence directly from plaintiff to defendants (and vice versa) cannot be classified and
should be produced without restriction (FBICLASS000311; FBICLASS000329–330). *Second*,
some classified documents appear to contain mostly *unclassified* material, save one or two
classified paragraphs. Specifically, defendants could produce several largely unclassified
internal documents with little inconvenience (FBICLASS000417–447; FBICLASS000449–475;

1 FBICLASS000477–502; FBICLASS000503–509; FBICLASS000510–531;
2 FBICLASS000532–558; FBICLASS000559–587). Whereas the existence or non-existence of
3 certain items, techniques, or procedures can sometimes be classified in and of themselves, that
4 does not appear to be the case for the aforementioned documents.

5 At least once, our court of appeals approved of a “case-by-case” approach for a court to
6 impose various “reasonable measure[s] to mitigate the potential unfairness” of allowing the
7 federal government to use classified information. *Al Haramain Islamic Foundation, Inc. v. U.S.*
8 *Dep’t of Treasury*, 686 F.3d 965, 982–84 (9th Cir. 2011). These measures included having the
9 government provide unclassified summaries of the classified materials or providing plaintiff’s
10 counsel with the necessary security clearance. *Ibid.* This order does not intend to go so far for
11 the majority of the classified documents here (although counsel are cleared for sensitive material,
12 they are not cleared to receive classified information). But, after review of all the classified
13 material, this order independently determines that in addition to correspondence between the
14 parties, the two internal training documents are eligible for production to plaintiff’s counsel
15 without implicating national security. Defendants are ordered to show cause as to why the
16 documents should not be produced. Specifically, the document numbers covered by this order
17 are:

- 18 • FBICLASS000311
- 19 • FBICLASS000329–330
- 20 • FBICLASS000417–447
- 21 • FBICLASS000449–475
- 22 • FBICLASS000477–502
- FBICLASS000503–509
- FBICLASS000510–531
- FBICLASS000532–558
- FBICLASS000559–587.

23 **3. THE “ULTIMATE QUESTION” WILL NOT BE REACHED**
24 **UNTIL THE MOTION IS RESOLVED.**

25 This order does not reach the third and final step of the *Reynolds* test as the issue of
26 whether the above listed documents should be produced is not yet settled.

27 **CONCLUSION**

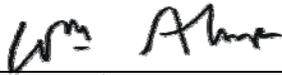
28 Defendants are ordered to show cause as to why the above mentioned documents should
not be produced and as to why this order should not be made public by **12:00 P.M. (PST)**,

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APRIL 7, 2013. This order is not requesting further briefing on any other privileges that are or may be asserted over the aforementioned documents. The Court will decide on the other privileges based on the record currently available.

IT IS SO ORDERED.

Dated: April 2, 2013.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE