

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

JANE DOE 1, et al.,
Plaintiffs,
v.
KIRSTJEN NIELSEN, et al.,
Defendants.

Case No. [18-cv-02349-BLF](#) (VKD)

**ORDER RE DISCOVERY DISPUTE RE
CONFIDENTIALITY OF
GOVERNMENT EMPLOYEE NAMES**

Re: Dkt. No. 181

The parties dispute whether the names of all government employees, with the exception of the USCIS Director and the Secretaries of State and Homeland Security, should be protected from public disclosure. Dkt. No. 181. The Court held a hearing on this matter on May 21, 2019. Dkt. No. 188. For the reasons explained below, the Court concludes that defendants have not demonstrated good cause to protect the names of all such employees from public disclosure.

I. BACKGROUND

In this action, plaintiffs seek review under the Administrative Procedures Act of changes defendants allegedly made to the Lautenberg-Specter program for processing the refugee applications of Iranian religious minorities. Dkt. No. 1 ¶¶ 95-96. Defendants contend that there is no final agency action to review, as no changes were made to the Lautenberg-Specter program; rather, USCIS simply began using information derived from enhanced security screening techniques as part of its overall consideration of applicants' admissibility. Dkt. No. 96 (Section V.C.); Dkt. No. 100 at 6-7. The Court permitted plaintiffs to take jurisdictional discovery regarding the nature of the agency action at issue. Dkt. No. 102.

Defendants have produced at least 2,656 documents to plaintiffs. Dkt. No. 162 at 2. The parties advise that virtually every document in this production includes the name of one or more

1 government employees. Defendants say that these names should be treated as “confidential”
2 under the protective order in this case (Dkt. No. 135) and protected from public disclosure because
3 the employees’ interest in maintaining their privacy outweighs the public’s interest in knowing
4 their names.¹ All of the government employees are employed by the Departments of State or
5 Homeland Security, but none of them is named or identified in the complaint. Some of them have
6 signed declarations in support of defendants’ submissions filed in this case.

7 **II. LEGAL STANDARDS**

8 “As a general rule, the public is permitted access to litigation documents and information
9 produced during discovery.” *In re Roman Catholic Archbishop of Portland in Oregon*, 661 F.3d
10 417, 424 (9th Cir. 2011) (internal quotations omitted). In other words, nothing prohibits public
11 disclosure of documents obtained during discovery, absent a court order to the contrary. *Id.*

12 Rule 26(c) of the Federal Rules of Civil Procedure governs protection of discovery
13 materials. That rule permits a court to issue orders protecting a party or person from “annoyance,
14 embarrassment, oppression, or undue burden or expense” upon a showing a good cause for such
15 protection by the party producing discovery. Fed. R. Civ. P. 26(c). “A party asserting good cause
16 bears the burden, for each particular document it seeks to protect, of showing that specific
17 prejudice or harm will result if no protective order is granted.” *Foltz v. State Farm Mut. Auto. Ins.*
18 *Co.*, 331 F.3d 1122, 1130 (9th Cir. 2003). If such a showing is made, the Court must balance the
19 interests of the public against the interests of the private litigants to decide whether a protective
20 order is warranted. *In re Roman Catholic Archbishop*, 661 F.3d at 424. Here, defendants are the
21 parties seeking protection and have the burden of demonstrating good cause.

22 **III. DISCUSSION**

23 Defendants have not provided the Court with any examples of documents that contain the
24 names of the government employees defendants seek to designate as “confidential.” The Court
25 assumes, however, that all of the documents in which the names appear concern the nature of the

26 _____
27 ¹ Plaintiffs contend that defendants have not properly invoked the protections of the protective
28 order because they did not mark the names as confidential, as required by paragraph 5.2 of the
order, except when the names appeared next to an email address in a document. Defendants do
not dispute plaintiffs’ description of their confidentiality markings.

1 action in dispute, whether characterized as changes to the Lautenberg-Specter program that
2 resulted in increased denials of refugee applications or as the use of information derived from
3 enhanced security screening techniques as part of the overall consideration of those applications.
4 Defendants say that these documents include the names of government employees at all levels of
5 seniority and responsibility. Dkt. No. 189.

6 **A. Evidence of Particularized Harm Resulting from Disclosure**

7 In considering whether good cause exists to restrict the public disclosure of the names of
8 government employees, the Court first considers defendants' evidence of the specific prejudice or
9 harm that will result if their names are disclosed.

10 Defendants argue that permitting public disclosure of the employee names is an invasion of
11 these employees' privacy that may subject them to harassment. Dkt. No. 181 at 6. In support of
12 this argument, defendants cite press reports describing a protest of the administration's immigrant
13 family separation policy outside an ICE office in Portland, Oregon and the compilation and
14 tweeting of ICE employees' already-public LinkedIn profiles. *Id.* As plaintiffs point out, neither
15 of these incidents involved harm to government employees based on public disclosure of their
16 names. *Id.* at 4. Plaintiffs also observe that defendants have already disclosed the names of some
17 employees in this action as well as in other matters, without incident. *Id.*

18 The Court agrees with plaintiffs that defendants have made only a speculative and
19 generalized assertion of harm with respect to employees whose names are included in documents
20 produced in discovery and have not made the particularized showing Rule 26(c) requires.

21 **B. Balance of Public and Private Interests**

22 Although defendants have not made the requisite showing at the first step of the Rule 26(c)
23 analysis, the Court nevertheless considers whether the public has an interest in the names of these
24 employees and how that interest compares to private interests of the employees.

25 Plaintiffs argue that the documents at issue involve agency decision-making regarding the
26 refugee program and related security vetting of applicants for the program, and that the public has
27 an interest in understanding the decisions the government has made about administration of the
28

1 refugee program and in knowing who is involved in implementing changes to the program.² Dkt.
2 No. 181 at 5. Defendants respond that the documents at issue reveal little of interest to the public,
3 as refugee admission is ultimately a discretionary determination, and that the conduct of individual
4 employees is not at issue in this case. *Id.* at 7. Defendants contend that there is simply no need
5 for the public to know the names of these employees. *Id.*

6 While individual admission decisions are likely not of substantial interest to the public,
7 plaintiffs argue persuasively that administration of the Lautenberg-Specter program and any
8 changes to the program or its administration certainly are of interest to the public. Documents
9 bearing on the nature of the agency action at issue in this case seem like precisely the kinds of
10 documents that shed light on an agency’s performance of its duties and let citizens know what
11 their government is up to. *See U.S. Dep’t of Justice v. Reporters Comm. for Freedom of Press*,
12 489 U.S. 749, 772–73 (1989). The private interests at stake would need to be significantly more
13 compelling and less speculative than what defendants have shown here to outweigh this public
14 interest.

15 **C. Defendants’ Other Arguments**

16 Defendants’ principal argument in support of designating employee names “confidential”
17 is that if the same records were requested under the Freedom of Information Act (“FOIA”), the
18 government would be permitted to redact the names under exemption 7(C), 5 U.S.C.
19 § 522(b)(7)(C), which exempts from disclosure “records or information compiled for law
20 enforcement purposes” where the release of such records “could reasonably be expected to
21 constitute an unwarranted invasion of personal privacy.” *See* Dkt. No. 6. As defendants
22 acknowledge, FOIA rules do not govern discovery in this matter, but exemption 7(C) is not
23 particularly helpful to defendants anyway. Defendants have not demonstrated that any of the
24 documents at issue are “records or information compiled for law enforcement purposes” and, for

25 _____
26 ² Plaintiffs also cite a practical concern. Because virtually every document produced in discovery
27 contains the name of at least one government employee, any court filing that includes a document
28 from the production will need to be presumptively filed under seal, even if it otherwise contains
non-confidential information, increasing the burden on plaintiffs and the Court to file and decide
administrative motions requesting leave to file under seal pursuant to Civil Local Rule 79-5. *See*
Dkt. No. 189. This burden does not seem particularly significant.

1 the reasons discussed above, the Court does not find the disclosure of the names of these
2 government employees an *unwarranted* invasion of their personal privacy.

3 Defendants additionally argue in a footnote that the employee names do not meet Rule
4 26’s threshold for discoverability—i.e., they are not relevant to a claim or defense or proportional
5 to the needs of the case—and so plaintiffs are not entitled to discover them in the first place. This
6 argument is not well-developed and adds little to the Rule 26 analysis. As a general matter, a
7 document that is otherwise responsive to a discovery request must be produced as it is kept in the
8 usual course of business and may not be altered to eliminate non-responsive information simply
9 because the producing party believes the non-responsive information is not relevant to a claim or
10 defense. *See* Fed. R. Civ. P. 34(b)(E)(“Unless otherwise stipulated or ordered by the court . . . [a]
11 party must produce documents as they are kept in the usual course of business”); *Orion*
12 *Power Midwest, L.P. v. Am. Coal Sales Co.*, No. 2:05-CV-555, 2008 WL 4462301, at *2 (W.D.
13 Pa. Sept. 30, 2008) (“There is no express or implied support for the insertion of another step in the
14 process (with its attendant expense and delay) in which a party would scrub responsive documents
15 of non-responsive information.”); *cf. Am. Immigration Lawyers Assoc. v. Exec. Office for*
16 *Immigration Review*, 830 F.3d 667, 670 (D.C. Cir. 2016) (holding that there is no statutory basis
17 in FOIA for redacting ostensibly non-responsive information from a record deemed otherwise
18 responsive). Defendants do not argue that the documents at issue are not relevant or that their
19 production is disproportionate to the needs of the case. If the documents at issue are otherwise
20 responsive to plaintiffs’ discovery requests, then the employee names may only be redacted, or
21 their disclosure restricted, if defendants show good cause for such protection under Rule 26(c).

22 **IV. CONCLUSION**

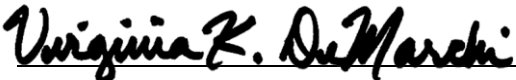
23 For the reasons explained above, the Court concludes that defendants have not shown good
24 cause to protect from public disclosure the names of government employees that appear in
25 defendants’ responsive documents. This order is without prejudice to defendants being able to
26 show that particular documents or portions of documents, including portions containing names of
27 law enforcement personnel operating in a covert capacity, should be redacted or protected from
28 public disclosure on the basis of the law enforcement privilege, which is the subject of a separate

1 discovery dispute. *See* Dkt. No. 180.

2 **IT IS SO ORDERED.**

3 Dated: May 28, 2019

4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28


VIRGINIA K. DEMARCHI
United States Magistrate Judge