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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Maria Del Socorro Quintero Perez, CY, a
Minor, and BY, a Minor,

Plaintiffs,

v.

UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF
HOMELAND SECURITY, UNITED
STATES CUSTOMS AND BORDER
PROTECTION OFFICE OF BORDER
PATROL, JANET NAPOLITANO,
THOMAS S. WINKOWSKI, DAVID
AGUILAR, ALAN BERSIN, KEVIN K.
McALLEENAN, MICHAEL J. FISHER,
PAUL A. BEESON, RICHARD
BARLOW, RODNEY S. SCOTT, CHAD
MICHAEL NELSON, AND DORIAN
DIAZ, AND DOES 1 - 50,,

Defendants.

Case No.: 13cv1417-WQH-BGS

**ORDER GRANTING PLAINTIFFS’
MOTION TO COMPEL
PURPORTEDLY PRIVILEGED
DOCUMENTS**

I. BACKGROUND

On November 16, 2015, counsel for Plaintiffs, Mr. McBride, and counsel for Defendants, Ms. Schweiner, jointly called the court regarding a discovery dispute in

1 compliance with the Court’s Chambers’ Rules. During that call, Plaintiffs sought
2 permission to file a motion to compel regarding documents they contend were improperly
3 withheld on the basis of deliberative process and law enforcement privileges. (ECF No.
4 98 at 2.) On November 20, 2015, the Court granted the parties permission to brief the
5 issue of privilege and ordered Defendants to lodge their privilege log and disputed
6 documents for *in camera* review. (*Id.* at 3)

7 Plaintiff filed a Motion to Compel Production of Purportedly Privileged
8 Documents on November 30, 2015 (ECF No. 101), and Defendants filed their opposition
9 on December 7, 2015. (ECF No. 102.) In their opposition, Defendants explain that
10 twenty-five of the twenty-seven documents in their privilege log were inadvertently
11 placed there as a result of a computer error, and are non-responsive to Plaintiffs’ RFPs.
12 (ECF No. 102 at 4.) In compliance with this Court’s November 20, 2015 order,
13 Defendants submitted a privilege log and all twenty-seven documents to the Court for *in*
14 *camera* review. Defendants brief explains that they provided all twenty-seven documents
15 for the Court to “confirm they do not need to be produced on the grounds they are non-
16 responsive.” (*Id.*) Plaintiffs replied on December 11, 2015. (ECF No. 108.) In their
17 reply brief, Plaintiffs question Defendants’ assertion that the twenty-five documents are
18 irrelevant, especially because Defendants met and conferred on the issue of privilege
19 “over a period of months.” (*Id.* at 2.)

20 **II. PURPORTEDLY IRRELEVANT DOCUMENTS**

21 Government counsel’s error of improperly listing irrelevant documents in their
22 privilege log has precluded the routine *in camera* review of privileged documents. As
23 counsel should know, when a party produces a privilege log, information on that log is
24 presumed to be “otherwise discoverable.” (Fed. R. Civ. P. 26(b)(5).) However, despite
25 listing the documents on their privilege log, Defendants now claim that twenty-five
26 documents are irrelevant, and request that this Court “confirm they do not need to be
27 produced on the grounds they are non-responsive.” (ECF No. 102 at 4.)

28 Defendants’ brief fails to address the proper procedure for when irrelevant

1 documents are inadvertently listed in a privilege log. Nor does it address whether or not
2 those twenty-five documents are subject to any privileges. Therefore, before the Court
3 reviews these documents, additional briefing is required. Defendants must submit a
4 supplemental motion addressing the following questions:

- 5 1. What is the appropriate procedure when a party erroneously places
6 irrelevant documents in a privilege log?
- 7 2. Are any of the twenty-five documents subject to a privilege?
- 8 3. Is it proper for a court to review documents *in camera* for relevance?

9 To the extent Defendants assert that any of the twenty-five documents are privileged,
10 they must attach an appropriate declaration so stating. *See Kelly v. City of San Jose*, 114
11 F.R.D. 653, 669 (N.D. Cal. 1987). Defendants must file this supplemental brief by
12 **February 5, 2016**. Plaintiffs' response must be filed by **February 12, 2016**. Both briefs
13 are limited to ten pages. No reply brief is requested.

14 **III. PARTIES' ARGUMENTS REGARDING PRIVILEGE**

15 Plaintiffs argue that Defendants have not validly asserted the official information
16 privilege in response to Plaintiffs' RFPs, and therefore, the Court should deem the
17 privilege waived. (ECF No. 100 at 5; *see also* ECF No. 108 at 3.) Specifically, Plaintiffs
18 state that Defendants did not timely submit a declaration from a responsible official
19 within their agency, as required under *Hampton v. City of San Diego*, 147 F.R.D. 227
20 (S.D. Cal. 1993). (ECF No. 100 at 3; *see also* ECF No. 108 at 2.) Plaintiffs further
21 contend that their interests as "civil-rights litigants outweigh any governmental interest in
22 maintaining the secrecy of any deliberative process," warranting the disclosure of the
23 withheld documents. (*Id.* at 5.)

24 Of the twenty-seven documents identified in Defendants' privilege log,
25 Defendants' brief limits their assertion of privilege to two documents.¹ (ECF No. 102 at
26

27
28 ¹ The two documents at issue are bates stamped PEREZ-EMAIL-0013034—35 and PEREZ-EMAIL-0013142—43.

1 4.) Defendants argue that the two documents “contain law enforcement sensitive
2 information,” which should be “protected from disclosure to safeguard law enforcement
3 techniques and procedures.”² (*Id.* (citing cases).) In support of their assertion that the
4 two documents contain law enforcement sensitive information, Defendants attach the
5 declaration of Michael Fisher, a retired Chief of the U.S. Border Patrol. (ECF No. 102-
6 2.) According to Fisher’s declaration, the two documents at issue “disclose certain of
7 CBP’s techniques, strategies and procedures for dealing with use of force issues” and
8 “identify individuals who are playing a role in those efforts.” (*Id.*)

9 **IV. RELEVANT LAW**

10 “The purpose of [the law enforcement privilege] is to prevent disclosure of law
11 enforcement techniques and procedures, to preserve the confidentiality of sources, to
12 protect witness and law enforcement personnel, to safeguard the privacy of individuals
13 involved in an investigation, and otherwise to prevent interference with an investigation.”
14 *In re Dep’t of Investigation of City of New York*, 856 F.2d 481, 484 (2d Cir. 1988) citing
15 *Aspin v. Dep’t of Defense*, 491 F.2d 24, 29-30 (D.C. Cir. 1973); *Frankel v. Securities and*
16 *Exchange Commission*, 460 F.2d 813, 817 (2d Cir. 1972). However, “the official
17 information privilege and its kin [i.e., the law enforcement privilege] are not absolute.”
18 *King v. Conde*, 121 F.R.D. 180, 190 (E.D.N.Y. 1988). In determining what level of
19 protection should be afforded by this privilege, courts conduct a case-by-case balancing
20 analysis, in which the interests of the party seeking discovery are weighed against the
21 interests of the governmental entity asserting the privilege. *Kelly v. City of San Jose*, 114
22 F.R.D. 653, 660 (N.D. Cal. 1987); *Miller v. Panucci*, 141 F.R.D. 292, 300 (C.D. Cal.
23 1992); *Hampton v. City of San Diego*, 147 F.R.D. 227, 230–31 (S.D. Cal. 1993).

24 First, “based on defendants’ objections to disclosure and accompanying affidavits
25 or declarations[,]” the court determines whether the party asserting the privilege has
26 _____

27 ² Defendants never identify a specific privilege in their brief or declaration, only referring to the
28 documents at issue as law enforcement sensitive. A review of the cases Defendants cite leads this Court
to conclude that they are referring to the law enforcement privilege in their argument.

1 made a “substantial threshold showing that disclosure of specific information would
2 result in specific harm to identified important interests.” *King*, 121 F.R.D. at 190; *see*
3 *also Soto*, 162 F.R.D. at 613; *In re The City of New York*, 607 F.3d 923, 944 (2d Cir.
4 2010); *Miller*, 141 F.R.D. 292, 301 (C.D. Cal. 1992)(citing *Kelly*, 114 F.R.D. at 671.)
5 The affidavit or declaration offered to support the assertion of privilege must be from an
6 agency official and must include: (1) an affirmation that the agency generated or
7 collected the material in issue and has in fact maintained its confidentiality ..., (2) a
8 statement that the official has personally reviewed the material in question, (3) a specific
9 identification of the governmental or privacy interests that would be threatened by
10 disclosure of the material to plaintiff and/or his lawyer, (4) a description of how
11 disclosure subject to a carefully crafted protective order would create a substantial risk of
12 harm to significant governmental or privacy interests, (5) and a projection of how much
13 harm would be done to the threatened interests if the disclosure were made. *Hampton*,
14 147 F.R.D. at 230–31 (citing *Kelly*, 114 F.R.D. at 670); *see also Bernat v. City of*
15 *California City*, 2010 WL 4008361, at *3 (E.D. Cal. 2010) (citing *Kelly*, 114 F.R.D. at
16 670). If no showing is made through the declaration or affidavit, the court should order
17 disclosure. *King*, 121 F.R.D. at 190; *Soto*, 162 F.R.D. at 613; *Miller*, 141 F.R.D. at 301.

18 Second, if a threshold showing is made, the court considers the parties’ papers and
19 affidavits in conjunction with the actual documents submitted for *in camera* review.
20 *King*, 121 F.R.D. at 190-91; *Miller*, 141 F.R.D. at 301; *Kelly*, 114 F.R.D. at 671. The
21 court’s analysis focuses on the extent to which the defendant’s interest in confidentiality
22 outweighs the plaintiff’s interest in the information. *King*, 121 F.R.D. at 190-91; *see also*
23 *Soto*, 162 F.R.D. at 613. It is only in this second step that the distinction among the
24 different federal privileges is relevant. The official information privilege and the law
25 enforcement privilege, for example, apply different factors when the court balances the
26 interests of the government and the interests of the party seeking discovery. *See, e.g.,*
27 *Kelly*, 114 F.R.D. at 669 (applying a five factor test to the analysis of the official
28 information privilege); *see also In re Dep’t of Investigation of City of New York*, 856 F.2d

1 at 483-84 (applying a ten factor test to the analysis of the law enforcement privilege.)

2 **V. APPLICATION**

3 **a. Defendants Did Not Automatically Waive Privilege**

4 Plaintiffs argue that Defendants waived the ability to assert the law enforcement
5 privilege as to any document because they did not provide Plaintiffs with a declaration
6 from an agency official when they provided their privilege log, and thus, did not “comply
7 with the procedures outlined in *Hampton[v. San Diego]*.” (ECF No. 108 at 3.) *Hampton*
8 sets forth the procedure by which a privilege is invoked **before the court** “will look at
9 police documents *in camera* and before it will entertain a discovery conference to compel
10 said documents.” 147 F.R.D. at 230.

11 This Court does not agree that *Hampton* stands for the proposition of automatic
12 waiver of privilege if a declaration is not provided to the receiving party upon production
13 of the privilege log. Nor does this Court support such a rigid guideline. *Hickman v.*
14 *Taylor*, 329 U.S. 495, 507 (1947) (noting that discovery rules are to be accorded a broad
15 and liberal treatment); accord *Martin v. Reynolds Metals Corp.*, 297 F.2d 49, 56 (9th Cir.
16 1961); *see also Macias v. City of Clovis*, 2015 WL 7282841 (E.D. Cal. Nov. 18, 2015)
17 (declining to waive the official information privilege when the defendant failed to timely
18 raise the objection or timely produce a privilege log). Therefore, Defendants failure to
19 provide Plaintiffs with a declaration in support of the law enforcement privilege at the
20 same time they provided the privilege log did not result in an automatic waiver of the
21 privilege.

22 **b. Defendants Did Not Make a Threshold Showing for Privilege**

23 Defendants submit a declaration from Michael Fisher, retired Chief of the U.S.
24 Border Patrol, to support their assertion that two documents in the privilege log contain
25 law enforcement sensitive information. (ECF No. 102-2.) Fisher’s declaration does not
26 discuss the documents individually. Instead, the entire substance of the declaration states
27 that both “documents contain information regarding CBP’s techniques and procedures.
28 In order to preserve the confidentiality of the information and protect law enforcement

1 personnel, these two documents should not be disclosed to the public.” (ECF No. 102-2
2 ¶ 2.)

3 As discussed above, a prerequisite to asserting any federal privilege is that the
4 government must make a “substantial threshold showing” by way of a declaration or
5 affidavit from a responsible official with personal knowledge of the matters to be attested
6 to in the affidavit. *King*, 121 F.R.D. at 188; *see also In re The City of New York*, 607
7 F.3d at 944; *In re Sealed Case*, 856 F.2d 268, 271 (D.C.C. 1988). The purpose of the
8 declaration “is to provide the court with the information it needs to make a reasoned
9 assessment of the weight of the interests that line up, in the particular situation before the
10 court, against the requested disclosure.” *Kelly*, 114 F.R.D. at 670.

11 In *Bernat v. City of California City*, the Court found insufficient a declaration that
12 did “not assert that the declarant reviewed the particular records at issue . . . fail[ed] to
13 “provide *specific* information about how disclosure of the *specific* documents requested .
14 . . would threaten the *specific* governmental and privacy interests at stake . . . fail[ed] to
15 evaluate how and to what extent a well-crafted protective order would minimize the
16 impact on the interests at issue [and] . . . how disclosure of the specific information
17 sought would result in harm.” 2010 WL 4008361, at *3 (italics in original) (relying on an
18 insufficient declaration to overrule the government’s assertion of the official information
19 privilege, the deliberative process privilege and the law enforcement privilege.)

20 Likewise, in *Soto v. City of Concord*, the court found that, where the defendants
21 asserted only “the general proposition that internal affairs investigatory documents and
22 statements of police officers and/or witnesses should remain secret in order to encourage
23 ‘frank discussions,’” that assertion was “insufficient to meet the threshold test for
24 invoking the official information privilege.” 162 F.R.D. at 614. Moreover, the Court
25 noted that the defendants failed to address how disclosure pursuant to a protective order
26 “would create a substantial risk of harm to significant government interests.” *Id.*

27 As in *Soto* and *Bernat*, Defendants’ blanket assertion that the two documents
28 should not be disclosed to “preserve the confidentiality of the information,” fails to

1 adequately address the harm that would result from a disclosure. Fisher’s declaration
2 does not state that he reviewed the particular records at issue, and fails to provide *specific*
3 information about how disclosure of the *specific* documents requested would threaten a
4 *specific* governmental interest at stake. In fact, Fisher’s declaration does not refer to *any*
5 specific harm—only that the documents should not be disclosed to “preserve the
6 confidentiality of the information and protect law enforcement personnel.” (ECF No.
7 102-2 ¶ 2.) Moreover, Fisher’s declaration fails to describe how disclosure subject to a
8 carefully crafted protective order would create a substantial risk of harm to significant
9 governmental or privacy interests.

10 Because Defendants’ declaration in support of their assertion of privilege lacks the
11 requisite specificity and fails to allege more than a general assertion of potential harm,
12 they have not made a threshold showing. As a result, the two documents at issue should
13 be disclosed. *Soto*, 162 F.R.D. at 613 (holding that if the party invoking the privilege
14 fails to satisfy this threshold burden the documents in issue should be disclosed.)
15 Accordingly, Defendants must produce both PEREZ-EMAIL-0013034—35 and PEREZ-
16 EMAIL-13142-13143, subject to a protective order the parties must enter in this case,
17 described below.

18 **VI. DISCLOSURE SHALL OCCUR SUBJECT TO PROTECTIVE ORDER**

19 Courts have fulfilled a plaintiff’s need for discovery while protecting a defendant’s
20 privacy by ordering the production of documents subject to a protective order limiting
21 access to the material at issue to plaintiff, his counsel, and those experts who would
22 require such information to formulate an opinion. *Soto*, 162 F.R.D. at 617.

23 The Court finds that a protective order will serve the interests of both parties in
24 facilitating discovery, while also protecting the government’s interests. Although the
25 Court acknowledges the difficulty these parties have had in negotiating a protective
26 order, the Court now orders the parties to enter into a protective order governing the
27 documents the Court has ordered Defendants to disclose. The parties shall finalize said
28 protective order no later than **February 10, 2015**. Service of the documents ordered

1 disclosed shall occur within **seven (7) calendar days** of when the Court signs the
2 protective order.

3 **VII. CONCLUSION**

4 1. Defendants must file a supplemental brief addressing the following issues by
5 **February 5, 2016.**

6 a. What is the appropriate procedure when a party erroneously places irrelevant
7 documents in a privilege log?

8 b. Are any of the twenty-five documents subject to a privilege?

9 c. Is it proper for a court to review documents in camera for relevance?

10 Plaintiffs' response must be filed by **February 12, 2016.** Both briefs are limited to
11 ten pages. No reply brief is requested.

12 2. The parties are ordered to enter into a protective order prior to exchanging any of
13 these documents. The parties must submit to the Court a proposed stipulated
14 protective order no later than **February 10, 2016.**

15 3. Upon court approval of the protective order, Defendants must produce the
16 following documents:

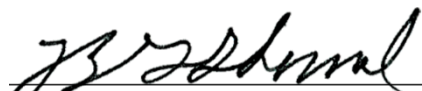
17 PEREZ-EMAIL-0013034—35

18 PEREZ-EMAIL-0013142—43

19 Service of the documents ordered disclosed shall occur within **seven (7) calendar days**
20 of when the Court signs the protective order.

21
22 **IT IS SO ORDERED.**

23
24 Dated: January 29, 2016

25 
26 Hon. Bernard G. Skomal
27 United States Magistrate Judge
28