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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

KAJI DOUSA,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF  
HOMELAND SECURITY, et al.,

Defendants.

CASE NO. 19cv1255-LAB (KSC)

**ORDER DENYING MOTION TO SEAL  
[Dkt. 74]**

“Access to public proceedings and records is an indispensable predicate to free expression about the workings of government.” *Courthouse News Svc. v. Planet*, 750 F.3d 776, 785 (9th Cir. 2014). The public’s interest in access is so weighty that the Court previously found that Plaintiff Kaji Dousa’s competing interest in protecting her social security number and birthdate outweighed the public interest “only slightly.” Dkt. 62 at 2. U.S. Customs and Border Protection asks the Court to find the public interest again outweighed, this time by CBP’s interest in the secrecy of its sensitive law enforcement information. But the information CBP wants to seal has been on the docket since the turn of the year. It’s not secret anymore. CBP’s interest in a vain attempt to reclaim lost secrecy isn’t compelling enough to overcome the strong First Amendment interests in maintaining public access to the information. The Court **DENIES** CBP’s Motion to Seal. Dkt. 74.

1 **Background**

2 The Court granted Dousa’s earlier Motion to Seal. Dkt. 62. In doing so, it  
3 required Dousa to show a “compelling reason” that would outweigh the public’s  
4 interest in access. *Id.* at 2. Balancing the public’s interest in the specific information  
5 to be sealed—Dousa’s social security number and birthdate—against Dousa’s interest  
6 in secrecy, the Court found the scales tipped in Dousa’s favor “only slightly” because  
7 there was “no legitimate public interest” in that information. *Id.*

8 CBP now asks to redact “confidential and law enforcement sensitive codes used  
9 in [CBP’s] Field Operation Reports.” Dkt. 74 at 6. CBP also asks the Court to seal the  
10 name, gender, race, and citizenship of three non-party individuals (although all that  
11 information save one name appears in unredacted form in the proposed replacement  
12 documents). *See* Dkt. 74 at 6; Dkt. 74-3 at 17, 25-26, 77-79. The documents containing  
13 that information were first filed on December 20, 2019 and January 10, 2020 as part  
14 of briefing on a motion to dismiss and a motion for preliminary injunction. One  
15 document was re-filed on January 24, 2020 in connection with Dousa’s Motion to Seal  
16 a Previously Filed Document. Dkt. 55-13, 59-1, 60-2. CBP filed its Motion on June  
17 15, 2020.

18 **CBP Must Present “Compelling Reasons” to Seal**

19 Because the public has an interest in the outcome of a motion to seal, a court  
20 can’t seal documents without independently weighing the movant’s interest against  
21 the public’s interest in access to court documents, even where no party opposes the  
22 motion. *See Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1178-79 (9th  
23 Cir. 2006) (court may not seal judicial records without “bas[ing] its decision on a  
24 compelling reason and articulat[ing] the factual basis for its ruling”). The public’s  
25 interest has deep roots, sprouting from the First Amendment to the United States  
26 Constitution. “The right of access is an essential part of the First Amendment’s  
27 purpose to ensure that the individual citizen can effectively participate in and  
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1 contribute to our republican system of self-government.” *Courthouse News Svc.*, 750  
2 F.3d at 785 (internal marks and citation omitted). Because this common law right is  
3 intended to promote public understanding of the judicial process and the bases for a  
4 court’s decision, the public’s interest is stronger where the information is part of  
5 briefing on a motion “more than tangentially related to the underlying cause of action.”  
6 *Center for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1099, 1102 (9th Cir.  
7 2016). The briefing in question—on a motion for preliminary injunction and a motion  
8 to dismiss—meets this description. Dkt. 55, 59; *see also* Dkt. 62 at 2.<sup>1</sup>

9 But just as clear as the public’s right to access is parties’ need for a forum in  
10 which they can litigate matters involving private information. *See generally* Fed. R.  
11 Civ. P. 5.2. In the case of a motion more than tangentially related to the underlying  
12 cause of action, the Ninth Circuit balances these considerations by permitted sealing  
13 orders only where the information is “traditionally kept secret” or where there are  
14 “compelling reasons” that outweigh the public’s interest. *Kamakana*, 447 F.3d at  
15 1178-79. Courts have discretion to determine what constitutes a “compelling reason,”  
16 so long as that reason is “supported by specific factual findings” and doesn’t rely on  
17 conjecture. *Center for Auto Safety*, 809 F.3d at 1097; *Kamakana*, 447 F.3d at 1178-  
18 79;

19 Information “traditionally kept secret” is an exclusive club. Only categories of  
20 information with “*neither* a history of access *nor* an important public need justifying  
21 access” are allowed in. *Kamakana*, 447 F.3d at 1184-85 (emphasis in original). The  
22 doorkeeper applies this standard so strictly that the Ninth Circuit Court of Appeals has  
23 recognized only three members: grand jury transcripts, warrant materials during the  
24 pre-indictment phase of an investigation, and attorney-client privileged materials. *Id.*

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25 <sup>1</sup> Dkt. 60-2 is identical to the publicly available version of Dkt. 55-13. Sealing portions  
26 of one and not the other would be futile, so CBP can’t meet the “good cause” standard  
27 applicable to the former without meeting the “compelling reasons” standard  
28 applicable to the latter. *See Center for Auto Safety*, 809 F.3d at 1097-99.

1 at 1185 (grand jury transcripts and warrant materials); *Lambright v. Ryan*, 698 F.3d  
2 808, 820 (9th Cir. 2012) (attorney-client privileged materials). Neither the personal  
3 information nor the “law enforcement sensitive” information CBP wants to redact fits  
4 any of these three categories. *See Kamakana*, 447 F.3d at 1184-85 (declining to treat  
5 law enforcement documents, generally, as “traditionally kept secret”).

6 Since CBP isn’t asking the Court to seal information “traditionally kept secret,”  
7 it must articulate compelling reasons supported by specific factual findings that  
8 outweigh the public’s right to access. *Id.* at 1178-79.

### 9 **The Hope of Reclaiming Lost Secrecy Isn’t a Compelling Reason to Seal**

10 CBP maintains that “[c]ontinued public disclosure of [its sensitive law  
11 enforcement material] would provide hostile actors with detailed insight into [CBP’s]  
12 capabilities” and “could provide an additional method of unauthorized access to”  
13 CBP’s intelligence reporting system. *Id.* CBP argues that its “Associated Workspace”  
14 numbers, along with other law enforcement sensitive information regarding the  
15 development of its Field Information Reports, reveal “techniques and methods [of  
16 information collection], including intelligence-collection goals and priorities and the  
17 particular geographic and operational areas of focus.” Dkt. 74-1 ¶ 7. The information  
18 also “reveals CBP’s assessment of the reliability of the information” contained in the  
19 Field Information Reports at issue, as well as “source descriptions, information about  
20 related CBP alerts and lookouts, and the virtual categorization of the Field Information  
21 Report.” *Id.* As for the redaction of non-parties’ personal information, CBP contends  
22 that the name, gender, race, and citizenship information it intended to redact are  
23 “sufficient information to harass or endanger” those non-parties. *Id.* ¶ 8.

24 The Court must conscientiously balance these concerns against the public’s  
25 interest. *Kamakana*, 447 F.3d at 1178 (quoting *Foltz v. State Farm Mut. Auto Ins. Co.*,  
26 331 F.3d 1122, 1135 (9th Cir. 2003)). Performing the same analysis with respect to  
27 Dousa’s social security number and birthdate, the Court found a compelling reason to  
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1 seal because the public didn't have a legitimate interest in that information and there  
2 is no historic right of access to social security numbers. Dkt. 62 at 2.

3 But the information here is different. The incompletely redacted personal  
4 information—comprised of names, gender, race, and citizenship—isn't as sensitive as  
5 social security numbers or even birthdates. And the public *does* have a legitimate  
6 interest in accessing the law enforcement sensitive information at issue.

7 That interest applies more forcefully to information more closely connected to  
8 the underlying claims in a case. *See Center for Auto Safety*, 809 F.3d at 1102 (greater  
9 public interest in motions “more than tangentially related” to merits). Dousa claims  
10 that CBP had an improper motive for surveilling her and its contrary justifications are  
11 mere pretext. Dkt. 1 ¶¶ 72-74, 120-125. As a result, the public has a legitimate interest  
12 in information that reveals CBP's intelligence-collection goals—CBP's internally-  
13 stated motives for surveillance. The public has an interest, too, in information that  
14 could support or undermine the claim that CBP's surveillance was pretextual—  
15 information like CBP's internal assessment of whether it could rely on its information  
16 about Dousa's activities.<sup>2</sup>

17 CBP's countervailing interest in sealing nevertheless might have outweighed  
18 the public interest had CBP promptly raised the issue. But by the time of the Motion,  
19 CBP's interest had lost its potency. The unredacted information was publicly  
20 accessible for five months before CBP's motion, and in that time at least one news  
21 organization drew the public's attention to the documents. *See* Mari Payton, Tom  
22 Jones, and Bill Feather, Documents Reveal Border Agents Targeted U.S. Pastor Over  
23 Caravan Marriage Ceremonies, (Jan. 7, 2020), [https://www.nbcsandiego.com/  
24 news/investigations/u-s-border-agents-suspected-pastor-performed-sham-marriages-](https://www.nbcsandiego.com/news/investigations/u-s-border-agents-suspected-pastor-performed-sham-marriages-)  
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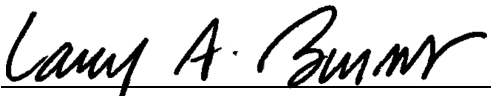
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26 <sup>2</sup> The Court makes no finding that the information in question makes Dousa's claim  
27 any more or less likely to succeed, only that it has more than a tangential relation to  
28 Dousa's claim.

1 for-migrant-caravan-members/2240500/ (last accessed Aug. 14, 2020). Removing the  
2 information from the docket now certainly “would prevent *additional* individuals . . .  
3 from accessing the information *through the Court’s docket.*” Dkt. 76-1 ¶ 5 (emphasis  
4 added). But this doubly qualified statement highlights the practical limitations of the  
5 Court’s power. The Court can neither take the information away from individuals who  
6 have already accessed it nor prevent them from distributing it to others. CBP’s need  
7 for such a questionably effective order isn’t compelling enough to overcome the  
8 public’s legitimate interest in maintaining access.

9 CBP asks the Court to close the stable door to keep an invisible horse from  
10 bolting. But that stable door sat open for five months before CBP asked the Court to  
11 secure it. Neither the Court nor CBP know whether the horse is gone, but the  
12 possibility that it’s still be there can’t outweigh public’s interest in open doors. CBP’s  
13 motion to seal is **DENIED**.

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15 Dated: August 17, 2020

  
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16 Hon. Larry Alan Burns  
17 Chief United States District Judge  
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