

The Honorable Richard A. Jones

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*,
Plaintiffs,
v.
DONALD TRUMP, President of the United
States, *et al.*,
Defendants.

No. 2:17-cv-00094-RAJ

**DEFENDANTS' RESPONSE IN
OPPOSITION TO PLAINTIFFS'
MOTION TO COMPEL RE LAW
ENFORCEMENT PRIVILEGE**

1 **I. INTRODUCTION**

2 Defendants have properly claimed the law enforcement privilege and have provided the
 3 required level of detail in their privilege logs to document their claim of privilege. Plaintiffs have
 4 incompletely represented the contents of Defendants' privilege logs and misstated the
 5 requirements for both the contents of a privilege log and a claim of privilege. First, Defendants'
 6 production of documents thus far primarily includes documents that refer or relate to the
 7 Controlled Application Review and Resolution Program ("CARRP") or the background check
 8 process conducted by U.S. Citizenship and Immigration Services ("USCIS") when adjudicating
 9 immigration benefit applications. Thus, it is intuitive and unsurprising that many of the entries on
 10 the privilege log would be similar given that the nature of the privileged information is similar.
 11 Second, there is no requirement that a governmental entity must identify on a privilege log the
 12 government official who, after a proper challenge, would later make a formal assertion of
 13 privilege before a court. And there is no requirement that a governmental entity must provide an
 14 affidavit formally asserting a privilege prior to a proper challenge in a motion to compel. Indeed,
 15 to require otherwise would create an entirely unworkable system, severely crippling the ability of
 16 senior level agency leadership to do their jobs, and rendering them as mere cogs in a civil
 17 discovery machine. Therefore, the Court should deny Plaintiffs' motion to compel.

18 **II. PROCEDURAL BACKGROUND**

19 Defendants have produced five volumes of documents in this case: Defendant USCIS
 20 Volume 001 on October 6, 2017, Defendant USCIS Volume 002 and 003 (on October 30, 2017),
 21 Defendant USCIS Volume 004 on November 22, 2017, and Defendant USCIS Volume 005 on
 22 February 12, 2018. Decl. of Joseph F. Carilli, Jr. (Feb. 20, 2018) ¶ 3, Exs. A – D (attached hereto
 23 as Ex. 1). After each production, Defendants timely produced privilege logs on October 30, 2017
 24 (Defendant USCIS Volume 001), November 3, 2017 (Defendant USCIS Volume 002),
 25 November 6, 2017 (Defendant USCIS Volume 003), and November 28, 2017 (Defendant USCIS
 26 Volume 004).¹ *Id.* ¶ 4.

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 28 ¹ Defendant USCIS Volume 005, made February 12, 2018, is not at issue in this motion. Defendants have not yet produced the privilege log for that production.

1 On January 19 and 26, 2018, via telephone conferences, Plaintiffs challenged
2 Defendants' claim of privilege. *Id.* ¶ 5. During the meet-and-confer, Defendants asked Plaintiffs
3 to identify the specific documents for which Plaintiffs were challenging the claim of privilege.
4 *Id.* Plaintiffs declined to do so; indeed to date, Plaintiffs have not identified any specific
5 documents to which their privilege challenge applies. *Id.* Subsequent to the meet-and-confer, on
6 January 31, 2018, Defendants produced revised privilege logs to further document and clarify the
7 nature of Defendants' privilege claims. *Id.*; Decl. of David Perez, Exs. 1 – 5, ECF No. 110.

8 **III. LEGAL STANDARD**

9 **A. Privilege Logs**

10 Federal Rule of Civil Procedure 26(b)(5) requires that a privilege log “describe the nature
11 of the documents, communications, or tangible things not produced or disclosed—and do so in a
12 manner that, without revealing information itself privileged or protected, will enable other parties
13 to assess the claim.” FED. R. CIV. P. 26(b)(5); *see Alliance v. Whitley Manufacturing Co.*, No. 13-
14 cv-1690, 2015 WL 13567493 (W.D. Wash. Nov. 9, 2015) (“At a minimum, the privilege log
15 must identify the nature of the redacted or withheld information, its date, the parties thereto (and
16 their connection to this litigation, if relevant), the privilege that justifies the failure to disclose,
17 and any other information necessary to show that the privilege applies.”).

18 **B. Law Enforcement Privilege**

19 The law enforcement privilege protects from dissemination information contained in both
20 criminal and civil investigatory files. *See Friedman v. Bache Halsey Stuart Shields, Inc.*, 738
21 F.2d 1136, 1341 (D.C. Cir. 1984); *United States v. McGraw-Hill Cos. Inc.*, No. 13-cv-779, 2014
22 WL 1647385, *6 (C.D. Cal. Apr. 15, 2014). The privilege acknowledges the strong public
23 interest in safeguarding the integrity of investigations, *In re Sealed Case*, 856 F.2d 268, 272
24 (D.C. Cir. 1988), and it may be invoked to protect the ongoing or future effectiveness of
25 investigatory techniques, *Shah v. Dep't of Justice*, 89 F. Supp. 3d 1074, 1080 (D. Nev. 2015).
26 “The purpose of this privilege is to prevent disclosure of law enforcement techniques and
27 procedures, to preserve the confidentiality of sources, to protect witness and law enforcement
28 personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to

1 prevent interference with an investigation.” *State Comp. Ins. Fund v. Drobot*, No. 13-cv-0956,
 2 2016 WL 3546583, at *5 (C.D. Cal. Feb. 29, 2016).

3 **IV. ARGUMENT**

4 **A. The Privilege Logs Meet the Requirements Under Federal Rule of Civil 5 Procedure 26(b)(5)**

6 Defendants’ privilege logs comply with Federal Rule of Civil Procedure 26(b)(5). Under
 7 Rule 26(b)(5), a privilege log must “describe the nature of the documents, communications, or
 8 tangible things not produced or disclosed—and do so in a manner that, without revealing
 9 information itself privileged or protected, will enable other parties to assess the claim.” FED. R.
 10 CIV. P. 26(b)(5); *see also Alliance*, 2015 WL 13567493. Defendants’ privilege logs contain all of
 11 that information, and more. Specifically, Defendants’ initial and revised privilege logs contain
 12 the following data columns: (1) Begin Bates number; (2) End Bates number; (3) Date/Time Sent
 13 (E-mail) / Date (Document); (4) To (E-mail); (5) From (E-Mail) / Author (Document); (6) CC
 14 (E-mail); (7) BCC (E-mail); (8) Document Title; (9) Date/Time Created; (10) Privilege; and (11)
 15 Privilege Description. *See, e.g., Ex. 1, Perez Decl., ECF No. 110.* Central to the dispute are the
 16 entries in column 11, entitled “Privilege Description.” An example entry in column 11 for the
 17 following document “USCIS PM-602-XXXX CARRP,” for which both the deliberative process
 18 privilege and the law enforcement privilege are asserted, is:

19 Draft CARRP policy document, which was not adopted by the agency, that was
 20 intended to rescind, update, and consolidate all USCIS CARRP policy documents;
 21 Deliberative, pre-decisional comments shared between agency officials about a
 22 revised, draft CARRP policy document that was intended to rescind, update, and
 23 consolidate all USCIS CARRP policy documents; Document contains information
 24 that identifies internal case handling procedures on the adjudication on an
 25 immigration benefit application, to include criteria used to evaluate an applicant’s
 26 eligibility for the immigration benefit, which might reveal the bases used to
 27 determine eligibility by agency officials, and if disclosed will risk circumvention
 28 or evasion of the law; Document contains information about the types of law
 enforcement checks, to include the information contained in the law enforcement
 check, performed on an applicant for an immigration benefit which might reveal
 sensitive internal law enforcement case handling procedures and if disclosed will
 risk circumvention or evasion of the law.

Id. This detailed entry is sufficient to “enable [Plaintiffs] to assess the claim.” FED. R. CIV. P.
 26(b)(5).

1 Despite the detailed nature of Defendants’ “privilege descriptions,” Plaintiffs claim that
2 the privilege logs are deficient because they believe that “Defendants must submit a proper
3 privilege log with narratives that identify the head of the department invoking the privilege.”
4 Plaintiffs’ Motion to Compel Re Law Enforcement Privilege, at 12, ECF No. 109. Defendants
5 are mistaken; simply put, there is no such requirement. *See Club Level, Inc. v. City of Wenatchee*,
6 618 F. App’x 316 (9th Cir. 2015) (listing the general information needed for each document in a
7 privilege log without mentioning the head of the department invoking the privilege).

8 Plaintiffs appear to argue that Defendants must submit an affidavit when making a claim
9 of privilege on a privilege log. The requirement for an affidavit, however, only arises after a
10 challenge before a court. *See infra* ¶ III.B. The burden Plaintiffs advance presents an unworkable
11 standard that would render senior government officials into mere functionaries of the civil
12 discovery process. *See Fed. Housing Fin. Agency v. JPMorgan Chase & Co.*, 978 F. Supp. 2d
13 267, 279 (S.D.N.Y. 2013) (finding that party’s contention that a certification must be included
14 with a privilege log “is incongruent with the real-world practicalities of agency governance”).

15 Plaintiffs’ suggestion that the privilege logs are insufficient because they contain “largely
16 the same boilerplate language for all these documents—even those that are clearly very different
17 in nature” is inaccurate, and their argument is without merit. ECF No. 109 at 8. As a threshold
18 matter, it is important to note that the information withheld in the documents produced to date
19 has come from two primary sources: (1) USCIS policy and operational guidance on the CARRP;
20 and/or (2) USCIS guidance on background checks conducted in order to adjudicate an
21 immigration benefit application. *See Perez Decl.*, Exs. 1 – 4, ECF No. 110; *infra*. Given the
22 similarities of many of the documents produced, it is entirely unremarkable—and indeed to be
23 expected—that the nature of the privileged information, and therefore the descriptions in the
24 privilege logs, would be the same or similar.

25 Moreover, Plaintiffs fail to point out or acknowledge that, on the privilege logs for
26 Defendant USCIS Volume 001 and 003, several of the entries they suggest are improper are
27 actually (a) entries for multiple drafts of the same document, *see Perez Decl.*, Exs. 1, 3, ECF No.
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1 110,² (b) entries for multiple versions or portions of the same document, *see, id.*,³ or (c) entries
 2 related to the same working group, *see id.*⁴ These overlapping and closely related entries account
 3 for 176 of the 259 entries wherein Defendants claim the law enforcement privilege.

4 Additionally, many of the near identical entries on one privilege log are identical for a
 5 reason—they are all part of one original record—a single CARRP independent study course. *See*
 6 *id.*, Ex. 2. Defendants specifically informed Plaintiffs of this fact when producing the
 7 documents. *See* Carilli Decl., Ex. C, (letter to Plaintiffs’ counsel stating “Production Volume
 8 Defendant USCIS 002 are documents associated with a [USCIS CARRP] independent study
 9 course. . . [which was originally an] Adobe Dreamweaver file.”). The description of privilege is
 10 the same for all of the documents because the documents are all part of the same original file and
 11 were merely disaggregated for production.

12 Overall, Defendants have taken great care to ensure that their privilege logs not only meet
 13 the minimum standards, but that they include greater detail than required, listing a separate entry
 14 for each document as opposed to listing categories of the documents.⁵ *See* FED. R. CIV. P.
 15 26(b)(5) advisory committee note to 1993 amendments (“[d]etails concerning time, person,
 16 general subject matter, etc., may be appropriate if only a few items are withheld, but may be
 17 unduly burdensome when voluminous documents are claimed to be privileged or protected,
 18 particularly if the items can be described by categories.”); *Phillips v. C.R. Bard, Inc.*, 290 F.R.D.
 19 615 (D. Nev. 2013) (permitting a categorical privilege log); *In re Imperial Corp. of Am.*, 174
 20 F.R.D. 475, 479 (C.D. Cal. 1997) (finding that “Fed. R. Civ. Pro. 26(b)(5) does not require the
 21 production of a document-by-document privilege log.”). In light of the specific categories and
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24 ² Listing 35 entries for USCIS PM-602-XXXX CARRP; 15 entries for USCIS Operational Guidance, National
 25 Guidance on the CARRP; 4 entries for USCIS PM-602-XXXX, Implementation of Final TECS Check Before
 26 Granting Lawful Permanent Resident Status or Administering the Oath of Allegiance to Approved Naturalization
 Applicants; 3 entries for USCIS PM-602-XXXX, Updated Instructions for Handling TECS B10 Hits.

27 ³ Listing 50 entries for certain portions and versions of the NaBISCOP.

28 ⁴ Listing 41 entries for the CARRP working group meeting minutes and notes; 28 entries for the NaBISCOP
 Advisory Panel meeting minutes.

⁵ Defendants reserve the right to list categories of documents on future privilege logs.

1 amount of information provided to Plaintiffs in Defendants' privilege logs, this Court should
2 reject Plaintiffs' non-particularized global attack on the sufficiency of such logs.

3 **B. The Information Withheld Is Privileged**

- 4 1. Defendants are not required to submit a declaration from an agency head until
5 they formally invoke the privilege.

6 Plaintiffs' generalized attack on the Defendants' claim of the law enforcement privilege
7 is also based on a fundamental misunderstanding of the requirement for a declaration by the head
8 of the agency. Plaintiffs argue that "Defendants must—for each document they assert is
9 privileged—submit an affidavit or declaration from the head of the department with control over
10 the requested information." ECF No. 109, at 6. The requirement for a declaration by the head of
11 the agency is to support a *formal* invocation of a privilege before a court; there is no such
12 requirement imposed at the initial stage of a claim of privilege. *See, e.g., United States v.*
13 *Reynolds*, 345 U.S. 1, 10-11 (1953) (accepting formal claim filed after order compelling
14 production was issued because, "when the formal claim of privilege was filed by the Secretary of
15 the Air Force, . . . there was certainly a sufficient showing of privilege to cut off further demand
16 for the document on the showing of necessity for its compulsion that had then been made"); *In re*
17 *Sealed Case*, 121 F.3d at 741 (holding White House had no obligation to formally invoke
18 privilege in advance of motion to compel; it was sufficient to state in response to subpoena a
19 "belie[f] the withheld documents were privileged"); *Phillips*, 290 F.R.D. at 615 (indicating that it
20 is not necessary for a defendant to produce an affidavit supporting the privilege for every
21 document in advance of a formal challenge to the assertion of privilege for specific documents);
22 *SEC v. Downe*, No. 92 Civ. 4092, 1994 WL 23141, at *5 (S.D.N.Y. Jan. 27, 1994) (holding
23 government not required to provide affidavit in support of investigative files privilege "prior to
24 formal motion practice"); *see also Maria Del Socorro Quintero Perez v. United States*, No. 13-
25 cv-1417, 2016 WL 362508, *3 (S.D. Cal. Jan. 29, 2016) ("Defendants failure to provide
26 Plaintiffs with a declaration in support of the law enforcement privilege at the same time they
27 provided the privilege log did not result in an automatic waiver of the privilege."). Because there
28 is no requirement to provide an affidavit at the initial instance of claiming law enforcement

1 privilege, Defendants’ privilege logs cannot be insufficient solely because they lack such
2 information.⁶

3 2. Defendants now formally invoke the law enforcement privilege.

4 The law enforcement privilege may be invoked to protect the ongoing or future
5 effectiveness of investigatory techniques. *Shah*, 89 F. Supp. 3d at 1080. In order to *formally*
6 invoke this privilege, after a formal challenge in a motion to compel, Defendants “must satisfy
7 three elements: (1) there must be a formal claim of privilege by the head of the department
8 having control over the requested information; (2) assertion of the privilege must be based on
9 actual personal consideration by that official; and (3) the information for which the privilege is
10 claimed must be specified, with an explanation as to why it properly falls within the scope of the
11 privilege.” ECF No. 98, at 3 (citing *In re Sealed Case*, 856 F.2d at 271). In formally invoking the
12 privilege before this Court, Defendants have satisfied those elements here.

13 First, Matthew D. Emrich is the Associate Director of the Fraud Detection and National
14 Security (“FDNS”) Directorate, USCIS, and, as such, is in charge of the FDNS Directorate, and
15 meets the definition of agency head. Emrich Aff. ¶ 1; *See Landry v. FDIC*, 204 F.3d 1125, 1135
16 (D.C. Cir. 2000) (allowing the head of the appropriate regional division of the FDIC’s
17 supervisory personnel to assert the deliberative process privilege, noting “it would be
18 counterproductive to read ‘head of the department’ in the narrowest possible way”). He has
19 received a formal delegation from the Director of USCIS, to invoke the law enforcement
20 privilege. *Id.* ¶ 3. Second, Associate Director Emrich is familiar with the documents and has
21 reviewed the documents and information withheld. *Id.* ¶¶ 8-10. Third, in his declaration,
22 Associate Director Emrich explains why the withheld information is within the scope of the law
23 enforcement privilege. *Id.* ¶ 12. Thus, all three elements of the assertion of privilege are met
24 here, and this Court should reject Plaintiffs’ challenge to Defendants’ privilege logs—

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27 ⁶ Nonetheless, to facilitate resolution of this current dispute, Defendants now submit a declaration to support their
28 claim of privilege. As indicated on the privilege logs and further supported by the affidavit of Matthew D. Emrich,
the information withheld is protected by the law enforcement privilege. *See Perez Decl.*, Ex. 1 – 4; Aff. of Matthew
D. Emrich (attached hereto as Ex. 2).

1 particularly when Plaintiffs continue to refuse to identify any specific documents that they are
2 challenging.

3 Additionally, in reviewing Plaintiffs' challenge to Defendants' claim of the law
4 enforcement privilege, the decision of the District Court for the District of Columbia in *ACLU of*
5 *S. Calif. v. USCIS* is instructive. 133 F. Supp. 3d 234 (D.D.C. 2015). In response to a Freedom of
6 Information Act ("FOIA") request by one of Plaintiffs' counsel, USCIS withheld similar
7 information from USCIS CARRP policy and operational guidance⁷ under FOIA Exemption 7E,
8 which protects records that would disclose techniques and procedures for law enforcement
9 investigations.⁸ 5 U.S.C. § 552(b)(7)(E) (Exemption 7E affords protection to law enforcement
10 information that "would disclose techniques and procedures for law enforcement investigations
11 or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions
12 if such disclosure could reasonably be expected to risk circumvention of the law."). The ACLU
13 challenged USCIS's withholding of the documents under FOIA Exemption 7E. *ACLU of S.*
14 *Calif.*, 133 F. Supp. 3d. at 234 (noting the ACLU is "challenging [USCIS's] search and
15 withholdings in response to ACLU's May 17, 2012 FOIA request. That request broadly sought
16 two categories of information: records relating to or concerning "policies for the identification,
17 vetting and adjudication of immigration benefits applications with national security concerns").
18 The court rejected in part ACLU's challenge and granted summary judgment, partially upholding
19 USCIS's withholding from the information under FOIA Exemption 7E.⁹ *Id.*, at 245 (finding that
20 USCIS "adequately describe[d] both the law enforcement purpose at issue and the risk of
21 circumvention of the law").

22 ⁷ The documents released in response to the ACLU's FOIA request included documents not yet produced by
23 Defendants in this litigation. The specific documents disputed in this instant motion, which were also released in
24 response to the ALCU's FOIA request, are DEF-00000009 to DEF-00000017; DEF-00000191 to DEF-00000199;
25 DEF-00000984 to DEF-00001029; DEF-00001083 to DEF-00001087, which are core CARRP policy and
26 operational guidance.

27 ⁸ Plaintiffs' First Set of Requests for Production, Request for Production 39 requested these documents in
28 unredacted form. Ex. A, Perez Decl., ECF No. 92 ("**REQUEST FOR PRODUCTION NO. 39:** All Documents
previously withheld or produced in redacted form pursuant to any exemption from the Freedom of Information Act,
produced in unredacted form. This request is limited to Documents withheld or produced in response to the ACLU
FOIA Request.).

⁹ The court upheld USCIS's withholding of information contained in the documents noted in footnote 7. *See supra*,
fn. 7.

1 Congress has also recognized the importance of the investigatory files privilege by
 2 incorporating a similar provision as Exemption 7 of the FOIA. 5 U.S.C. § 552(b)(7); *see Ctr. for*
 3 *Nat'l Sec. Studies v. Dep't of Justice*, 331 F.3d 918, 925-2626 (D.C. Cir. 2003) (quoting *NLRB v.*
 4 *Robbins Tire & Rubber Co.*, 437 U.S. 214, 232 (1978)) (“Congress recognized that law
 5 enforcement agencies had legitimate needs to keep certain records confidential, lest the agencies
 6 be hindered in their investigations.”). And, courts have recognized the relationship between
 7 FOIA exemption 7 and the law enforcement privilege. *See Commonwealth of Puerto Rico v.*
 8 *United States*, 490 F.3d 50, 63 (1st Cir. 2007) (stating this exemption “provide[s] guidance in
 9 determining the appropriate scope of the [law enforcement] privilege”). Therefore, this Court
 10 should take into account the agency’s legitimate needs and concerns, as recognized by Congress
 11 and other courts throughout the country when evaluating USCIS’s assertion of the law
 12 enforcement privilege.

13 **C. The Protective Order Does Not Provide Adequate Protection for Information**
 14 **About Law Enforcement Investigatory Techniques and Procedures**

15 Plaintiffs argue that the Court should allow disclosure of the privileged information under
 16 the Stipulated Protective Order, ECF No. 86. Although the law enforcement privilege is a
 17 qualified privilege, the Court must conduct a case-by-case balancing analysis of the interests of
 18 the requesting party against the interest of the governmental entity. *Kelly v. City of San Jose*, 114
 19 F.R.D. 653, 660 (N.D. Cal. 1987); *see In re Sealed Case*, 856 F.2d at 272 (“The public interest in
 20 nondisclosure must be balanced against the need of a particular litigant for access to the
 21 privileged information.”). The balancing analysis includes the following factors: “(1) the extent
 22 to which disclosure will thwart governmental processes by discouraging citizens from giving the
 23 government information; (2) the impact upon persons who have given information of having
 24 their identities disclosed; (3) the degree to which governmental self-evaluation and consequent
 25 program improvement will be chilled by disclosure; (4) whether the information sought is factual
 26 data or evaluative summary; (5) whether the party seeking the discovery is an actual or potential
 27 defendant in any criminal proceeding either pending or reasonably likely to follow from the
 28 incident in question; (6) whether the police investigation has been completed; (7) whether any
 intradepartmental disciplinary proceedings have arisen or may arise from the investigation; (8)

1 whether the plaintiff's suit is non-frivolous and brought in good faith; (9) whether the
2 information sought is available through other discovery or from other sources; and (10) the
3 importance of the information sought to the plaintiff's case." *Frankenhauser v. Rizzo*, 59 F.R.D.
4 339, 344 (E.D. Pa. 1973), *overruled on other grounds, Startzell v. City of Philadelphia*, No. 05-
5 05287, 2006 U.S. Dist. LEXIS 74579 (E.D. Pa. Oct. 13, 2006). Because Plaintiffs seek law
6 enforcement privileged information, they must state their compelling need for the information
7 withheld. *See In re City of N.Y.*, 607 F.3d 923, 945 (2nd Cir. 2010) (holding "that a 'compelling
8 need' is required" when a party seeks law enforcement privileged information). Here, Plaintiffs
9 certainly have not put forward any showing¹⁰ to overcome the need to protect such information,
10 nor can they in this case.

11 Courts have recognized that the release of law enforcement techniques and procedures
12 used to conduct ongoing or future investigations under a protective order is different from the
13 release of other information protected under the law enforcement privilege. The purpose of the
14 law enforcement privilege is to prevent the disclosure of "law enforcement techniques and
15 procedures" and to prevent "inference with an investigation." *State Comp. Ins. Fund*, 2016 WL
16 3546583, at *5 ("The purpose of this privilege is to prevent disclosure of law enforcement
17 techniques and procedures, to preserve the confidentiality of sources, to protect witness and law
18 enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and
19 otherwise to prevent interference with an investigation."); *Tuite v. Henry*, 181 F.R.D. 175, 176-
20 77 (D.D.C. 1998), *aff'd per curiam*, 203 F.3d 53, 340 U.S. App. D.C. 183 (D.C. Cir. 1999) (the
21 law enforcement privilege aims to protect the integrity of law enforcement techniques, sources,
22 and investigations—disclosure of which would be "contrary to the public interest in the effective
23 functioning of law enforcement."); *Abdou v. Gurrieri*, No. 05 Civ. 3946 (JG) (KAM), 2006 U.S.
24 Dist. LEXIS 68650, 2006 WL 2729247, at *3 (E.D.N.Y. Sept. 25, 2006) (finding documents
25 subject to the law enforcement privilege where disclosure "would reveal how the FBI follows up
26 on confidential lead[s] and the tools, techniques and procedures utilized in such an

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28 ¹⁰ Because Plaintiffs did not address the importance of the information in their motion, the court should not consider
an argument in Plaintiffs' reply brief without giving Defendants an opportunity to respond. *See Provenz v. Miller*,
102 F.3d 1478, 1483 (9th Cir. 1996).

1 investigation”). When balancing the interests of the requesting party against the interest of the
2 governmental entity, courts routinely withhold information of law enforcement techniques and
3 procedures, especially when that information will interfere with ongoing or future investigations.
4 *See In re City of N.Y.*, 607 F.3d. at 935-36 (discussing the risk of harm from release of
5 investigatory procedures under an “attorney’s eyes only” provision or filing under seal and
6 declining to release or filing the information where public safety is at issue); *see also*
7 *Frankenhauser*, 59 F.R.D. at 346 (allowing disclosure of police files where the police
8 investigation occurred two years prior and no criminal charges had been brought against anyone
9 and no party seeking discovery was a potential defendant in any criminal case arising out of the
10 incidents in question); *Elliott v. Webb*, 98 F.R.D. 293, 297 (D. Idaho 1983) (relying on
11 *Frankenhauser*, articulated that the distinctions between completed versus ongoing
12 investigations and factual versus self-evaluative material were the more important factors,
13 finding material contained in ongoing investigations should ordinarily remain confidential);
14 *Coalition v. Jewell*, 292 F.R.D. 44, 51-52 (D.D.C. 2013) (rejecting disclosure of “information
15 [that] could forewarn potential attackers by providing them with sensitive information that could
16 be utilized to circumvent law enforcement efforts.”).

17 The cases cited by Plaintiffs in support of disclosure under a protective order are
18 inapposite. *Cf. In re Anthem, Inc. Data Breach Litig.*, 236 F. Supp. 3d 150, 166-7 (D.D.C. 2017)
19 (ordering the disclosure of information that “d[id] not pertain to an ongoing or closed criminal or
20 civil investigation of a particular law violation” under a protective order); *Ibrahim v. Dep’t of*
21 *Homeland Sec.*, C 06-00545 WHA, 2009 WL 5069133, at *15 (N.D. Cal. Dec. 17, 2009),
22 *vacated and remanded on other grounds*, 669 F.3d 983 (9th Cir. 2012) (ordering the disclosure
23 of a “transcript of the teletype that SFPD officers received from law enforcement databases about
24 plaintiff” under a protective order); *MacNamara v. City of New York*, 249 F.R.D. 70, 87-89
25 (S.D.N.Y. 2008) (ordering disclosure of documents that “contain information regarding specific
26 vulnerabilities in the NYPD’s ability to *respond to instances of mass disorder*, as well as specific
27 techniques and procedures employed by, or expected to be employed by, the NYPD in
28 *responding to such activity*” under a protective order) (emphasis added); *Nat’l Cong. for Puerto*

1 *Rican Rights ex rel. Perez v. City of New York*, 194 F.R.D. 88, 94, 96 (S.D.N.Y. 2000) (ordering
2 disclosure of the “disciplinary records concerning individual officers” under a protective order,
3 but rejecting disclosure of documents that “describe investigatory techniques and strategies”).

4 USCIS is a component of the Department of Homeland Security responsible for
5 determining whether individuals or organizations filing for immigration benefits pose a threat to
6 national security, public safety, or the integrity of the nation’s immigration system. Emrich Aff. ¶
7 5. As part of its duties, USCIS establishes guidance and processes for identifying, reviewing, and
8 vetting immigration benefit applications that involve national security concerns. *Id.* ¶ 4. Here, the
9 information withheld as privileged includes documents that identify internal case handling
10 procedures for the adjudication of immigration benefit applications, identifies sensitive
11 information about law enforcement checks, contains record identification numbers and similar
12 codes, and identifies shortcomings and vulnerabilities of vetting. *Id.* ¶ 12. As Associate Director
13 Emrich explains, there is a significant risk of harm from disclosure of this information to any
14 third party because the information would allow insight into sensitive agency processes used to
15 vet an applicant for an immigration benefit and to adjudicate an applicant’s immigration benefit
16 application, *id.* ¶ 13, information that would potentially permit an applicant to adjust tactics or
17 responses, so as to counteract the agency’s ability to identify the truth and detect national
18 security threats, *id.* ¶ 14. Associate Director Emrich provides specific examples to demonstrate
19 the type of harm that would occur if the investigatory procedures were released to the public. *Id.*
20 ¶ 25. Indeed, Associate Director Emrich addresses that even disclosure under a protective order
21 would inadequately protect the information. *Id.* ¶ 11. Balancing the risk at hand, the risk of harm
22 to the integrity of the nation’s immigration process and security greatly outweighs any benefit
23 Plaintiffs might receive through accessing this information.

24 **V. CONCLUSION**

25 Defendants have properly claimed the law enforcement privilege and have provided the
26 necessary information to document their claim of privilege. Further, through the agency official’s
27 declaration, Defendants have established that the information withheld is privileged. Therefore,
28 the court should deny Plaintiffs’ motion to compel.

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Dated: February 20, 2018

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 20, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participants:

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