The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

DONALD TRUMP, President of the United States, *et al.*,

Defendants.

No. 2:17-cv-00094-RAJ

DEFENDANTS' REPLY IN SUPPORT OF DEFENDANTS' MOTION TO FOR LIMITED PROTECTIVE ORDER

HON. RICHARD A. JONES

NOTED ON MOTION CALENDAR: March 9, 2018

UNITED STATES DEPARTMENT OF JUSTICE
Civil Division, Office of Immigration Litigation
District Court Section
219 S. Dearborn St., 5th Floor
Chicago, IL 60604
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Plaintiffs' opposition misconstrues Defendant's motion—which was invited by the Court, and which seeks materially different relief than what has been previously litigated—as an improper second motion for reconsideration. The fact that Defendants are not seeking to withhold categories of information, but instead seeking to shape the terms of access, disclosure, and transmittal of information, is enough to dismiss Plaintiffs' unfounded mischaracterization out of hand.

Moreover, Defendants' request for this limited protection is premised on a declaration from officials not only at U.S. Citizenship and Immigration Services ("USCIS"), but also at the Federal Bureau of Investigation ("FBI") and U.S. Immigration and Customs Enforcement ("ICE"). Both FBI and ICE are charged with substantial investigative responsibilities that extend well outside the context of adjudication of adjustment of status and naturalization applications at issue in this action.

Finally, Plaintiffs' "compromise" is nothing of the sort, as it would result in the precise harms Defendants have articulated a protective order is necessary to prevent.

A. Defendants' Motion Seeks Materially Different Relief Than What Has Been Previously Litigated

At the outset, it is important to note that Defendants are *not* asking this Court to permit the names and A-numbers to be withheld from class counsel. The Court has resolved that issue. On March 5, 2018, Defendants initially produced a class list with the class members' names, A-numbers, and application filing dates[1] redacted pending resolution of the instant motion for limited protective order. Notably, Plaintiffs have identified no prejudice whatsoever that has resulted or will result from withholding this information until the instant motion is resolved and the security of the information is assured.

The question now is: Once the information is produced, how can it be used, with whom it can be shared, and how it should be protected against unauthorized and

[1] As Defendants explained to Plaintiffs, *see* ECF No. 128-1, at 1 (top message), the application filing date, taken together with other biographic information on the class list provided to Plaintiffs would permit an individual to identify him or herself, even without the use of the name or A-number.

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inadvertent disclosure? These are fundamentally different issues than the prior question of *whether* the names and A-numbers had to be disclosed at all. Plaintiffs themselves recognize this distinction, but deny it has any importance. ECF No. 127 at 4. Even if Defendants were relying on the exact same facts (which they are not), it is common sense that the same facts often apply differently in different contexts. Furthermore, the fact that the information is still considered sensitive is unexceptional—indeed, it is to be expected.

Here, where there is a different question at issue *and* it is supported by different facts (including declarations from officials of two non-party agencies with interests in the matter) the suggestion that Defendants are improperly seeking reconsideration for a second time is meritless.[2] It defies logic to claim that seeking to withhold it entirely and seeking to protect it once disclosed are identical requests.

B. Plaintiffs Have Offered No Substantively Valid Opposition

Rather than address the merits of Defendant's motion for a limited protective order, Plaintiffs continue to address the applicability of the law enforcement privilege to this information, which the Court has already decided and Defendants are not contesting in this motion. In the process of doing so, Plaintiffs step from error to error in concluding that they must be permitted to inform potential class members that their naturalization or adjustment-of-status application has been processed pursuant to CARRP.

To begin, Plaintiffs selectively quote and paraphrase from the Court's order to give the appearance that the Court has approved of their intentions to release the information on the class list to the class members, when the Court has done no such thing. *See* ECF No. 127 at 7. Plaintiffs wrote: "When denying Defendants' motion for reconsideration, the Court explicitly recognized the limited scope of Plaintiffs' request—only releasing 'the names of potential class members' to those individuals . . ." *Id.* This

[2] Plaintiffs' curious suggestion that Defendants would have been "more proactive" in seeking this relief if the information at issue were truly sensitive, ECF No. 127 at 5, is contradicted by Plaintiffs' own argument that Defendants are improperly seeking to protect the information more often than permitted. Plaintiffs' speculative commentary is also contradicted by multiple sworn declarations.

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is misleading. The Court did not hold the names of class members should or could be released "to those individuals." *Id.* What the Court wrote, in full, was:

> Plaintiffs articulated enough to tip the balance in their favor; they requested limited information—only the names of potential class members—and explained that those potential class members may already be aware of the Government's additional scrutiny considering the passage of time.

ECF No. 102 at 3. The Court did not say that the names of the individual class members should be disclosed to those class members, or approve of Plaintiffs' plan to contact those class members.[3] The Court merely found that producing a list of potential class members was not unduly burdensome, and that Defendants had failed to validly invoke the law enforcement privilege to preclude producing the list at all. *See* ECF No. 98 at 3-4.

Indeed, the Court relied in part upon the existence of the stipulated protective order to conclude that the privilege should not be enforced, *id.* at 4, and noted the limited scope of Plaintiffs' demand, explaining that "Plaintiffs did not request more than the identities of the class members" and "they requested limited information—only the names of potential class members." ECF No. 102 at 3. The Court did not comment on Plaintiffs' desire to contact individual class members and, if anything, such contacting of class members would be inconsistent with the Court's rationale, which emphasized the limited nature of the request. In any event, Plaintiffs' selective quotation should be given no credence. The Court has not previously approved of their plan.

There are further difficulties. For example, Plaintiffs suggest that "Defendants have *routinely* disclosed to individuals that they are subject to CARRP in response to FOIA requests and in other litigation." ECF No. 127 at 6. But, as previously explained, such disclosures have not been routinely made, and in any instance where such a disclosure was made, it was contrary to policy and should not have occurred. ECF No. 94 Ex. E, ¶19 & Ex. G. ¶¶13-26. Nor is it surprising that "examples of how those

[3] It would be inconceivable to require a law enforcement agency to provide a list of individuals under investigation for the purpose of notifying the subjects of investigation of that fact – yet that is essentially what Plaintiffs contend the Court has already done.

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disclosures caused any harm to law enforcement interests," ECF No. 127 at 6, would themselves be sensitive and not for public consumption in open court.

Citing their own prior assertion in a brief (but no actual facts), Plaintiffs claim that "[b]ecause the two certified classes are limited to individuals whose applications have been languishing for at least six months, they are *already* on notice that their applications have been subject to additional scrutiny." ECF No. 127 at 7 (citing ECF No. 95 at 3-4) (emphasis in original). Again, the record contradicts Plaintiffs' position. As previously shown, a great many applications that are *not* subject to CARRP remain pending for six months before they are adjudicated—it is an entirely ordinary processing timeline. ECF Nos. 73 at 4-5 & 73-1. The current average processing time for naturalization and adjustment of status applications is approximately ten months. ECF No. 126-1, Ex. A, ¶ 17. Thus, the fact that an application has been pending for six months says nothing about whether it is, or has been, subject to CARRP, so confirmation of investigations would indeed cause harm beyond what an applicant could reasonably glean from the length of time it has been pending. In addition, this harm has now been articulated by senior agency officials across multiple agencies.

Finally, Plaintiffs incorrectly state that the Court has rejected Defendants' argument that "'disclosure that an applicant is (or was) subject to CARRP . . . would allow the applicant to infer that he or she may be subject to investigative scrutiny by law enforcement.'" ECF No. 127 at 7 (quoting ECF No. 126 at 3-4). The Court did not reject that argument; it found that on balance Plaintiffs' needs outweighed the potential harm to Defendants, as it had then been articulated. The Court did not identify which, if any, of the Plaintiffs' reasons it found compelling, or which, if any, of Plaintiffs' stated intentions it condoned.

Furthermore, it would be inappropriate to read into the Court's order an intent to permit Plaintiffs to take action inconsistent with the stipulated protective order – as notifying class members of their status would be[4] – without an express statement to that

[4] Other than in the context of a deposition. *See* ECF No. 86 ¶4.2(h).

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effect. Plaintiffs were well aware of the type of information that they were likely to seek in discovery, and fully negotiated the terms of the stipulation with Defendants. Plaintiffs now resort to twisting the language and logic of the Court's orders to arrive at their desired outcome. Their conclusion should be rejected.

C. The Current Protective Order Is Insufficient and Plaintiffs' "Compromise" Is Nothing of the Sort

Plaintiffs suggest, as an alternative, the Court adopt a "compromise" that the class members' names and A-numbers would be subject to an "Attorney's Eyes Only" protective order (subject to challenge under the procedure in the existing stipulated protective order), but that Plaintiffs' counsel could inform individuals whether they are class members. This is not a compromise in any sense of the word. The list as a whole is already subject to the stipulated protective order. This proposal offers less protection than what is permitted under the already agreed-to stipulated protective order; permits individuals with pending benefit applications for whom there is (or was) an articulable link to a national security ground of inadmissibility or removability to become aware that they are or were subject to CARRP; and permits Plaintiffs to move to withdraw the Attorney Eyes Only provision without limitation. This provides no additional protection to Defendants, apart from withdrawing the ability of the named Plaintiffs to access the class list as a whole. Defendants would prefer the existing stipulated protective order remain in place than supplement it with a unilateral, one-sided "compromise."

CONCLUSION

The Court should grant Defendants' Motion for a Limited Protective Order.

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Dated: March 9, 2018

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 9, 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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