

Exhibit A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES--GENERAL

Case No. EDCV 10-0894-VAP (DTBx)

Date: November 16, 2011

Title: Tarek Hamdi v. United States Citizenship and Immigration Services, et al.

DOCKET ENTRY

PRESENT:

HON. DAVID T. BRISTOW, UNITED STATES MAGISTRATE JUDGE

Deb Taylor
Deputy Clerk

n/a
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFF:

None present

ATTORNEYS PRESENT FOR DEFENDANTS:

None present

**PROCEEDINGS: PLAINTIFF'S MOTION TO COMPEL FURTHER
DISCOVERY RESPONSES (DKT. NO. 52)**

On April 28, 2011, plaintiff filed a Motion to Compel and defendants filed a Motion for Protective Order regarding plaintiff's Request for Production of Documents and the depositions of certain individuals. Following briefing, the Court held, *inter alia*, that the deliberative process privilege and the law enforcement privilege did not appear to apply to the documents at issue, subject to the Court's in camera review of the documents, and that the policies, procedures, practices, and training pertaining to naturalization applications generally were not relevant in this action. (Dkt No. 40.) On July 8, 2011, plaintiff filed a Motion for Reconsideration with respect to the Court's finding regarding the policies, procedures, practices, and training pertaining to naturalization applications. (Dkt. No. 44.) After additional briefing and oral argument, on July 21, 2011, the Court granted in part and denied in part plaintiff's motion. Specifically, the Court concluded that the policies, procedures, practices, and training that address or relate to defendants' interpretations of the terms "association(s)," "membership(s)," and "affiliation(s)" could reasonably lead to the discovery of admissible evidence and, as such, plaintiff was entitled to discovery regarding this information. (Dkt. No. 55.)

On July 18, 2011, after an in camera review of the documents withheld by defendants on the basis of the deliberative process privilege and/or the law enforcement privilege, the Court concluded that the privileges did not apply to the majority of the documents at issue. (Dkt No. 50.)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES--GENERAL

Case No.: EDCV 10-0894-VAP (DTBx)

November 16, 2011

Tarek Hamdi v. United States Citizenship and Immigration Services, et al. Page 2

Thereafter, on July 29, 2011, and August 8, 2011, respectively, defendants filed Motions for Review of the Court's findings regarding (1) the application of the deliberative process privilege and the law enforcement privilege and (2) the discovery of information regarding the policies, procedures, practices, and training as they related to the interpretation of the terms "association(s)," "membership(s)," and "affiliation(s)." (Dkt. Nos. 56, 62.) On September 28, 2011, the District Judge issued a Minute Order granting in part and denying in part defendants' first Motion for Review and granting defendants' second Motion for Review.

In the interim, on July 25, 2011, plaintiff filed a Motion to Compel Further Discovery Responses seeking further answers to deposition questions and plaintiff's First Set of Interrogatories ("Motion"). On the same date, the parties filed a Joint Stipulation ("Jt. Stip.") reflecting their respective positions. On August 1, 2011, the Court conducted a telephonic conference and ordered the parties to further meet and confer regarding their discovery dispute. On August 4, 2011, the Court denied the parties' Joint Stipulation to shorten the time to hear the Motion and advised the parties that the Motion would be taken under submission as of the date the Reply was due and/or filed and would be decided on the papers without oral argument. (Dkt No. 61.) On August 9, 2011, the parties filed a "Joint Stipulation on Plaintiff's Motion to Compel Discovery Re Limiting Issues in Dispute and Briefing Schedule" ("8/9/11 Jt. Stip."), advising the Court that the parties had resolved some of their discovery issues. (Dkt No. 65.) Thereafter, on August 11, 2011, defendants filed a "Memorandum of Law in Opposition to Plaintiff's Second Motion to Compel" ("Opp."), and plaintiff filed a Reply on August 15, 2011 ("Reply").

Following the District Judge's September 28, 2011 Minute Order, on October 11, 2011, the Court ordered further briefing solely addressing the impact of the District Judge's September 28, 2011 ruling on the pending Motion. (Dkt No. 80.) On October 25, 2011, in accordance with the Court's Order, each party submitted a Supplemental Brief regarding this issue.

Thus, this matter is now ready for decision. For the reasons discussed below, particularly in light of the District Judge's September 28, 2011 Minute Order, plaintiff's Motion is GRANTED in part and DENIED in part.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES--GENERAL

Case No.: EDCV 10-0894-VAP (DTBx)

November 16, 2011

Tarek Hamdi v. United States Citizenship and Immigration Services, et al. Page 3

DISCUSSION

I. Deposition Questions

Plaintiff seeks to compel further answers to deposition questions. Specifically, on April 13, May 3, and May 11, 2011 respectively, plaintiff took the depositions of United States Citizenship and Immigration Service (“USCIS”) Officers Roberto Osuna and Cecil Clark, and USCIS Fraud Detection and National Security (“FDNS”) Immigration Officer Elias Valdez. (Jt. Stip. at 4.) At these depositions, defendants objected to numerous questions, citing the deliberative process privilege and/or the law enforcement privilege, and instructing the witnesses not to answer. (*Id.*) The District Judge’s September 28, 2011 Minute Order directly addressed these issues, and therefore, this portion of the dispute is largely resolved by the District Judge’s September 28, 2011 ruling.¹

A. Deliberative process privilege

The Court has reviewed the deposition questions in which defendants instructed the witnesses not to respond on the basis of the deliberative process privilege. The questions at issue relate to the evaluation of plaintiff’s naturalization application and the analysis of naturalization applications generally. As the District Judge found that defendants have properly invoked the deliberative process privilege with respect to the USCIS’s evaluation of plaintiff’s naturalization application (*see* Dkt No. 78 at 3-7), this Court is bound by such determination. As such, defendants have properly invoked this privilege with respect to those questions dealing with the evaluation of plaintiff’s naturalization application.

¹ In the Joint Stipulation, the parties organized the deposition testimony into categories. Following a meet and confer, the parties narrowed the categories of information sought, and plaintiff notified the Court that he no longer sought further testimony regarding categories XII, XIII, XIV, and XV as identified in the Joint Stipulation. (*See* 8/9/11 Jt. Stip.)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES--GENERAL

Case No.: EDCV 10-0894-VAP (DTBx)

November 16, 2011

Tarek Hamdi v. United States Citizenship and Immigration Services, et al. Page 4

Although the Court finds that some of defendants' objections on the basis of the deliberative process privilege were not justified with respect to a few of the more general questions, see Lahr v. Nat'l Transp. Safety Bd., 569 F.3d 964, 979-80 (9th Cir. 2009), the Court concludes that this information was not discoverable on the basis of relevance, as discussed, *supra*.

B. Law enforcement privilege

Defendants also invoked the law enforcement privilege in response to many of the deposition questions. The law enforcement privilege² is a qualified privilege designed "to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witness and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent inference with an investigation." In re the City of N.Y., 607 F.3d 923, 941 (2d Cir. 2010) (quoting In re Dep't of Investigation of the City of N.Y., 856 F.2d 481, 484 (2d Cir. 1988)); Bernat v. City of Cal. City, No. 1:10-cv-00305 OWW JLT, 2010 WL 4008361, at *5 (E.D. Cal. Oct. 12, 2010) (citing In re Dep't of Investigation of City of N.Y.); Ibrahim v. Dep't of Homeland Sec., No. C 06-00545 WHA, 2009 WL 5069133, at *14 (N.D. Cal. Dec. 17, 2009) (citing In re Dep't of Investigation of City of N.Y.). The burden of invoking the privilege rests with the party seeking its benefits. Kelly v. City of San Jose, 114 F.R.D. 653, 662 (N.D. Cal. 1987); see generally Cheney v. U.S. Dist. Ct. for the Dist. of Columbia, 542 U.S. 367, 383, 124 S. Ct. 2576, 159 L. Ed. 2d 459 (2004). "The privilege must be formally asserted and delineated in order to be raised properly, and the party opposing disclosure must state with specificity the rationale of the claimed privilege." Howard, 2011 WL 2182441, at *1 (internal quotation marks and citation omitted). Further, "[s]ince privileges derogate

² The law enforcement privilege also has been referred to as the official information privilege, the government privilege, and the executive privilege. See, e.g., Brooks v. Cnty. of San Joaquin, 275 F.R.D. 528, 532 (E.D. Cal. 2011); Howard v. Cnty. of San Diego, No. 09-CV-2416-IEG (WVG), 2011 WL 2182441, at *1 n.1 (S.D. Cal. June 3, 2011).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES--GENERAL

Case No.: EDCV 10-0894-VAP (DTBx)

November 16, 2011

Tarek Hamdi v. United States Citizenship and Immigration Services, et al. Page 5

the search for the truth they are supposed to be narrowly construed.” Kelly, 114 F.R.D. at 659 (citing United States v. Nixon, 418 U.S. 683, 710, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974)). Assertion of the law enforcement privilege requires: “(1) [A] formal claim of privilege by the ‘head of the department’ having control over the requested information; (2) assertion of the privilege based on actual personal consideration by that official; and (3) a detailed specification of the information for which the privilege is claimed, with an explanation why it properly falls within the scope of the privilege.” Landry v. F.D.I.C., 204 F.3d 1125, 1135 (D.C. Cir. 2000) (citing In re Sealed Case, 856 F.2d 268, 271 (D.C. Cir. 1988)); see also Howard, 2011 WL 2182441, at *1 (“The affidavit must contain, *inter alia*, “a specific identification of the governmental or privacy interests that would be threatened by disclosure of the material to plaintiff and/or his lawyer,” “a description of how disclosure subject to a carefully crafted protective order would create a substantial risk of harm to significant governmental or privacy interests,” and “a projection of how much harm would be done to the threatened interests if the disclosure were made.”) (quoting Soto v. City of Concord, 162 F.R.D. 603, 613 (N.D. Cal. 1995)). The official claiming the privilege must “have seen and considered the contents of the documents and himself have formed the view that on grounds of public interest they ought not to be produced and state with specificity the rationale of the claimed privilege.” Kerr v. U.S. Dist. Crt. for the N. Dist. of Cal., 511 F.2d 192, 198 (9th Cir. 1975) (citing United States v. Reynolds, 345 U.S. 1, 8 n.20, 73 S. Ct. 528, 97 L. Ed. 727 (1953)), affirmed by 426 U.S. 394, 96 S. Ct. 2119, 48 L. Ed. 2d 725 (1976); Howard, 2011 WL 2182441, at *1. A general claim of harm to the public interest is insufficient to overcome the burden placed on the party seeking to shield material from disclosure. Miller v. Pancucci, 141 F.R.D. 292, 300 (C.D. Cal. 1992); Howard, 2011 WL 2182441, at *2.

After considering the declaration submitted by Jane Arellano, District Director of the USCIS, the Court concludes that defendants have not satisfied their burden of invoking the law enforcement privilege. Director Arellano’s identification of harm is couched in general terms and does not identify any specific governmental interest or harm at issue. (Declaration of Jane Arellano (“Arellano Decl.”) at ¶8 (“Disclosure of such information would reveal investigatory techniques and procedures and would impair the agency’s law enforcement investigative process.”).) Indeed, Director

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES--GENERAL

Case No.: EDCV 10-0894-VAP (DTBx)

November 16, 2011

Tarek Hamdi v. United States Citizenship and Immigration Services, et al. Page 6

Arellano's declaration is substantially similar to the one previously submitted by defendants with respect to plaintiff's Motion to Compel the production of documents. The Court previously determined that declaration was insufficient to invoke the law enforcement privilege, a finding that was confirmed by the District Judge in the September 28, 2011 Minute Order. Specifically, the District Judge held, "[d]efendants did not, as they were required to do, submit a declaration or affidavit from the appropriate head of the department, stating inter alia, with specificity the rationale of the claimed privilege." (Dkt No. 78 at 8.) Although defendants appear to identify more specific harm in the Joint Stipulation, this does not alleviate their burden of complying with the specific requirements for asserting this privilege. There has been no showing that Director Arellano, after reviewing information at issue, concluded that any specific harm would result or how much harm would be done or threatened. See Bernat, 2010 WL 4008361, at *6; see also Howard, 2011 WL 2182441, at *1. As such, defendants have not properly invoked this privilege. Accordingly, defendants may not withhold the information sought on the basis of the law enforcement privilege.

C. Relevance

Defendants further contend that, regardless of an asserted privilege, the information at issue is not relevant and thus, plaintiff's Motion should be denied on this basis. (See Jt. Stip. at 6-8; defendants' Supplemental Letter Brief dated October 25, 2011 at 2-5.) Preliminarily, defendants did not object to the deposition testimony on this basis nor file a motion for a protective order. Nevertheless, a discovery request must be relevant to the subject matter involved in the pending action or reasonably calculated to lead to the discovery of admissible evidence. Fed. R. Civ. P. 26(b)(1). Pursuant to this Court's previous findings and the District Judge's September 28, 2011 Minute Order, information regarding the policies, procedures, practices, and training pertaining to naturalization applications generally are not relevant and not likely to lead to the discovery of admissible evidence. Accordingly, most of the deposition testimony at issue is not discoverable.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES--GENERAL

Case No.: EDCV 10-0894-VAP (DTBx)

November 16, 2011

Tarek Hamdi v. United States Citizenship and Immigration Services, et al. Page 7

Nevertheless, there remains a limited number of questions which sought to elicit information regarding plaintiff's specific naturalization application and to which the only objection raised was based of the law enforcement privilege, which the Court has determined was not properly invoked. As such, plaintiff's Motion to compel further deposition testimony regarding the following topics shall be granted as such subject matter specifically related to plaintiff's naturalization application:

1. Valdez Deposition

- a. Whether plaintiff's case was a national security case (Jt. Stip. at 21 (Valdez Depo. at 137:22-138:3).)
- b. Why plaintiff's case was a CARRP case (Jt. Stip. at 21 (Valdez Depo. at 177:23-178:4).)
- c. Why there was a "positive response" in plaintiff's case (Jt. Stip. at 56 (Valdez Depo. at 157:22-158:3).)
- d. When was the last time that Mr. Valdez had a conversation with certain Federal Bureau of Investigation ("FBI") agents regarding plaintiff (Jt. Stip. at 56 (Valdez Depo. at 175:13-17).)
- e. Mr. Valdez's understanding as to whether FBI agents were investigating plaintiff (Jt. Stip. at 56 (Valdez Depo. at 178:19-179:3).)
- f. The purpose of speaking to FBI agents regarding plaintiff's case (Jt. Stip. at 57 (Valdez Depo. at 181:22-183:24).)
- g. Whether an investigation regarding plaintiff remains ongoing (Jt. Stip. at 57 (Valdez Depo. at 181:22-183:24).)
- h. The purpose of speaking to Mr. Clark regarding plaintiff's case (Jt. Stip. at 73 (Valdez Depo. at 189:8-12).)
- i. Whether the grounds for removability were based on a national security issue (Jt. Stip. at 83 (Valdez Depo. at 185:18-186:25).)
- j. The work Mr. Valdez did on plaintiff's case (Jt. Stip. at 83-84 (Valdez Depo. at 190:18-192:4).)
- k. What databases Mr. Valdez checked with regard to plaintiff's case (Jt. Stip. at 84 (Valdez Depo. at 190:18-192:4).)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES--GENERAL

Case No.: EDCV 10-0894-VAP (DTBx)

November 16, 2011

Tarek Hamdi v. United States Citizenship and Immigration Services, et al. Page 8

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- l. Whether Mr. Valdez requested any information from any other law enforcement agencies regarding plaintiff (Jt. Stip. at 84 (Valdez Depo. at 190:18-192:4).)
 - m. Why Mr. Valdez attended plaintiff's hearing (Jt. Stip. at 84-85 (Valdez Depo. at 190:18-192:4).)
 - n. Documents establishing that plaintiff was moving at the time of his interview (Jt. Stip. at 86 (Valdez Depo. at 201:16-204:24).)
 - o. How Mr. Valdez determined whether plaintiff lived at a certain residence (Jt. Stip. at 87 (Valdez Depo. at 201:16-204:24).)
 - p. What questions Mr. Caputo asked plaintiff during his interview (Jt. Stip. at 91 (Valdez Depo. at 172:22-173:3).)
 - q. The responses plaintiff gave during his interview with Mr. Caputo (Jt. Stip. at 91 (Valdez Depo. at 172:22-173:33).)
 - r. What documents Mr. Valdez reviewed regarding an exchange between Mr. Caputo and plaintiff (Jt. Stip. at 92 (Valdez Depo. at 219:9-220:10).)
 - s. Declaration concerning plaintiff and the source of the information contained in the declaration (Jt. Stip. at 92-93 (Valdez Depo. at 228:23-229:16).)
 - t. Any investigations Mr. Valdez conduct regarding Mr. Caputo's interview (Jt. Stip. at 93 (Valdez Depo. at 228:23-229:16).)
2. Clark Deposition
 - a. Information received from the FBI (Jt. Stip. at 58-59 (Clark Depo. at 121:11-122:20).)
3. Osuna Deposition
 - a. Whether Mr. Osuna met with FBI personnel or spoke to them on the telephone regarding plaintiff's application (Jt. Stip. at 59 (Osuna Depo. at 91:10-16).)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES--GENERAL

Case No.: EDCV 10-0894-VAP (DTBx)

November 16, 2011

Tarek Hamdi v. United States Citizenship and Immigration Services, et al. Page 9

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- b. The difference between a background check and administrative check in the context of plaintiff's case (Jt. Stip. at 67 (Osuna Depo. at 87:10-88:9).)

As to the following questions, it appears that plaintiff's counsel was seeking information regarding plaintiff's naturalization application. As such, to the extent that these questions were seeking information regarding plaintiff's naturalization application, such information is relevant. On the other hand, to the extent plaintiff's counsel was seeking information regarding the policies, procedures, practices, and training of naturalization applications generally, such information is not discoverable.

1. Valdez Deposition

- a. The purpose of speaking with Mr. Osuna (Jt. Stip. at 73 (Valdez Depo. at 189:7-17).)
- b. A conversation with Mr. Clark regarding the grounds for ineligibility (Jt. Stip. at 74 (Valdez Depo. at 243:11-15).)
- c. The purpose of talking to Mr. Caputo (Jt. Stip. at 91 (Valdez Depo. at 172:22-173:3).)

2. Clark Deposition

- a. Information Mr. Clark received from the FBI (Jt. Stip. at 58 (Clark Depo. at 118:12-16).)
- b. What the "positive" designation meant on plaintiff's Exh. 18 (Jt. Stip. at 62-63 (Clark Depo. at 85:7-86:2).)
- c. What the term "unclass" meant on plaintiff's Exh. 43 (Jt. Stip. at 64 (Clark Depo. at 93:21-94:10).)
- d. What the term "non-ident" meant on plaintiff's Exh. 43 (Jt. Stip. at 64-65 (Clark Depo. at 94:12-21).)
- e. What the term "reassign" meant on a particular file (Jt. Stip. at 65 (Clark Depo. at 95:9-96:16).)
- f. What the phrase "CMI Jane" meant on a particular file (Jt. Stip. at 65 (Clark Depo. at 95:9-96:16).)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES--GENERAL

Case No.: EDCV 10-0894-VAP (DTBx)

November 16, 2011

Tarek Hamdi v. United States Citizenship and Immigration Services, et al. Page 10

II. Interrogatory No. 10³

By way of Interrogatory No. 10, plaintiff sought information regarding all naturalization applications that defendants have denied in the last five years “because the applicant failed to disclose, in response to questioning about their organizational ‘associations,’ any or all of the organizations to which they have made donations.” (Jt. Stip. at 139.) Defendants objected on the grounds that the interrogatory was overbroad, unlimited in scope, unduly burdensome, irrelevant, and may seek information protected by the attorney-client, deliberative process, and law enforcement privileges. (Jt. Stip. at 139-40.)

The District Judge’s September 28, 2011 Minute Order has resolved this discovery issue. Specifically, the District Judge held that this action is “one solely for relief under 8 U.S.C. § 1421(c), naturalization by the District Court.” (Dkt. No. 78 at 10.) Because the District Judge will review plaintiff’s naturalization application de novo, neither the process nor the outcome of the USCIS hearing or appeal are at issue in this action. (Id.) Likewise, defendants’ denial of other applications regarding the question of association would not be discoverable. As previously explained, in its review, the District Judge makes its own findings of fact and conclusions of law. United States v. Hovsepien, 359 F.3d 1144, 1162 (9th Cir. 2004) (en banc). As such, given that such information is not relevant and considering the substantial burden of producing this information, plaintiff’s Motion to compel further responses to Interrogatory No. 10 is denied.⁴

³ Plaintiff originally sought further responses to Interrogatory Nos. 1, 9, 10, and 13. However, pursuant to the parties’ August 9, 2011 Joint Stipulation, the parties resolved their discovery dispute as to Interrogatory Nos. 1 and 9. (8/9/11 Jt. Stip. at 1.) Thereafter, defendants also supplemented their response to Interrogatory No. 13. (Opp. at 6.) As such, plaintiff clarified in his Reply that he now only seeks to compel a further response to Interrogatory No. 10. (Reply at 1 n.1.)

⁴ Plaintiff appears to concede that the District Judge’s September 28, 2011 Minute Order likely resolved this issue in defendants’ favor. (See plaintiff’s

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES--GENERAL

Case No.: EDCV 10-0894-VAP (DTBx)

November 16, 2011

Tarek Hamdi v. United States Citizenship and Immigration Services, et al. Page 11

Accordingly, plaintiff's Motion to compel further responses to Interrogatory No. 10 is denied.

CONCLUSION AND ORDER

For the foregoing reasons, IT IS THEREFORE ORDERED AS FOLLOWS:

(1) Plaintiff's Motion to compel further responses to deposition questions is GRANTED in part and DENIED in part. Within 14 days of the service date of this Minute Order, defendants are ordered to produce Messers. Osuna, Clark, and Valdez for their depositions on the limited information described above. In all other respects, plaintiff's Motion to compel further deposition testimony is DENIED.

(2) Plaintiff's Motion to Compel a further response to Interrogatory No. 10 is DENIED.

The Court is mindful of the District Judge's cautionary comment that: "Neither side will be permitted at trial to introduce or otherwise rely on evidence it has not previously disclosed in discovery, particularly any evidence as to which it has claimed the shield of privilege, unless such evidence can be identified properly as rebuttal evidence, a very narrow category indeed." (Dkt No. 78 at 10.)

Supplemental Letter Brief dated October 25, 2011 at 1-2.)