UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

GULET MOHAMED, Plaintiff, v. ERIC H. HOLDER, JR., in his official capacity as Attorney General of the United States, *et al*., Defendants.	)	Case No. 1:11-CV-0050

DEFENDANTS' REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION

Defendants respectfully submit this reply memorandum in support of their motion to reconsider or clarify the Court's Order dated August 6, 2014, directing the Defendants to provide an *in camera* submission. *See* ECF No. 125 ("August 6 Order"); 128-129 ("Defs' Mot. to Reconsider"). Plaintiff's opposition, *see* ECF No. 137, largely ignores the Defendants' motion to reconsider; instead, Plaintiff briefly asserts the Court's authority to issue the August 6 Order and otherwise uses the opposition as an opportunity to make arguments regarding the constitutional merits of the No Fly List—a question which cannot be decided prior to resolution of the instant motion and the pending motion to dismiss. Plaintiff does not substantively address Parts II, III and IV of the Motion to Reconsider, and instead asserts the intent to seek leave to file a sixth Complaint in this matter (to which Defendants will respond in due course).

I. The Proposed *In Camera* Submission Is Not an Appropriate Means to Evaluate an Assertion of the State Secrets Privilege and Motion to Dismiss.

Fourth Circuit case law establishes a process for evaluating the state secrets privilege, and that process does not involve a merits-based submission that would include classified or

otherwise privileged information not subject to Plaintiff's motion to compel. The Court can and should evaluate the assertion of the privilege based on an assessment of the declarations currently provided to the Court, a procedure firmly established in Fourth Circuit case law. *See* Defs' Mot. to Reconsider at 3-8. *See also El-Masri v. United States*, 479 F.3d 296, 308 (4th Cir. 2007); *Sterling v. Tenet*, 416 F.3d 338, 348 (4th Cir. 2005).[1]

Plaintiff's only substantive argument against reconsideration is based upon a single statement in which the Fourth Circuit noted that it could be proper for a Court to review all underlying classified information. Opposition at 3 (quoting *Sterling*, 416 F.3d at 348). Plaintiff, however, quotes that language outside of its proper context. In *Sterling*, the Fourth Circuit opined that "district courts frequently can satisfy themselves of the sufficiency of that claim through the explanation of the department head who is lodging it," but further noted that, hypothetically, "[t]here may of course be cases where the necessity for evidence is sufficiently strong and the danger to national security sufficiently unclear that in camera review of all materials is required to evaluate the claim of privilege." *Sterling*, 416 F.3d at 344-45. This discussion in *Sterling*, though, ends with a caution: "But both Supreme Court precedent and our own cases provide that when a judge has satisfied himself that the dangers asserted by the government are substantial and real, he need not—indeed, should not—probe further." *Id*. at 345. That caution is underscored by similar warnings from the Fourth Circuit and the Supreme Court. *See id.* at 344 ("Once the judge is satisfied that there is a 'reasonable danger' of state secrets being exposed, any further disclosure is the sort of 'fishing expedition' the Court has declined to countenance. Courts are not required to play with fire and chance further disclosure—inadvertent, mistaken, or even intentional—that would defeat the very purpose for

[1] As offered in the Motion for Reconsideration, if the Court requires additional explication of the privileged information at issue and/or briefing on the appropriate standard for substantive due process, Defendants would provide further briefing on either question.

which the privilege exists.") (internal citations omitted); *El-Masri*, 479 F.3d at 311 ("when 'the occasion for the privilege is appropriate, . . . the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers'") (quoting *Reynolds v. United States*, 345 U.S. 1, 10 (1953)).

This is not a case where "the danger to national security [is] sufficiently unclear" such that further *in camera* submissions would be appropriate; nor has the Court made such a determination. Rather, like the Court of Appeals in *El-Masri* and *Sterling*, this Court already has before it the materials necessary to conclude that the privilege has been properly invoked and that further litigation of this matter presents a reasonable danger of exposing the privileged information. *See* Defs' Mot. to Reconsider at 5-8; Defs' Mot. to Compel Opp. at 11-14 (ECF No. 102); Defs' Mot. to Dismiss (ECF No. 105).[2]

Even assuming that Plaintiff has even made the broader, facial substantive due process claim as articulated in the August 6 Order, it is clear from the information already submitted and the nature of such a claim that further litigation would risk disclosure of information that is subject to the state secrets privilege. Further litigation along the lines suggested by the Court's August 6 Order would require probing of current intelligence regarding the nature and scope of the threats to civil aviation, the means by which the United States seeks to address those threats, and the specific information, if any, regarding Plaintiff and how he relates to such threats. Accordingly, the Court should be able to readily conclude on the basis of the information already available to it that further litigation risks disclosure of state secrets privileged information. *See El-Masri*, 479 F.3d at 309-10 (describing hypothetical defenses to plaintiff's claims that could

[2] It does not appear that Plaintiff actually disputes this point. At the motion hearing, Plaintiff seemed to maintain that the information he seeks in discovery is necessary to the litigation. Here, Plaintiff does not deny that the information he seeks—and possibly the additional information requested by the Court's August 6 Order—is necessary to litigate his substantive claims, but rather he appears to question whether the privilege applies to that information.

require disclosure of state secrets to litigate); *Sterling*, 416 F.3d at 345-47 (discussing the nature of the evidence likely to be relevant).

Moreover, the August 6 Order goes well beyond the type of *in camera* submission described hypothetically in *Sterling*. The *Sterling* court addressed the possibility that a court could review information over which the privilege had been asserted to evaluate the claim of privilege, not to conduct a review on the merits. Plaintiff cites to no state secrets case in which a court required a merits-based submission about what evidence the Defendants *might* use should the case proceed. Here, the Defendants have asserted the state secrets privilege over information sought by Plaintiff in discovery, and they have explained in public and *ex parte* declarations how both the nature of this information and the nature of the claims at issue in this case require the dismissal of Plaintiff's substantive and procedural claims. *See generally* Defs' Mot. to Dismiss. If the Court believed that the threat to national security from the information sought in discovery was unclear, under the *Sterling* court's reasoning, it could order *in camera* submission of the information and documents described in Defendants' declarations to provide an additional explanation about why the information sought in discovery or the nature of Plaintiff's claims warrant dismissal. Instead, the August 6 Order appears to require a merits-based submission of Defendants' hypothetical case should this matter proceed, something that is not contemplated in the procedures for reviewing an assertion of the state secrets privilege as set forth in *Sterling*.[3]

In summary, as required by *Sterling*, the Government has satisfied the Fourth Circuit's standards for upholding the state secrets privilege and dismissing this case. Defendants have provided a thorough description of the harm to national security that would result from the

[3] Moreover, as set forth in more detail in Defendants' motion for reconsideration, the August 6 Order seems to require a merits-based submission of other information relating to a claim that Plaintiff has not asserted and information that is not yet at issue in the case. Plaintiff's opposition does not address the key aspect of the August 6 Order about which Defendants seek reconsideration or clarification: the Order seems to require the submission of new, classified information that is not the subject of Plaintiff's motion to compel.

disclosure of the privileged information sought in discovery, as well as an explanation about how the very nature of Plaintiff's claims will similarly involve privileged information. The additional submissions ordered by the Court run counter to this Circuit's established state secrets privilege case law and are not necessary to conclude that the privilege requires dismissal of this case.

II. Plaintiff's Discussion of an Allegedly Leaked Version of the 2013 Watchlisting Guidance Is Irrelevant to the Resolution of This Motion and, Regardless, a Purported Unauthorized Disclosure of Privileged Information Does Not Waive Otherwise Applicable Privileges and Protections.

Plaintiff argues that the purported leak of the 2013 Watchlisting Guidance provides "a factual basis for doubting the propriety of the Government's [state secrets] privilege assertion." Opposition at 4. The purported leak does no such thing and, as a preliminary matter, the purported leak is simply irrelevant to the questions presented in Defendants' Motion for Reconsideration or Clarification.

Defendants moved the Court for reconsideration or clarification of its August 6 order because Defendants were uncertain of the purpose for which the Court requested an *in camera* submission. Defendants believe that the Court's August 6 Order could be read one of two ways—as requiring the *in camera* submission either in further support of Defendants' assertion of the state secrets privilege, or as a substantive response to a different construction of Plaintiff's substantive due process claim—or possibly even some other way. *See* Defs' Mot. to Reconsider at 1-2, 16-17. Defendants moved for reconsideration or clarification because the Court's purpose for requesting an *in camera* submission will affect the way in which they craft their response. *Id.* While Defendants moved for reconsideration on both grounds, at bottom, Defendants first asked the Court to clarify the purpose for which it requested an *in camera* submission.

In this context, Plaintiff's argument that the allegedly leaked version of the Watchlisting Guidance is unrelated to Defendants' motion for reconsideration of the requested *in camera*

submission. The Court has not ordered the *in camera* production of the documents over which Defendants asserted the state secrets privilege (including the Watchlisting Guidance), and Plaintiff's discussion of a purported leak of the Watchlisting Guidance is therefore irrelevant to the arguments before the Court on this motion. The relevant question presented by Defendants' motion for reconsideration is whether the ordered *in camera* submission on the merits is an appropriate means to evaluate an assertion of the state secrets privilege. *See supra* 1-5.

Regardless, unless the allegedly leaked document is an official, intentional disclosure, any privileges or protections asserted over the document continue to attach. It is well-established that the purported unauthorized disclosure of privileged information does not waive otherwise applicable privileges and protections. *See Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1370 (4th Cir. 1975); *Wolf v. CIA*, 473 F.3d 370, 378 (D.C. Cir. 2007); *see also Maxwell v. First Nat'l Bank of Md.*, 143 F.R.D. 590, 597-98 (D. Md. 1992) ("The state secrets privilege [] must have a standard for waiver based on public disclosure that is at least as stringent as the one under FOIA."). Litigants seeking to establish that national security information already resides in the public domain bear the burden of demonstrating that, among other things, the specific information at issue has been "officially acknowledged," or in other words, "the information requested must already have been made public through an *official* and *documented* disclosure." *Wolf*, 473 F.3d at 378 (emphasis added). Harms to national security can arise in circumstances where parties seek to use purportedly leaked documents to force government officials to reveal sensitive information. *See Colby*, 509 F.2d at 1370; *Maxwell*, 143 F.R.D. at 597. Courts distinguish so firmly between official and unofficial disclosures because of the "critical difference" between them. *See Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990); *Alsawam v. Obama*, 764 F. Supp. 2d 11, 15 (D.D.C. 2011).

Plaintiff does not argue, let alone demonstrate, that the purportedly leaked document is an officially acknowledged disclosure. His reliance upon the allegations of a website that the document is authentic does not alter this analysis; as the Fourth Circuit observed, "[i]t is one thing for a reporter . . . to speculate or guess that a thing may be so or even, quoting undisclosed sources, to say that it is so; it is quite another thing for one in a position to know of it officially to say that it is so." *Colby*, 509 F.2d at 1370; *see also ACLU v. U.S. Dep't of Def.*, 628 F.3d 612, 621-22 (D.C. Cir. 2011).

Plaintiff's arguments regarding the purported leak of the Watchlisting Guidance are wholly unrelated to the Motion for Reconsideration and, in any event, provide no reason to doubt the assertion of the state secrets privilege.

Dated: September 11, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 11, 2014, I electronically filed the foregoing Opposition with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following counsel of record:

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