

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

**USAMA JAMIL HAMAMA, et al.,**

Petitioners and Plaintiffs,

v.

**REBECCA ADDUCCI, et al.,**

Defendants and Respondents.

Case No. 2:17-cv-11910

Hon .Mark A. Goldsmith

Mag. David R. Grand

Class Action

**RESPONDENTS' MEMORANDUM IN SUPPORT OF GOVERNMENT  
PRIVILEGE CLAIMS**

Pursuant to the Court's March 13, 2018 Order, ECF No. 254, Respondents, by and through their undersigned counsel, hereby provide this memorandum in support of their privilege assertions and other basis for withholding information responsive to Petitioners'/Plaintiffs' First Set of Interrogatories to All Respondents.

Defendant Immigration and Customs Enforcement (ICE) and Defendant Department of Homeland Security (DHS) assert the law enforcement privilege with respect to portions of their responses to Interrogatory 12 as set forth below, and provide the attached declarations as justification for the asserted privilege.

Specifically, Interrogatory Number 12 seeks:

The name, title and department of the government (for both Iraq and the United States) of each individual negotiating the Iraqi Agreement, including the "ongoing diplomatic negotiations" referenced in the declaration of

Michael V. Bernacke at paragraph 4 (ECF 184-2, Pg.ID# 5070-71), identification of the individuals authorized to enter into any agreement reached by the governments regarding the repatriation of Iraqi Nationals, and the date each individual engaged in the “ongoing diplomatic negotiations.”

For the reasons explained herein and the attached declarations, Defendant ICE and Defendant DHS have withheld certain names of ICE officers and foreign government officials who participated in meetings regarding the implementation of removals to Iraq. *See* Ex. 1, Declaration of Philip T. Miller, and Ex. 2, Declaration of James W. McCament.

### **I. Legal Standard**

The law enforcement privilege protects from dissemination information contained in both criminal and civil investigatory files. *See Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1136, 1341 (D.C. Cir. 1984); *United States v. McGraw-Hill Cos. Inc.*, No. 13-cv-779, 2014 WL 1647385, \*6 (C.D. Cal. Apr. 15, 2014). The privilege acknowledges the strong public interest in safeguarding the integrity of investigations, *In re Sealed Case*, 856 F.2d 268, 272 (D.C. Cir. 1988), and it may be invoked to protect the ongoing or future effectiveness of investigatory techniques, *Shah v. Dep’t of Justice*, 89 F. Supp. 3d 1074, 1080 (D. Nev. 2015).

“The purpose of this privilege is 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 interference with an

investigation.” *State Comp. Ins. Fund v. Drobot*, No. 13-cv-0956, 2016 WL 3546583, at \*5 (C.D. Cal. Feb. 29, 2016); *Tuite v. Henry*, 181 F.R.D. 175, 176-77 (D.D.C. 1998), *aff’d per curiam*, 203 F.3d 53, 340 U.S. App. D.C. 183 (D.C. Cir. 1999) (the law enforcement privilege aims to protect the integrity of law enforcement techniques, sources, and investigations—disclosure of which would be “contrary to the public interest in the effective functioning of law enforcement.”); *Abdou v. Gurrieri*, No. 05 Civ. 3946 (JG) (KAM), 2006 U.S. Dist. LEXIS 68650, 2006 WL 2729247, at \*3 (E.D.N.Y. Sept. 25, 2006) (finding documents subject to the law enforcement privilege where disclosure “would reveal how the FBI follows up on confidential lead[s] and the tools, techniques and procedures utilized in such an investigation”). When balancing the interests of the requesting party against the interest of the governmental entity, courts routinely withhold information of law enforcement techniques and procedures, especially when that information will interfere with ongoing or future investigations.

Although the law enforcement privilege is a qualified privilege, the Court must conduct a case-by-case balancing analysis of the interests of the requesting party against the interest of the governmental entity. *Kelly v. City of San Jose*, 114 F.R.D. 653, 660 (N.D. Cal. 1987); *see In re Sealed Case*, 856 F.2d at 272 (“The public interest in nondisclosure must be balanced against the need of a particular litigant for access to the privileged information.”). The balancing analysis includes

the following factors: “(1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who have given information of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether the information sought is factual data or evaluative summary; (5) whether the party seeking the discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the 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) whether the plaintiff’s suit is non-frivolous and brought in good faith; (9) whether the information sought is available through other discovery or from other sources; and (10) the importance of the information sought to the plaintiff’s case.” *Frankenhauser v. Rizzo*, 59 F.R.D. 339, 344 (E.D. Pa. 1973), overruled on other grounds, *Startzell v. City of Philadelphia*, No. 05-05287, 2006 U.S. Dist. LEXIS 74579 (E.D. Pa. Oct. 13, 2006).

## **II. STANDARDS FOR INVOKING PRIVILEGE**

In order to formally invoke the privilege, Defendants “must satisfy three elements: (1) there must be a formal claim of privilege by the head of the department having control over the requested information; (2) assertion of the privilege must be

based on actual personal consideration by that official; and (3) the information for which the privilege is claimed must be specified, with an explanation as to why it properly falls within the scope of the privilege.” *In re Sealed Case*, 856 F.2d at 271). As explained below, Defendants have satisfied those elements here.

First, with regard to Defendant ICE’s invocation of the privilege: Philip T. Miller is the Deputy Executive Associate Director, Office of Enforcement and Removal Operations (ERO), in Washington, D.C. In this position, he assists the Executive Associate Director in leading ERO, including overseeing programs and operations to identify and apprehend removable aliens, to detain these individuals when necessary, and to remove illegal aliens from the United States. *See* Ex. 1 Decl. of Philip T. Miller; *see Landry v. FDIC*, 204 F.3d 1125, 1135 (D.C. Cir. 2000) (allowing the head of the appropriate regional division of the FDIC’s supervisory personnel to assert the deliberative process privilege, noting “it would be counterproductive to read ‘head of the department’ in the narrowest possible way”). As the Deputy Executive Associate Director of ERO, he is the appropriate person to invoke the law enforcement privilege. *Id.* ¶ 3. In addition, Associate Director Miller is familiar with and has reviewed the information withheld. *Id.* ¶¶ 7-8. And finally, in his declaration, Associate Director Miller explains why the withheld information is within the scope of the law enforcement privilege. *Id.* ¶¶ 9-10. Thus, all three

elements of the assertion of privilege are met as to ICE's assertion of privilege with regard to their response to Interrogatory 12.

Second, with regard to Defendant DHS's invocation of the privilege: James W. McCament is the Deputy Undersecretary for Strategy, Policy & Plans. As the Deputy Undersecretary for Strategy, Policy & Plans, he is the senior DHS official with responsibility for overseeing the Office of Policy, Strategy & Plans. Deputy Undersecretary McCament oversees the Office of International Engagement, which is the primary DHS office that engages with DHS component agencies, foreign governments, and the Department of State on a variety of international engagements. *See* Decl. of James W. McCament, attached hereto as Ex. 2; *see Landry*, 204 F.3d at 1135. As the Deputy Undersecretary for Strategy, Policy & Plans, he is the appropriate person to invoke the law enforcement privilege. *Id.* ¶ 3. In addition, Deputy Undersecretary McCament is familiar with and has reviewed the information withheld. *Id.* ¶¶ 8-9. And finally, in his declaration, Deputy Undersecretary McCament explains why the withheld information is within the scope of the law enforcement privilege. *Id.* ¶¶ 10-12. Thus, all three elements of the assertion of privilege are met as to DHS's assertion of privilege with regard to their response to Interrogatory 12.

Relevant here, Congress has recognized the importance of the investigatory files privilege by incorporating a similar provision as Exemption 7 of the Freedom

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

As explained in both the Deputy Undersecretary McCament and Associate Director Miller declarations, ICE ERO is the component of DHS responsible for a multitude of functions involving the removal of aliens from the United States. *See* Ex. 1 ¶ 9, Ex. 2 ¶ 10. ERO personnel investigate and apprehend removable aliens in the United States and work with foreign government representatives to effectuate the removal orders worldwide. *Id.* Here, the information withheld as privileged the disclosure of the withheld information could cause risk to national security and

impact Defendants' ability to carry out the agency missions or operations for several reasons.

First, as set forth the declarations, identifying information of law enforcement personnel was withheld to protect their privacy and safety. *See* Ex. 1 ¶ 9, Ex. 2 ¶ 10. As Associate Director Miller explains, disclosure of officers' names could cause them to become targets of harassment and comprise their safety. Ex. 1 ¶ 9. Second, the disclosure of the information withheld would impede the law enforcement mission of ICE/ERO. To carry out its law enforcement and removal missions, ICE/ERO must regularly engage with foreign government officials for the purpose of obtaining travel documents and making other arrangements relating to repatriation. Third, the disclosure of the information withheld could have a chilling effect on communications and collaborative relationships between DHS, other federal agencies, and foreign government counterparts as a whole. As Deputy Undersecretary McCament explains, the United States and its foreign counterparts regularly conduct sensitive government business and rely on the confidentiality of these communications, disclosing this information could have a chilling effect on the cooperation between the United States and its foreign government partners. Ex., 2 ¶ 12. Balancing the risk at hand, the risk of harm to the integrity of the nation's immigration process and security greatly outweighs any benefit Plaintiffs might receive through accessing this information.



Defendants have properly claimed the law enforcement privilege and have provided the necessary information to document their claim of privilege. Further, through the agency official's declaration, Defendants have established that the information withheld is privileged and should be protected from disclosure in discovery.

Dated: March 23, 2018

Respectfully submitted,

Chad A. Readler  
Acting Assistant Attorney General

William C. Peachey  
Director

William C. Silvis  
Assistant Director

/s/ Nicole N. Murley  
Nicole N. Murley  
Trial Attorney  
United States Department of Justice  
Office of Immigration Litigation  
District Court Section  
PO Box 868 Ben Franklin Station  
Washington, D.C. 20044  
Tel: (202) 616-0473  
Fax: (202) 305-7000

**CERTIFICATE OF SERVICE**

I hereby certify that on this date, I caused a true and correct copy of the foregoing Memorandum to be served via CM/ECF upon all counsel of record.

Dated: March 23, 2018

Respectfully submitted,

/s/ Nicole N. Murley  
NICOLE N. MURLEY

*Counsel for Defendants*

# EXHIBIT 1

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

**USAMA JAMIL HAMAMA, et al.,**

Petitioners and Plaintiffs,

v.

**REBECCA ADDUCCI, et al.,**

Respondents and Respondents.

Case No. 2:17-cv-11910

Hon. Mark A. Goldsmith

Mag. David R. Grand

Class Action

---

**DECLARATION OF PHILIP T. MILLER**

---

I, Philip T. Miller, do hereby declare and say:


1. Since July 27, 2015, I have been employed by U.S. Immigration and Customs Enforcement (ICE) as the Deputy Executive Associate Director, Office of Enforcement and Removal Operations (ERO), in Washington, D.C. In this position, I assist the Executive Associate Director in leading ERO, including overseeing programs and operations to identify and apprehend removable aliens, to detain these individuals when necessary, and to remove illegal aliens from the United States. ERO has approximately 7,600 employees and is comprised of six headquarters divisions and 24 Field Offices.
2. I began my career with the U.S. Immigration and Naturalization Service, (INS) (ICE's predecessor) in August 1996 as an immigration inspector at the New Orleans Port of Entry. In 1998, I became an INS deportation officer in New Orleans and then an INS special agent in 2001. With the creation of ICE in 2003, I became a special agent with ICE's Office of Investigations. In 2007, I became an Assistant Field Office Director for ERO in New Orleans.

In 2008, I became the Deputy Field Office Director in New Orleans, then the Field Office Director in September 2009. Before assuming my current position, I became the Assistant Director for Field Operations for ERO in Washington, D.C. in May 2013.

3. The matters contained in this declaration are based upon my review of the information withheld in the case of *Hamama, et al., v. Adducci, et al.*, 2:17-cv-11910, in the U.S. District Court for the Eastern District of Michigan, Southern Division, and after consideration of information available to me in my capacity as Deputy Executive Associate Director.
4. I am aware that in the course of the litigation Petitioners have requested information in Petitioner/Plaintiff Usama Jamil Hamama's First Set of Interrogatories to All Respondents with respect to the process for removal of aliens to Iraq since March 1, 2017.
5. I am also aware that Respondents in responding to the request for interrogatories have withheld information on the ground that the information sought was protected from disclosure by the Law Enforcement Sensitive Privilege. The withholdings are limited and narrowly tailored to only that information that is privileged.
6. I am aware that in this present litigation the parties have entered into a Protective Order, ECF No. 71, and I have received the terms of this Protective Order. For the reasons mentioned in the below paragraphs, public disclosure of the information withheld would pose a risk to national security or public safety. Because the information sought applies to discussions with a foreign government relating to the removal of aliens from the United States to Iraq, even disclosure under a protective order would not mitigate the risks because the withheld privileged information would be provided to third parties outside the federal government.
7. I have recently reviewed the information withheld and submit this declaration as the formal assertion invoking the law enforcement sensitive privilege for the information contained in these redactions.

8. The information withheld from each of these responses related to any of the following:  
Interrogatory 12 – the names of ICE officers and foreign government officials who participated in meetings regarding the implementation of removals to Iraq.
9. Disclosure of the withheld information could cause risk to national security and impact ICE to carry out its missions or operations for several reasons. First, the redactions of identifying information of law enforcement personnel were made to protect their privacy and safety. ERO personnel handle a myriad of tasks relating to removal of aliens, including investigating and apprehending removable aliens in the United States, working with foreign government representatives to effectuate removals worldwide, and conducting removals. The officers were, and are, in positions of access to information regarding ICE removal operations, including sensitive information relating to removal schedules and officer information for escorted removals, and contacts with foreign governments. If their identities are released, they could become targets of harassing or coercive inquiries for unauthorized access to information pertaining to ongoing and closed investigations or identified during an operation, thereby compromising ICE's law enforcement operations. Additionally, such disclosure could compromise the safety of these officials.
10. Disclosure could also harm the collaborative relationship between ICE, other federal government agencies, and foreign government counterparts. This information withheld here is essential to the cooperative discussions to effectuate removals to Iraq. Disclosure of the names of foreign government officials could lead to difficulties in engaging with foreign government representatives of Iraq, and potentially other foreign governments as well, if the names of individuals participating in sensitive discussions are subject to disclosure to third parties.
11. Pursuant to the provisions of 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my information, knowledge, and belief.

Executed on this 22nd day of March 2018, in Washington, District of Columbia.



---

Philip T. Miller  
Deputy Executive Associate Director  
Enforcement and Removal Operations  
U.S. Immigration and Customs Enforcement  
Washington, District of Columbia

# EXHIBIT 2



**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

**USAMA JAMIL HAMAMA, et al.,**

Petitioners and Plaintiffs,

v.

**REBECCA ADDUCCI, et al.,**

Respondents and Respondents.

Case No. 2:17-cv-11910

Hon. Mark A. Goldsmith

Mag. David R. Grand

Class Action

**DECLARATION OF JAMES W. McCAMENT**

---

I, James W. McCament, do hereby declare and say:

1. Since March 5, 2018, I have been employed by the U.S. Department of Homeland Security (“DHS”) as the Deputy Undersecretary for Strategy, Policy & Plans. As the Deputy Undersecretary for Strategy, Policy & Plans, I am the senior DHS official with responsibility for overseeing the Office of Policy, Strategy & Plans. The position of Undersecretary for Strategy, Policy & Plans currently is vacant. In my current role, I oversee the Office of International Engagement, which is the primary DHS office that engages with DHS component agencies, foreign governments, and the Department of State on a variety of international engagements.
2. Prior to my current position as Deputy Undersecretary of Strategy, Policy & Plans, I served in a variety of roles within DHS Headquarters and U.S. Citizenship and Immigration Services (“USCIS”). I began my career with DHS as an Attorney-Advisor in the Office of the General Counsel in 2003. I served as a Special Advisor to the Secretary of Homeland Security from 2003 to 2006, and as a Senior Counselor to the Director of USCIS from 2006 to 2008. Since 2008, I

have served in a variety of roles within USCIS, including Field Office Director in Havana, Cuba; Acting Chief of Staff and Deputy Chief of Staff; Chief, Office of Legislative Affairs; and Deputy Associate Director, Service Center Operations. Before assuming my current position, beginning in March 2017, I served as Deputy Director of USCIS, including service as Acting Director from April to October 2017, at which point I resumed my role as Deputy Director.

3. The matters contained in this declaration are based upon my review of the information withheld in the case of *Hamama, et al., v. Adducci, et al.*, 2:17-cv-11910, in the U.S. District Court for the Eastern District of Michigan, Southern Division, and after consideration of information available to me in my capacity as Deputy Undersecretary for Strategy, Policy & Plans.
4. I am aware of the litigation that has been filed in the U.S. District Court for the Eastern District of Michigan.
5. I am aware that in the course of the litigation Petitioners have requested information in Petitioner/Plaintiff Usama Jamil Hamama's First Set of Interrogatories to All Respondents.
6. I am also aware that the Government withheld information on the ground that the information sought was protected from disclosure by the law enforcement privilege. The withholdings are limited and narrowly tailored to only that information that is privileged.
7. I am aware that in this present litigation the parties have entered into a Protective Order, ECF No. 71, and I have reviewed the terms of this Protective Order. For the reasons mentioned in the below paragraphs, public disclosure of the information withheld would pose a risk to national security or public safety. Because the information sought applies to sensitive diplomatic communications with a foreign government, even disclosure under a protective order would not mitigate the risks because the withheld privileged information would be provided to third parties outside the federal government.
8. I have recently reviewed the information withheld and submit this declaration as the formal

assertion invoking the law enforcement privilege for the information withheld from the response to Interrogatory Number 12.

9. The information withheld from each of these responses related to any of the following:

Number 12: The names of ICE officers and foreign government officials who participated in meetings regarding the implementation of removals to Iraq.

10. Disclosure of the withheld information could cause risk to national security and impact DHS's ability to carry out its missions or operations for several reasons. First, identifying information of law enforcement personnel was withheld to protect their privacy and safety. U.S. Immigration and Customs Enforcement's Enforcement and Removal Operations ("ICE/ERO") personnel handle a myriad of tasks relating to removal of aliens, including investigating and apprehending removable aliens in the United States, working with foreign government representatives to effectuate removals worldwide, and conducting removals. The officers were, and are, in positions of access to information regarding ICE removal operations, including sensitive information relating to removal schedules and officer information for escorted removals, and contacts with foreign governments. If their identities are released, they could become targets of harassing or coercive inquiries for unauthorized access to information pertaining to ongoing and closed investigations or identified during an operation, thereby compromising ICE's law enforcement operations. Additionally, such disclosure could compromise the safety of these officials.

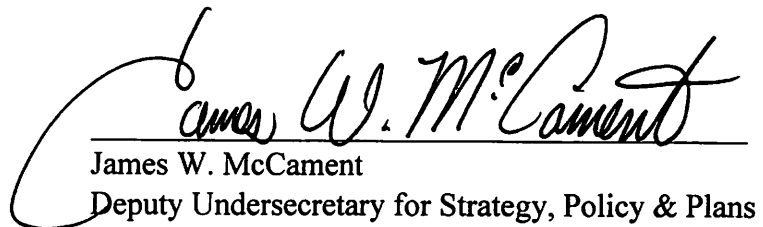
11. Second, the disclosure of the information withheld would impede the law enforcement mission of ICE/ERO. To carry out its law enforcement and removal missions, ICE/ERO must regularly engage with foreign government officials for the purpose of obtaining travel documents and making other arrangements relating to repatriation. Disclosure could harm the collaborative relationship between the DHS, other federal government agencies, and foreign government counterparts. This information withheld here is essential to the ability to engage with foreign

government agencies and officials to enable both the United States and its foreign partners conduct sensitive government business and, for the United States, to carry out its law enforcement mission of removing aliens from the United States with final orders of removal.

12. Third, the disclosure of the information withheld could have a chilling effect on communications and collaborative relationships between DHS, other federal agencies, and foreign government counterparts as a whole. The United States and foreign partners regularly conduct sensitive government business and rely on the confidentiality of sensitive communications. Disclosure of such communications could have a chilling effect and lead other agencies and foreign governments to withhold cooperation out of a concern that communications and activities would not be confidential and become publicly known.

11. Pursuant to the provisions of 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my information, knowledge, and belief.

Executed on this 23 day of March 2018, in Washington, District of Columbia.

  
James W. McCament  
Deputy Undersecretary for Strategy, Policy & Plans  
Department of Homeland Security  
Washington, District of Columbia