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15 **UNITED STATES DISTRICT COURT**
16 **NORTHERN DISTRICT OF CALIFORNIA**
17 **OAKLAND DIVISION**

18 CAROLYN JEWEL, *et al.*,

19 Plaintiffs,

20 v.

21 NATIONAL SECURITY AGENCY,
22 *et al.*,

23 Defendants.

) Case No. 4:08-cv-04373-JSW

) **THE GOVERNMENT DEFENDANTS’**
) **OPPOSITION TO PLAINTIFFS’**
) **ADMINISTRATIVE MOTION TO**
) **ADVANCE HEARING DATE ON**
) **PLAINTIFFS’ MOTION FOR ACCESS**
) **TO CLASSIFIED DISCOVERY**
) **MATERIALS PURSUANT TO 18 U.S.C.**
) **§ 2712(b)(4)**

) Hon. Jeffrey S. White

24
25 Plaintiffs’ Administrative Motion to Advance Hearing Date on Plaintiffs’ Motion for
26 Access to Classified Discovery Materials Pursuant to 18 U.S.C. § 2712(b)(4) (ECF No. 394)
27 (“Pls.’ Admin. Mot.”) should be denied. A hearing on Plaintiffs’ underlying motion for access to
28 the classified discovery responses the Government has lodged for *ex parte*, *in camera* review

1 would be premature, and likely wasteful of the Court's time and energies, before the Court has
2 conducted an examination sufficient to assess the Government's claims of privilege over the
3 extraordinarily sensitive national-security information at issue.

4 The Court's Civil Minute Order of May 22, 2017, ECF No. 356 ("May 22, 2017, Order"),
5 set a schedule for "[s]tagged [d]iscovery" under which Plaintiffs were permitted to serve revised
6 discovery requests limited to the issue of standing, and the Government Defendants were
7 required to respond to those requests by "marshal[ing] all evidence" pertaining to the standing
8 issue. *Id.* The Court directed the Government to file its unclassified responses to Plaintiffs'
9 revised discovery requests on the public record, *id.*, and to submit classified materials responsive
10 to Plaintiffs' requests *ex parte* and *in camera*. *Id.* At the preceding case management
11 conference, the Court explained that upon receiving the classified materials it would review them
12 *ex parte* and *in camera* for purposes of ruling on the Government's objection that disclosing
13 these materials would place national security at risk. *See* Reporter's Transcript of Proceedings,
14 Further Case Management Conference, dated May 19, 2017, at 48:7-21, 73:8-24. Thereafter, the
15 Court explained further, it would set a schedule for briefing on dispositive motions. *Id.* at
16 74:12-17; *see also* May 22, 2017, Order ("Briefing and hearing on omnibus motions shall be set
17 in the Order on Discovery.").

18 In accordance with the Court's May 22, 2017, Order, Plaintiffs served on the Government
19 Defendants 160 discovery requests on the issue of standing, to which the Government served its
20 unclassified responses on February 16, 2018. *See* The Government Defendants' Notice of
21 Submission of Their Classified and Unclassified Responses to the Court's May 22, 2017, Order
22 & App. A, ECF No. 388. The Government Defendants also submitted classified responses to
23 Plaintiffs' interrogatories and requests for admission, set forth in the Classified Declaration of
24 Admiral Michael S. Rogers, Director of the National Security Agency ("NSA") ("Classified
25 NSA Declaration"). *See id.* at 2. The Classified NSA Declaration, together with the classified
26 documents responsive to Plaintiffs' requests for production, were lodged with the Court
27 Information Security Officer also on February 16, 2018. *Id.* (An unclassified (redacted) version
28 of the Classified NSA Declaration was filed on the public record on March 30, 2018. *See* Notice

1 of Filing of Redacted Version of the Classified Declaration the Government Defendants Lodged
2 With the Court In Camera and Ex Parte on February 16, 2018 (ECF No. 389).¹

3 Also filed with the Government's classified discovery responses was the Public
4 Declaration of the Principal Deputy Director of National Intelligence ("PDDNI"), dated February
5 16, 2018 ("Public PDDNI Declaration"). For the reasons explained in the Public PDDNI
6 Declaration and the Classified NSA Declaration, the PDDNI, in her capacity as Acting Director
7 of National Intelligence, has asserted the state secrets privilege, and the statutory privilege under
8 50 U.S.C. § 3024(i)(1), over the classified documents and information made available to the
9 Court in response to Plaintiffs' revised discovery requests. For the same reasons, the Director of
10 the NSA has also asserted the NSA's statutory privilege under section 6 of the National Security
11 Agency Act of 1959, 50 U.S.C. § 3605(a), against disclosure of these materials. As explained by
12 the PDDNI and the Director of the NSA, the Government's *ex parte, in camera* submissions
13 concerning the sources, methods, and operational details of the classified NSA intelligence-
14 gathering activities challenged by Plaintiffs are extraordinarily sensitive and detailed, and their
15 disclosure would cause exceptionally grave damage to national security. Public PDDNI Decl.
16 ¶¶ 7, 8, 10, 19, 36; Classified NSA Decl. ¶¶ 2, 11, 22, 324, 334, 383 (public version).

17 Plaintiffs nevertheless seek access to these highly classified and extraordinarily sensitive
18 materials, on the asserted grounds that access by their counsel is "necessary" for the Court "to
19 accurately determine plaintiffs' standing," and is authorized for that purpose by 18 U.S.C.
20 § 2712(b)(4) and 50 U.S.C. § 1806(f). Pls.' Mot. for Access to Classified Discovery Materials
21 Pursuant to 18 U.S.C. § 2712(b)(4) (ECF No. 393) at 1, 6. As the Government Defendants will
22 show in their forthcoming opposition to Plaintiffs' motion for access, Plaintiffs are mistaken on
23 both counts. As most pertinent here, however, the Court made clear at the May 19, 2017, case

24 ¹ Consistent with the Court's Order of January 19, 2018, the Government Defendants
25 supplemented their classified *ex parte, in camera* submissions on April 2, 2018, with the results
26 of searches of preserved communications data that could not be completed by February 16, 2018.
27 See ECF No. 387 at 5; Notice of Filing of Classified Declaration of Dr. Mark O., National
28 Security Agency, Filed by the Government Defendants for the Court's *In Camera* and *Ex Parte*
Review (ECF No. 390). In addition, the NSA is still engaged in a significant technical effort to
recover and search PSP Internet content data that had been stored for purposes of this litigation
on magnetic tapes, but which were deleted in whole or in part at one or more points prior to
2017. See Classified NSA Declaration ¶ 83 (public version) (ECF No. 389-2). The NSA
anticipates that it will next update the Court regarding this project in early June.

1 management conference, and in its ensuing Civil Minute Order, that it is not engaged at present
2 in adjudicating Plaintiffs' standing. Rather, it will first rule on the Government's objection that
3 the classified information Plaintiffs seek cannot be disclosed, directly or indirectly, without
4 placing national security at grave risk. Only once it has settled this dispute will it set a schedule
5 for briefing and a hearing on dispositive issues, such as standing. *See supra* at 2.

6 Thus, Plaintiffs' motion for access to the Government's classified *ex parte, in camera*
7 submissions begs the very question now before the Court—whether this extremely sensitive
8 information concerning the sources, methods, and operational details of NSA intelligence-
9 gathering activities spanning more than a decade can be disclosed without placing national
10 security at risk. As explained in the Classified NSA Declaration, the answer to that question is
11 emphatically “no.” For present purposes, however, the point is that the Court should not address
12 the access issue without first conducting an examination that will permit it to assess the risks to
13 national security (or, more precisely, to evaluate the Government's assessment of the risks) that
14 would ensue from disclosure of this information.²

15 It would be premature, therefore, to hold a hearing on Plaintiffs' motion for access to the
16 Government's classified discovery responses until the Court has conducted a review focused on
17 the national-security consequences of disclosing those materials. Without the benefit of such a
18 review, the Court will lack context highly pertinent to resolving Plaintiffs' request for access,
19 whenever a hearing might be held. On the other hand, prior review of the Government's
20 classified submissions in support of its privilege claims can only enhance the value of a hearing
21 to the Court's resolution of this important issue, or, perhaps most efficient of all, render a hearing
22 on Plaintiffs' motion for access unnecessary altogether.

23
24 ² As the Government Defendants will explain at greater length in their opposition to
25 Plaintiffs' motion for access, the Court's examination need only include, and, indeed, should
26 only include, a review of the Classified NSA Declaration, wherein the NSA explains at length
27 why disclosing the classified documents and information responsive to Plaintiffs' discovery
28 requests would cause exceptionally grave damage to national security. *See, e.g., United States v. Reynolds*, 345 U.S. 1, 9-10 (1953) (Where the Government through its assertion of privilege has shown a reasonable danger that compulsion of evidence will place national security at risk, “the occasion for the privilege is appropriate, and 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.”).

1 The classified documents and information assembled in response to Plaintiffs' discovery
2 requests are now available to the Court for its *ex parte, in camera* review at a location, in close
3 proximity to the Oakland, California, courthouse, with the facilities needed to ensure the proper
4 storage and handling of the materials at issue. The Government is also prepared, on request, and
5 assuming satisfaction of the usual pre-requisites (including successful completion of an
6 appropriate background investigation) to grant the Court's career law clerk access to certain
7 categories of the classified information it has lodged, to assist the Court in conducting its review.
8 *See Gov't Defs.' Response to Court's Minute Order Re: Law Clerk Access to Classified*
9 *Information (ECF No. 361).* For these and all the reasons stated herein, Plaintiffs' request to
10 advance the hearing on their motion for access to the Government's classified discovery
11 responses should be denied.

12 Dated: May 15, 2018

13
14 Respectfully submitted,

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