

1 JAMES McMANIS (40958)  
2 MARWA ELZANKALY (206658)  
3 KEVIN HAMMON (232360)  
4 CHRISTINE PEEK (234573)  
5 McMANIS, FAULKNER & MORGAN  
6 A Professional Corporation  
7 50 W. San Fernando, 10th Floor  
8 San Jose, CA 95113  
9 Telephone: (408) 279-8700  
10 Facsimile: (408) 279-3244

11 Attorneys for Plaintiff, Rahinah Ibrahim

12  
13 UNITED STATES DISTRICT COURT  
14  
15 NORTHERN DISTRICT OF CALIFORNIA  
16  
17 SAN FRANCISCO DIVISION  
18

19 RAHINAH IBRAHIM, an individual,

20 Plaintiff,

21 v.

22 DEPARTMENT OF HOMELAND  
23 SECURITY, et al.,

24 Defendants.

CASE NO. C 06 0545 WHA

**PLAINTIFF, RAHINAH IBRAHIM’S,  
OPPOSITION TO FEDERAL  
DEFENDANTS’ MOTIONS TO FILE  
“SENSITIVE SECURITY  
INFORMATION” UNDER SEAL;  
MOTION TO STRIKE**

Date: June 29, 2006

Time: 8:00 a.m.

Crtrm: 9 – 19<sup>th</sup> Floor

The Hon. William Alsup

25 The Federal Defendants’ proposed reliance upon *ex parte*, secret evidence, would violate  
26 the foundational principles of American justice. Therefore, the Court should deny the federal  
27 defendants’ motion to file under seal and allow, at a minimum, plaintiff’s counsel to examine the  
28 evidence. Alternatively, the federal defendants should not be allowed to benefit from the use of  
*ex parte* evidence. Thus, should the Court be inclined to grant the motion to file under seal, it

1 should nonetheless strike the federal defendants' *ex parte* evidence as unfairly prejudicial to  
2 Ibrahim.

3 **Reliance Upon the Federal Defendants' *Ex Parte* Evidence is Fundamentally Unfair**  
4 **and Would Prejudice Ibrahim.**

5 Granting the federal defendants' motion and relying upon evidence that Ibrahim has  
6 never seen and cannot refute or challenge would only serve to help the government conceal its  
7 wrongs and subject Ibrahim to further deprivation of her rights. The federal defendants attempt  
8 to hide the so-called "Sensitive Security Information" from Ibrahim while using it against her is  
9 a classic attempt to evade the Constitution and double-deal. What is more, the only justification  
10 offered for concealing this evidence used against Ibrahim amounts to "because we say so." Such  
11 a casual disregard for the principles of justice cannot stand.

12 The Supreme Court long ago held that "[s]ecrecy is not congenial to truth-seeking and  
13 self-righteousness gives too slender an assurance of rightness. No better instrument has been  
14 devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case  
15 against him and opportunity to meet it." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341  
16 U.S. 123, 171-172 (1951). Moreover, "[w]ithout any opportunity for confrontation, there is no  
17 adversarial check on the quality of the information" on which the federal defendants intend to  
18 rely. *American-Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 1045, 1069 (9th Cir.1995).  
19 Thus, "procedural due process notice and hearing requirements have 'ancient roots' in the rights  
20 to confrontation and cross-examination. *American-Arab Anti-Discrimination Committee v. Reno*,  
21 70 F.3d 1045, 1069 (9th Cir.1995); *see also Lynn v. Regents of University of California*, 656  
22 F.2d 1337, 1346 (9th Cir. 1981) ("The system functions properly and leads to fair and accurate  
23 resolutions, only when vigorous and informed argument is possible. Such argument is not  
24 possible, however, without disclosure to the parties of the evidence submitted to the court.").

25 In defiance of these fundamental principles of justice, the federal defendants have  
26 submitted evidence in support of their motion to dismiss, upon which they want the Court to rely,  
27 yet they seek to shield its disclosure to Ibrahim. The only justification offered is that the Under  
28

1 Secretary has decided that disclosing this evidence would “be detrimental to the security of  
2 transportation.” Yet, these Security Directives are disclosed to thousands of individuals,  
3 including airline personnel and local officials. Indeed, the federal defendants argue that “any  
4 Security Directive” is worthy of such protection. The federal defendants offer nothing more than  
5 these exceedingly vague pronouncements made without explanation or the possibility of review.  
6 In essence, the federal defendants ask the Court and Ibrahim to take their word for the fact that  
7 her lawyers should not see the evidence they intend to use against her.

8 This one-sided approach to the truth is plainly abhorrent to our liberty and sense of  
9 justice. “The plea that evidence of guilt must be secret is abhorrent to free men, because it  
10 provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play  
11 the role of informer undetected and uncorrected.” *American-Arab Anti-Discrimination*  
12 *Committee v. Reno*, 70 F.3d 1045, 1069 (9th Cir.1995). For this reason:

13 As judges, we are necessarily wary of one-sided process: “democracy implies respect for  
14 the elementary rights of men ... and must therefore practice fairness; and fairness can  
15 rarely be obtained by secret, one-sided determination of facts decisive of rights. ***It is***  
16 ***therefore the firmly held main rule that a court may not dispose of the merits of a case***  
17 ***on the basis of ex parte, in camera submissions.*** Thus, the very foundation of the  
adversary process assumes that use of undisclosed information will violate due process  
because of the risk of error.

18 *American-Arab Anti-Discrimination Committee v. Reno*, 70 F.3d 1045, 1069 (9th  
19 Cir.1995) (quoting *Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 170 (1951) (Frankfurter,  
20 J., concurring)) (citations omitted) (emphasis added).

21 The “Supplemental Statement,” filed by the federal defendants on May 26, does little to  
22 allay these concerns. The Statement is made in only the vaguest of terms, describing nothing  
23 about how the information is relevant to Ibrahim or the Motion to Dismiss. Moreover, the  
24 Statement gives only very general descriptions of how the documents are used and updated, but  
25 describes nothing about the content of the documents themselves. Thus, the Supplemental  
26 Statement is a wholly inadequate substitute for the actual evidence submitted against Ibrahim.

1 The federal defendants’ unexplained and unsubstantiated “security” concerns may not  
 2 trump the rights afforded Ibrahim by our Constitution. Fear and misinformation cannot be  
 3 allowed to overpower the rule of law. “One has to remember that when one’s interest is keenly  
 4 excited evidence gathers from all sides around the magnetic point \* \* \*. It should be particularly  
 5 heeded at times of agitation and anxiety, when fear and suspicion impregnate the air we breathe.”  
 6 *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 171 (1951) (Frankfurter, J.,  
 7 concurring).

8 The federal defendants’ reliance upon *Chowdhury v. Northwest Airlines*, 226 F.R.D. 608  
 9 (N.D. Cal. 2004) is similarly misplaced. In *Chowdhury*, the defendant had withheld documents  
 10 from *discovery* based on a claim of privilege deriving from the sensitive nature of security  
 11 information. *Id.* at 609. Here, in contrast, the Federal Defendants seek to ***rely upon and benefit***  
 12 ***from evidence they have submitted*** while continuing to withhold that evidence from Ibrahim.  
 13 Thus, the *Chowdhury* court dealt with a discovery dispute and did not face the assault on  
 14 fundamental judicial principles leveled by the federal defendants here.

15 Thus, this Court should either allow Ibrahim access to the evidence submitted against her  
 16 and provide her the opportunity to be heard, or it should strike the evidence and refuse to  
 17 consider it in support of the federal defendants’ motion to dismiss. As Justice Frankfurter so  
 18 eloquently stated: “Appearances in the dark are apt to look different in the light of day.” *Joint*  
 19 *Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 171 (1951). The Federal Defendants’  
 20 motion should be denied.

21  
22 Dated: June 8, 2006

McMANIS FAULKNER & MORGAN

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25 \_\_\_\_\_/S/  
 JAMES MCMANIS  
 MARWA ELZANKALY

26  
27 Attorneys for Plaintiff,  
 RAHINAH IBRAHIM