

1 JAMES McMANIS (40958)
ELIZABETH PIPKIN (243611)
2 McMANIS FAULKNER
A Professional Corporation
3 50 West San Fernando Street, 10th Floor
San Jose, California 95113
4 Telephone: (408) 279-8700
Facsimile: (408) 279-3244
5 Email: cpeek@mcmanislaw.com
epipkin@mcmanislaw.com

6 Attorneys for Plaintiff,
7 Rahinah Ibrahim

8 UNITED STATES DISTRICT COURT
9
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION

13 RAHINAH IBRAHIM, an individual,

14 Plaintiff,

15 vs.

16 DEPARTMENT OF HOMELAND
SECURITY, et al.,

17 Defendants.

Case No. C 06-0545 WHA

**PLAINTIFF’S RESPONSE TO THE
COURT’S ORDER RE CLEARANCE
(DOCKET NO. 666)**

Trial Date: December 2, 2013
Complaint Filed: January 27, 2006

19
20
21 **INTRODUCTION**

22 Plaintiff hereby responds to the Court’s request for briefing on the following two
23 questions: (1) whether and how one or more of plaintiff’s counsel could obtain a clearance to
24 review the classified submissions, including how long it would take; and (2) whether plaintiff’s
25 counsel is willing to undertake the process. This response also explains why such clearances are
26 not necessary to resolve this case.

27 ///

28 ///

1 **ARGUMENT**

2 **I. THE EXECUTIVE HAS ASSERTED ITS ABSOLUTE DISCRETION TO**
3 **GRANT OR DENY PLAINTIFF'S COUNSEL CLEARANCE.**

4 The executive branch generally has discretion to grant or deny a security clearance,
5 absent a colorable constitutional challenge to the denial. *Dep't of the Navy v. Egan*, 484 U.S.
6 518, 526-30 (1988); *Dorfmont v. Brown*, 913 F.2d 1399, 1401-04 (9th Cir. 1990). Plaintiff's
7 counsel are informed and believe that obtaining a top secret clearance can take 6 to 9 months or
8 longer. *See* U.S. Dept. of Justice, Federal Bureau of Investigation, Security Clearance Process
9 for State and Local Law Enforcement, *available at* [http://www.fbi.gov/stats-services/law-](http://www.fbi.gov/stats-services/law-enforcement/clearance/security-clearance-process-for-law-enforcement-pdf)
10 [enforcement/clearance/security-clearance-process-for-law-enforcement-pdf](http://www.fbi.gov/stats-services/law-enforcement/clearance/security-clearance-process-for-law-enforcement-pdf). Defendants in this
11 case previously objected to any procedure that would enable plaintiff's counsel to receive
12 classified information, whether or not the court upholds the state secrets privilege with respect to
13 the information. *See* Defendants' Response To The Court's Request For Briefing Regarding The
14 Identification Of Classified Information On Defendants' Privilege Log (Docket No. 412), 5:13-
15 6:20 ("In addition, **Defendants oppose any procedure that would provide classified**
16 **information to Plaintiff's counsel**, if that is what the Court contemplates.") (emphasis added).
17 Plaintiff's counsel understand this to mean that the executive will not exercise its discretion in
18 favor of granting a security clearance to plaintiff's counsel.

19 Even if plaintiff's counsel misunderstood the government's position, the government
20 historically has contended that classified information can be withheld **even from cleared**
21 **counsel** on the ground that they have "no need to know." *See Horn v. Huddle*, 647 F. Supp. 2d
22 55, 59-60 & 63, n.11 (D.D.C. 2009), *vacated by* 699 F. Supp. 2d 236, 238. Although at first
23 blush it may seem like a feasible alternative to just get counsel "cleared," in reality, any order to
24 that effect will only provide defendants the ability (1) to arbitrarily deny plaintiff and her counsel
25 access to classified information; (2) to conduct unfettered investigations into the personal lives of
26 plaintiff's counsel and their friends and family members; and (3) to hold up the case for months
27 if not years while defendants conduct the investigation. It would cede authority over the
28

1 progress in this case to an interested party, the defendants. The Executive already has enough of
2 an advantage.

3 **II. THE COURT SHOULD NOT REVIEW ANY ALLEGEDLY PRIVILEGED**
4 **INFORMATION TO DECIDE PLAINTIFF'S CONSTITUTIONAL**
5 **CHALLENGES, BUT IF IT DOES, THE COURT HAS THE POWER TO**
6 **REVIEW THE ALLEGED STATE SECRETS INFORMATION AND MAKE**
7 **APPROPRIATE ORDERS TO PROVIDE ACCESS TO COUNSEL OR A PARTY.**

8 The Court may determine whether plaintiff was allowed adequate due process without
9 resort to any secret information. Defendants fully presented their procedures to the Court, and
10 plaintiff has testified regarding the lack of process accorded her. The Court can assess the
11 strengths of the parties' respective interests and the risk of an erroneous deprivation of rights
12 without regard to the specific content of any allegations against Dr. Ibrahim. The Court need not
13 resolve what alternate procedures could be provided in order to decide Ibrahim's procedural due
14 process challenge in her favor and against the government. *Humphries v. County of Los Angeles*,
15 554 F.3d 1170, 1201 (9th Cir. 2009) ("Beyond declaring that California's procedural protections
16 are constitutionally inadequate, we do not propose to spell out here precisely what kind of
17 procedure California must create."), *rev'd on other grounds*, 131 S.Ct. 447 (2010). Plaintiff
18 must only show that the current procedures are constitutionally deficient, which she has done.
19 *See Humphries*, 554 F.3d at 1201. The government's attempts now to use secret evidence to
20 deprive plaintiff of a remedy serve as further evidence they have deprived plaintiff of due
21 process.

22 If the Court decides to review the allegedly privileged material, Ibrahim has argued
23 throughout this case that the supreme law of the land, the United States Constitution, and
24 specifically the due process protection found in the Bill of Rights, requires that defendants
25 provide adequate notice of the purported bases for their decision wrongfully to label her a
26 terrorist and diminish her rights, including any classified information that is required to enable
27 Ibrahim to respond to the accusations against her. *See Kaur v. Holder*, 561 F.3d 957, 961-62
28 (9th Cir. 2009) (use of secret evidence violated applicable regulations as well as due process);
KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner, 710 F. Supp. 2d 637, 657-60
(N.D. Ohio 2010); *see also American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045,

1 1069-70 (9th Cir. 1995), *superseded in part by statute on other grounds as discussed in* 525 U.S.
2 471, 475-76 (1999); *Al Odah v. United States*, 559 F.3d 539, 544–45 (D.C. Cir. 2009)
3 (discussing the standard under which courts may compel disclosure of classified information);
4 *Rafeedie v. INS*, 880 F.2d 506, 523-24 (D.C. Cir. 1989); *United States v. Abuhamra*, 389 F.3d
5 309, 329, 331 (2d Cir. 2004) (alternate summary disclosure procedure).

6 The Bill of Rights trumps defendants’ executive orders and evidentiary privileges.
7 Moreover, given that plaintiff’s counsel have already cleared background checks for sensitive
8 security information, national security is not threatened by their review of any alleged state
9 secret information. The Court may overrule the state secrets privilege asserted by defendants
10 and allow plaintiff and her counsel access to the information under appropriate protective orders.
11 *See Horn*, 647 F. Supp. 2d at 60-63 (“When the privilege is denied, the Court has the ability to
12 order the information disclosed in litigation.”); *see also id.* at 65-66 (“The deference generally
13 granted the Executive Branch in matters of classification and national security must yield when
14 the Executive attempts to exert control over the courtroom.”).

15 Another court recently confronted with claims of secrecy in the national security context
16 held as follows: “Where, as here, core individual constitutional rights are implicated by
17 Government action, Congress should not be able to cut off a citizen's right to judicial review of
18 that Government action simply because it intended for the conduct to remain secret by operation
19 of the design of its statutory scheme. While Congress has great latitude to create statutory
20 schemes like FISA, it may not hang a cloak of secrecy over the Constitution.” *Klayman v.*
21 *Obama*, 2013 WL 6598728, Section II.A., at p. 9 on counsel’s Westlaw copy (D.D.C. 2013).
22 Here, the scheme at issue was not even enacted by Congress. Defendants’ watchlisting scheme
23 is purely a creation of executive orders and “understandings” that the government erroneously
24 argues are completely shielded from review by the courts and the American people. The
25 Executive branch may not hang a cloak of secrecy over the Constitution.

26 ///

27 ///

28 ///

1 **III. ANY PROCEDURE ALLOWING THE USE OF CLASSIFIED**
2 **INFORMATION IN THIS CASE MUST COMPORT WITH FAIRNESS AND**
3 **DUE PROCESS.**

4 Despite the government’s almost certain refusal to allow a clearance to plaintiff’s
5 counsel, one or more of plaintiff’s counsel is willing to go through the process, assuming
6 plaintiff’s counsel is allowed adequate access and opportunity to be heard regarding the
7 information upon which defendants rely. That includes the following:

- 8 1. Plaintiff’s counsel have full access to the information at any time, without restrictions
9 on their use of the information for the case.
- 10 2. Plaintiff’s counsel may discuss the information with their client so that she and they
11 may rebut any allegations contained in the secret information.
- 12 3. Plaintiff’s counsel may fully investigate the information provided to them through the
13 normal means any attorney would employ, including but not limited to interviewing
14 witnesses, searching publicly available materials, and consulting experts.
- 15 4. Plaintiff’s counsel are allowed to conduct discovery on the information, including
16 written discovery and depositions.
- 17 5. After plaintiff’s counsel have adequate opportunity to investigate and conduct
18 discovery, the information is presented to the court through the normal trial process.
- 19 6. Plaintiff’s counsel may call witnesses and move for admission of documents to rebut
20 the information.
- 21 7. Clearances are provided in ninety (90) days or less so that plaintiff is not subjected to
22 further delay in this matter.

23 **IV. PLAINTIFF OBJECTS TO THE GOVERNMENT’S INTRODUCTION OF**
24 **SECRET EVIDENCE IN THESE PROCEEDINGS.**

25 As noted above, the Court need not review or rely on secret evidence to resolve this case.
26 Plaintiff objects to any further consideration of the material. The government has sandbagged
27 plaintiff, who has no knowledge of the nature or extent of the surreptitiously submitted
28 “evidence.” At a minimum, plaintiff objects on the following grounds:

