

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

SIBEL EDMONDS,	)	
	)	
Plaintiff,	)	
	)	C.A. No. 1:02CV01448 (JR)
v.	)	
	)	
UNITED STATES DEPARTMENT OF	)	
JUSTICE, et al.,	)	
	)	
Defendants.	)	

**DEFENDANTS' REPLY IN FURTHER SUPPORT OF MOTION TO DISMISS**

The United States does not lightly seek dismissal of a case on the ground of the state secrets privilege. In this case, however, it is the only appropriate course. This dispute cannot be litigated without posing an intolerable risk of disclosure of information protected by the state secrets privilege and, as a result, substantial damage to the national security and foreign policy interests of the United States. Notwithstanding plaintiff's baseless procedural challenges to the state secrets privilege in this litigation, defendants have properly perfected that privilege here. Because the case cannot be litigated without threatening the disclosure of privileged material, the suit must be dismissed.

In opposing defendants' motion to dismiss, plaintiff raises a number of arguments that reflect a fundamental misunderstanding of the nature of the state secrets privilege and the information that defendants seek to protect. First, plaintiff claims that the Attorney General is required to consider personally every aspect of the underlying lawsuit before deciding whether to

assert the privilege. But this proposed standard conflates the question of privilege with the separate question of whether its assertion should result in dismissal of the case. In asserting privilege, the Attorney General is only to consider personally the *matters as to which he has claimed privilege*. His declaration satisfies that personal consideration requirement.

As is clear from the declarations offered in support, the Attorney General has asserted the privilege over information lying at the core of this case. Defendants have not contended that *all* documents and information at issue in this case are subject to the claim of state secrets privilege, as plaintiff repeatedly contends. However, the information subject to the privilege remains at the heart of this dispute, and further litigation risks its disclosure. Additionally, under the circumstances of this case, information that might otherwise not appear to be sensitive would, in the context of this litigation, disclose or risk the disclosure of privileged information.

Finally, defendants do not move to dismiss plaintiff's case under 12(b)(6). Rather, they ask the Court to uphold their assertion of the state secrets privilege and to dismiss the case as a result. Thus, whether plaintiff's allegations are sufficient to state a claim under Fed. R. Civ. P. 12(b)(6) is irrelevant. Here, what is at issue is not the sufficiency of plaintiff's allegations – but what proof of, defense against, or mere litigation of them would entail. The result of all of these considerations is that this Court should uphold the Attorney General's assertion of the state secrets privilege and dismiss this case.<sup>1</sup>

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<sup>1</sup> In light of defendants' assertion of the state secrets privilege, the sensitive nature of the information covered by the privilege, and the potential danger to national security and foreign policy should disclosure of privileged information occur, discovery would be inappropriate until after disposition of defendants' motion to dismiss. The Court recognized this on November 26, 2002, when it granted defendants' Motion to Stay Discovery, and plaintiff's apparent renewal of her request for immediate discovery, *see* Pl's Opp. at 43-44, should be denied.

## ARGUMENT

### **I. THE ATTORNEY GENERAL'S ASSERTION OF THE PRIVILEGE WAS ENTIRELY PROPER.**

Plaintiff misconstrues the role of the Attorney General in asserting the state secrets privilege. The Attorney General's role is, upon personal consideration, to assert the privilege over the information subject to the privilege. United States v. Reynolds, 345 U.S. 1, 7-8 (1953). In order to invoke the privilege, the government must make "[1] a formal claim of privilege, [2] lodged by the head of the department which has control over the matter, after [3] actual personal consideration by that officer." Id. (footnotes omitted). That is precisely what has occurred here. The Attorney General, the highest-ranking official in the Department of Justice, has made a formal claim of privilege upon personal consideration of the matter. Declaration of John Ashcroft, ¶¶ 5-6. In asserting the privilege, the Attorney General is not required to consider specifically either the allegations of the Complaint, or the claims asserted by plaintiff in this case. All that he needs to consider is whether protection of the foreign policy and national security interests of the United States requires assertion of the privilege over the information at issue. Whether this case should then be dismissed as a result is a separate question.

Along the same lines, plaintiff mistakenly contends that because the Attorney General's unclassified declaration does not make the explicit representation that he has personally seen and considered the material for which the privilege is sought, the Attorney General has not properly invoked the privilege here. Pl's Opp. at 8. But the unclassified declaration states that the Attorney General personally considered this matter, and that: "Any further elaboration concerning this matter on the public record would reveal information that could cause the very

harms my assertion of the state secrets privilege is intended to prevent.” Declaration of John Ashcroft, ¶ 5. As this Court will see, the classified declarations offered in support of the Attorney General's assertion of the privilege set forth in greater detail the information subject to the assertion of privilege. Because of the nature of the privileged information in this case, and the risk that more detailed discussion on the public record might disclose the very information at issue, the Attorney General's public declaration is necessarily limited. This is “unexceptionable.” Kasza v. Browner, 133 F.3d 1159, 1169 (9th Cir. 1998) (“Here, after actual personal consideration, the person that Reynolds requires to claim the privilege publicly claimed it. Elaborating the basis for the claim of privilege through in camera submissions is unexceptionable.”) (citing cases).

Plaintiff contends that the Attorney General “has altogether failed to explain why an 'item-by-item' approach cannot protect the government's interests in this matter.” Pl's Opp. at 14 (citing In re United States, 872 F.2d 472, 479 (D.C. Cir. 1989)). But such an explanation is not a blanket requirement. The court's analysis in In re United States, for example, turned on an inquiry specific to the facts of that case: “[W]e cannot reasonably determine merely on the basis of this in camera affidavit that evidence of the Government's activities of twenty to thirty years ago will result in the disclosure of state secrets today.” Id. at 479. Here, by contrast, as detailed in the classified declarations, information that might otherwise not appear to be sensitive would, in the context of this litigation, disclose or risk the disclosure of privileged information. As the court recognized in Halkin v. Helms, 598 F.2d 1, 8 (D.C. Cir. 1978), sorting such information is not as easy as it may seem:

It requires little reflection to understand that the business of foreign intelligence

gathering in this age of computer technology is more akin to the construction of a mosaic than it is to the management of a cloak and dagger affair. Thousands of bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate.

Id.

In light of the difficulties involved in separating state secrets from unclassified information here, a public explanation of the nature or categories of information sought to be protected would risk disclosure of that very information. Taking such a risk is not required in order to assert the state secrets privilege. See, e.g., Hayden v. Nat'l Security Agency/Central Security Service, 608 F.2d 1381, 1385 (D.C. Cir. 1979) (“The facts of this case present a situation where the district court could reasonably find that public itemization and detailed justification would compromise legitimate secrecy interests, thus making it appropriate to receive affidavits *in camera* rather than in public. . . . We recognize that a fuller public record could enhance the adversary process; but it could also reveal sensitive information.”)

Nor is the Attorney General required to state on the public record a detailed basis for his assertion of privilege. This is not required even by the authority on which plaintiff relies:

Specifically, two concerns prevent us from adopting a strict rule that the trial judge must compel the government to defend its claim publicly before submitting materials *in camera*. First, it is imperative that the procedure used to evaluate the legitimacy of a state secrets privilege claim not force 'disclosure of the very thing the privilege is designed to protect.' Fear lest an insufficient public justification result in denial of the privilege entirely might induce the government's representatives to reveal some material that, in the interest of national security, ought not to be uncovered. Second, as was noted at the outset, there is considerable variety in the situations in which a state secrets privilege may be fairly asserted. We would not wish to hobble district courts in designing procedures appropriate to novel cases.

Ellsberg v. Mitchell, 709 F.2d 51, 63 (D.C. Cir. 1983); see also Linder v. Dep't of Defense, 133

F.3d 17, 23 (D.C. Cir. 1998) (requiring detailed public explanation *or in camera* review by court); Pl's Opp. at 11-12. The Ellsberg court's first reason is applicable here, where the classified declarations amply detail the basis for invocation of the privilege, and where information that might otherwise not appear to be sensitive would, in the context of this litigation, disclose or risk the disclosure of privileged information.<sup>2</sup>

Plaintiff makes repeated reference to comments made in the media concerning her case, and to briefings to Congress and the Inspector General about plaintiff. Pl's Opp. at 15. Public disclosure, however does not automatically waive the state secrets privilege. See Fitzgibbon v. CIA, 911 F.2d 755, 766 (D.C. Cir. 1990) (“we have unequivocally realized that the fact that information resides in the public domain does not eliminate the possibility that further disclosures can cause harm to intelligence sources, methods, and operations”). Plaintiff's apparent assumption is that the quoted statements at issue in the alleged media disclosures by the government are identical to the information set forth in defendants' privilege claim. Complaint, ¶¶ 29-32. The Court is respectfully referred to the classified declarations as to the accuracy of that assumption, but it cannot be further discussed in a public filing. See Classified Declarations of John Ashcroft and Bruce Gebhardt.

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<sup>2</sup> Even if this Court were to find the Attorney General's assertion of privilege somehow lacking, the proper recourse is not to deny altogether either the assertion of privilege or the motion to dismiss, but rather, to provide the Attorney General another opportunity to address the privilege. See, e.g., Yang v. Reno, 157 F.R.D. 625, 634 (M.D. Pa. 1994) (“Respondents have failed to satisfy the well established threshold requirements necessary to invoke the state secrets and deliberative process privileges. Nevertheless, the government will be given the opportunity to re-assert the privileges in accordance with this memorandum.”); Kinoy v. Mitchell, 67 F.R.D. 1, 10 (S.D.N.Y. 1975) (“Accordingly, the Court declines to recognize the Government's claim that the documents contained in in camera Exhibit A are privileged military or state secrets until assertion of that claim is made by the Attorney General upon personal consideration.”).

With respect to the Inspector General, the Office of the Inspector General is an internal office within the Department of Justice, fully authorized to receive and consider classified information, and a disclosure to that office does not constitute a disclosure either to the public or into the public domain. See, e.g., 5 U.S.C. App. 3, § 8E. In addition, that office is under the control of the Attorney General, who has the authority to prevent publication of any information that might harm national security. Id. at § 8E(a). While plaintiff claims that the Inspector General “presumably will publish a report documenting his findings” in this matter, Pl's Opp. at 14, there is no reason to believe that any report will be inconsistent with the Attorney General's assertion of the state secrets privilege here.

Moreover, the fact that the FBI provided briefings to Congress about plaintiff's allegations does not undermine the privilege claim. Plaintiff herself brought her allegations to Congress, and the FBI was asked to address them. Even if information was disclosed to Congress, it does not mean that the Attorney General cannot claim the state secrets privilege now. Congressional briefings are a standard and routine part of Congressional oversight, and information imparted to Congress does not waive the privilege.<sup>3</sup> See Fitzgibbon, 911 F.2d at 766 (“The mere fact that the CIA voluntarily transmitted an official document to a congressional committee does not mean that the Agency can thereby automatically be forced to release any number of other documents.”); In re Consolidated Litigation Concerning International Harvester's Disposition of Wisconsin Steel, 1987 WL 20408, \*9 (N.D. Ill. Nov. 20, 1987) (“disclosure to Congress in compliance with its request, including requests from its committees, does not waive

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<sup>3</sup> Moreover, a routine use covers any disclosures to Congress in the Privacy Act context. 5 U.S.C. § 552a(b)(9).

the privilege”). Cf. Murphy v. Dep't of the Army, 613 F.2d 1151, 1156 (D.C. Cir. 1979) (in FOIA context: “we conclude that, to the extent that Congress has reserved to itself in section 552(c) the right to receive information not available to the general public, and actually does receive such information pursuant to that section (whether in the form of documents or otherwise), no waiver occurs of the privileges and exemptions which are available to the executive branch under the FOIA with respect to the public at large”); Safeway Stores Inc. v. FTC, 428 F. Supp. 346, 347 (D.D.C. 1977) (“[d]isclosure to an authorized congressional committee does not waive the exemption”). Further, any statements made by lower-level FBI officials during such briefings clearly cannot waive or supercede the Attorney General's determination as to what is a state secret. See Maxwell v. First Nat'l Bank of Maryland, 143 F.R.D. 590, 596 (D. Md. 1992).

Moreover, it is in the additional detail that would be needed to further explore those disclosures that the risk lies. The government could not, for example, explain to plaintiff the difference between what might be privileged and what would not, and could not delineate the boundaries of the information over which the privilege is claimed. See Afshar v. Dep't of State, 702 F.2d 1125, 1130 (D.C. Cir. 1983) (“In many cases, the very fact that a known datum appears in a certain context or with a certain frequency may itself be information that the government is entitled to withhold. For example, even if the CIA at one time acknowledged the existence of an intelligence relationship with SAVAK, which is information that fits into one of the categories of information withheld in this lawsuit, the release of a series of telegrams and cables recording particular contacts in the relationship might well provide new information regarding the extent and nature of the liaison. This too may be information that the agency may safeguard.”).

## **II. DISMISSAL OF PLAINTIFF'S CASE IS PROPER ON THE GROUND OF THE STATE SECRETS PRIVILEGE.**

### **A. Privileged Information Lies at the Core of Plaintiff's Privacy Act Claims.**

Plaintiff devotes much of her argument to contending that the allegations in her Complaint are sufficient to withstand a challenge under Fed. R. Civ. P. 12(b)(6). But that is irrelevant here. The point of defendants' motion is not to challenge the sufficiency of the allegations in the Complaint to state a claim; rather, defendants' position is that, in the absence of the information protected by the state secrets privilege, and in order to avoid the risk of disclosure of privileged information, plaintiff's Privacy Act claim cannot be litigated and must be dismissed.<sup>4</sup> As a result, it is more than the mere allegations of plaintiff's complaint or the substance of the alleged disclosures themselves that must be examined; the Court should consider as well what litigation of the claims would entail.

First, litigation of plaintiff's Privacy Act claims would implicate the central issues that consume the whole of this litigation – the duties of plaintiff and her co-workers, plaintiff's underlying allegations, and the facts, documents, and evidence in connection therewith. Here, identification and production of records related to the allegations, and identification of individuals involved in the matter, would necessarily implicate privileged information. Litigation into the merits of plaintiff's claims would require probing the substantive content of what may be contained in a system of records and who had access to it. In this case, defendants

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<sup>4</sup> Further, contrary to plaintiff's assertions, defendants do not claim that *all* of the information and the documents at issue in this case would be privileged. Rather, defendants believe that once the privileged information is removed from the case, litigation would be impossible. Thus, the fact that defendants may produce certain documents in response to plaintiff's FOIA requests is not inconsistent with defendants' claim of privilege.

do not claim that *all* the documents are privileged; the underlying documents are, however, infused with sensitive classified information.

Second, deposition testimony would also pose unacceptable risks of disclosure of privileged information. Particularly here, where information that might otherwise not appear to be sensitive would, in the context of this litigation, disclose or risk the disclosure of privileged information, both the foundational questions and the substance of the deposition would create a substantial risk of disclosure.

Third, it would not be feasible to carve out specific information subject to the privilege. Even if some aspects of the claim do not implicate privileged information, probing into *the matter* that gave rise to the alleged violations would plainly intrude on such information. Attempting to work around the privileged information at issue would pose an unacceptable risk of disclosure. Privileged information is not at the periphery of this case. The records and information at issue in the Privacy Act claim, and the witnesses who could address the matter, all implicate a classified matter that cannot be revealed.<sup>5</sup> Attempting to identify what could not be disclosed would itself be revealing. Examining a witness in a deposition or a courtroom quite plainly presents the kind of uncontrolled setting in which the risk of disclosure is greatest.

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<sup>5</sup> Indeed, plaintiff's accuracy claim, 5 U.S.C. § 552a(e)(6), goes to the very heart of plaintiff's employment grievance and allegations of misconduct in the program in which she worked, because such a claim directly puts at issue the accuracy of the content of government records and information – a matter which plainly involves addressing the facts gathered concerning plaintiff's allegations and the nature of her duties. Because information surrounding plaintiff's employment and her allegations cannot be disclosed, the accuracy of governmental records cannot be probed. Similarly, under 5 U.S.C. § 552a(e)(7), the parties cannot litigate the specifics of how plaintiff's records may come “within the scope of an authorized law enforcement activity.”

**B. Privileged Information Lies at the Heart of Plaintiff's First Amendment Claim.**

At the heart of plaintiff's First Amendment claim lie the nature of plaintiff's and other translators' duties, her allegations of misconduct, and defendants' reasons for discharging plaintiff from her employment contract with the FBI.

Plaintiff contends that defendants have failed to identify a reason that the second prong of the O'Donnell test is at issue in this case. Pl's Opp. at 30. In the case of speech made in private – which plaintiff contends is the relevant issue here – the question is whether the government's interest in “promoting the efficiency of the public services it performs through its employees” “outweighs . . . the public's interest in having the employee make himself heard within his organization.” O'Donnell v. Barry, 148 F.3d 1126, 1135 (D.C. Cir. 1998). On the government's side, the court must consider “whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise.” Id. (quoting Rankin v. McPherson, 483 U.S. 378, 388 (1987)).<sup>6</sup> Here, the government interests described above apply, and any defense by the government on those grounds would certainly implicate the nature of the relationship between plaintiff and her superiors or co-workers as well as their duties, and a description of the

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<sup>6</sup> Even if plaintiff's speech was, as she contends, made to FBI management and internal offices designated to receive reports of misconduct, she still bears the burden of proof on the second prong of the O'Donnell test. It simply cannot be the case that any allegations of wrongdoing by an employee in such a circumstance automatically outweigh *all* governmental interest in the efficiency of the organization. See, e.g., Pickering v. Board of Education, 391 U.S. 563, 574 (1968) (suggesting that false statements knowingly or recklessly made by teacher and critical of school policy could be grounds for dismissal from public employment).

operation of the enterprise.<sup>7</sup>

Likewise, litigation of the third prong (plaintiff's speech was a substantial or motivating factor in her discharge) and fourth prong (the employer would have reached the same decision in the absence of the protected conduct) of the O'Donnell test would require the disclosure of privileged information, concerning the reasons for plaintiff's discharge. While plaintiff alleges that the government has already disclosed these reasons, the bare description of the reasons for plaintiff's discharge given in plaintiff's submissions is obviously insufficient to litigate the claim. See, e.g., Complaint, ¶¶ 30 (plaintiff “fired last spring for performance issues”); 32 (plaintiff fired “because her 'disruptiveness' hurt her on-the-job 'performance'”; plaintiff “found to have breached security”). Proof of any of these reasons for plaintiff's discharge – necessary for the defense of this claim – would require inquiry into the nature and quality of plaintiff's performance of her duties, as well as inquiry into the type of breach of security of which plaintiff was accused, and the merits of defendants' findings on those issues. Such inquiries would directly implicate privileged information.

Finally, even under plaintiff's argument, to prove her retaliation claim, she must have reported her concerns and been “retaliated against for making those reports.” Pl's Opp. at 34. But whether plaintiff was retaliated against for making those reports again depends upon the reason for defendants' termination of plaintiff's contract. Those matters cannot be discussed without implicating privileged information.

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<sup>7</sup> Contrary to plaintiff's insinuation, see Pl's Opp. at 30 n. 7, it is hardly sanctionable conduct under Fed. R. Civ. P. 11 for defendants to require plaintiff to prove all necessary elements to support her claim, or to vigorously defend against them.

**C. Plaintiff's Fifth Amendment Claim Directly Implicates Privileged Information.**

As to the Fifth Amendment, plaintiff has simply misapprehended defendants' argument, which is that even if plaintiff could prove a violation of her Fifth Amendment rights, the remedy is a “name-clearing” hearing. This “name-clearing” hearing, however, is required “[o]nly if the employer creates and disseminates a false and defamatory impression about the employee in connection with his termination.” Codd v. Velger, 429 U.S. 624, 628 (1977). Thus, in order to demonstrate her entitlement to such a hearing, plaintiff must prove that any stigmatizing statements must have been both (1) publicly disclosed, and (2) false. See also Seal v. Pryor, 670 F.2d 96, 99 (8th Cir. 1982) (to be entitled to post-termination hearing, appellant needed to show, inter alia, that stigmatizing information was false); Colaizzi v. Walker, 655 F.2d 828, 832 (7th Cir. 1981) (due process hearing not required if trier of fact found that allegations were true).

Even if plaintiff could prove a violation of her Fifth Amendment rights, therefore, obtaining a remedy would require litigation over the truth of defendants' allegedly defamatory statements about plaintiff. Defs' Mot. at 13-14; Complaint ¶¶ 28-32. Such litigation would necessarily involve the nature of plaintiff's duties with the FBI, and the substance of what happened in the underlying dispute, all of which would implicate privileged information.<sup>8</sup>

Likewise, while plaintiff states that she has also alleged a Fifth Amendment claim based on “defendants' alleged release of derogatory and defamatory statements to others about plaintiff

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<sup>8</sup> Kartseva v. Dept. of State, 37 F.3d 1524 (D.C. Cir. 1994), relied upon by plaintiff, is inapposite. Pl's Opp. at 37-39. That case concerned the reversal by the D.C. Circuit of the district court's dismissal of the plaintiff's claim of a due process liberty interest, with a remand back to the district court as a result. Kartseva, 37 F.3d at 398. Accordingly, the opinion never reached the mechanics of a “name-clearing” hearing if, in fact, a violation of plaintiff's due process rights had occurred.

in addition to terminating her employment,” Pl's Opp. at 39, that claim would require litigating the truth of the defendants' allegedly defamatory statements about plaintiff (presumably those listed in paragraphs 29-32 of plaintiff's complaint), which would again implicate information subject to the state secrets privilege. See Moldea v. New York Times Co., 22 F.3d 310, 318 (D.C. Cir. 1994) (substantial truth is a defense to defamation). And contrary to plaintiff's representation, any litigation over how the agency reached its determinations with respect to any adverse action taken against plaintiff would require an inquiry similar to that involved in her retaliation claim, and delving into the reasons for the termination of plaintiff's contract. This, too, would directly implicate privileged information. See Pl's Opp. at 39-40.

### **CONCLUSION**

Defendants recognize the hardship to plaintiff of dismissing her claims on the grounds of the state secrets privilege. See e.g., Fitzgerald v. Penthouse International, Ltd., 776 F.2d 1236, 1238-39 n.3 (4th Cir. 1985). But the risk of disclosure of sensitive privileged information involved in litigation of this suit is simply too great. For the reasons set forth above, and in defendants' Motion to Dismiss, plaintiff's lawsuit must be dismissed as a result.

Dated: January 27, 2003

Respectfully submitted,

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/s/

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