

State Secrets Privilege

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**FILED**

**APR 23 2013**

**RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

13 **UNITED STATES DISTRICT COURT**  
14 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

15 RAHINAH IBRAHIM,

17 Plaintiff,

18 v.

19 DEPARTMENT OF HOMELAND  
SECURITY, *et al.*,

20 Defendants.

No. 3:06-cv-0545 (WHA)

**DECLARATION OF ERIC HOLDER, JR.,  
ATTORNEY GENERAL OF THE UNITED  
STATES**

1 I, ERIC H. HOLDER, JR., hereby state and declare as follows:

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3 1. I am the Attorney General of the United States and head of the United States Department  
4 of Justice ("DOJ"), an Executive Department of the United States. *See* 28 U.S.C §§ 501, 503,  
5 509. The purpose of this declaration is to assert, at the request of the Assistant Director of the  
6 Counterterrorism Division in the Federal Bureau of Investigation ("FBI"), and in my capacity as  
7 Attorney General and head of DOJ, a formal claim of the state secrets privilege in order to  
8 protect the national security interests of the United States. The statements made herein are based  
9 on my personal knowledge, on information provided to me in my official capacity, and on my  
10 evaluation of that information.  
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12 2. In the course of my official duties, I have been informed that Plaintiff Rahinah Ibrahim is  
13 a citizen of Malaysia who currently resides in Malaysia and has done so since 2005. In January  
14 2005, Ms. Ibrahim was lawfully in the United States on a student visa. Her visa has since been  
15 revoked, and her 2009 application for a new visa was denied by the Department of State.  
16

17 3. I understand that Plaintiff asserts that her name is currently on the No Fly List, and she  
18 seeks declaratory relief finding that the placement of her name on the list violates procedural and  
19 substantive due process, equal protection, freedom of religion, and freedom of association under  
20 the United States Constitution, and injunctive relief ordering, among other things, the removal of  
21 her name from the No Fly List and other terrorist watchlists, or, in the alternative, a name-  
22 clearing hearing.  
23

24 4. I am advised that the Government has informed Plaintiff's counsel of unclassified  
25 information concerning whether or not Plaintiff's name appears on any terrorist watchlists  
26 pursuant to an attorney's eyes only protective order. I understand that, following this disclosure,  
27 Plaintiff has moved to compel the production of classified information. As described below, the  
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1 disclosure of the classified information sought by Plaintiff through her discovery could  
2 reasonably be expected to cause significant harm to the national security.

3 5. I have read and carefully considered the classified declaration of Andrew G. McCabe  
4 Assistant Director, Counterterrorism Division of the FBI. After careful and actual personal  
5 consideration of the matter, I have concluded that disclosure of the three categories of  
6 information described below and in more detail in the classified FBI declaration could  
7 reasonably be expected to cause significant harm to the national security, and I therefore  
8 formally assert the state secrets privilege over this information. The classified FBI declaration,  
9 which is available for the Court's *ex parte, in camera* review, describes in classified detail the  
10 information over which I am asserting the state secrets privilege. As Attorney General, I possess  
11 original classification authority under Section 1.3 of Executive Order (E.O. 13526) dated  
12 December 29, 2009. *See* 75 Fed. Reg. 707. I have determined that the classified FBI declaration  
13 is properly classified under Section 1.2 of E.O. 13526 because public disclosure of the  
14 information contained in that declaration also could reasonably be expected to cause significant  
15 harm to national security.  
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19 6. In unclassified terms, my privilege assertion encompasses information in the following  
20 categories:

- 21 • Subject Identification: Information that could tend to confirm or deny  
22 whether a particular individual was or was not the subject of an FBI  
23 investigation or intelligence operation. This includes the existence of any  
24 records about Plaintiff contained in the Terrorist Identities Datamart  
25 Environment ("TIDE"), which is classified in its entirety, as well as the  
26 contents of any classified TIDE records that might exist about Plaintiff,  
27 whether presently contained in the TIDE database or contained in any FBI  
28 counterterrorism investigative files about Plaintiff, should such exist. This  
also includes the classified contents of any FBI counterterrorism  
investigative or operational files about Plaintiff, should they exist.

- 1 • Reasons for Investigation and Results: Information that could tend to reveal  
2 the predicate for an FBI counterterrorism investigation or intelligence  
3 activity of a particular person, any information obtained during the course of  
4 such an investigation or intelligence operation, and the status and results of  
5 the investigation or operation. This includes any information (if any)  
6 obtained by the FBI from the U.S. Intelligence Community related to the  
7 reasons for any investigation or operation and information regarding Plaintiff  
8 or any of her associates that could tend to reveal the predicate for,  
9 information obtained in; or results of a counterterrorism investigation or  
10 operation.  
11
- 12 • Sources and Methods: Information that could tend to reveal whether  
13 particular sources and methods, such as classified policies and procedures,  
14 were used by the FBI in any counterterrorism investigation or intelligence  
15 activity (if any) of Plaintiff or her associates. This includes information  
16 related to whether court-ordered searches or surveillance, confidential human  
17 sources, and other investigative or operational sources and methods were  
18 used by the FBI in a counterterrorism investigation of or intelligence activity  
19 regarding a particular person, the reasons such methods were used, the status  
20 of the use of such sources and methods, and any results derived from such  
21 methods.  
22

23 7. As indicated above and explained further below, I have determined that disclosure of  
24 information falling into the foregoing categories could reasonably be expected to cause  
25 significant harm to national security.

26 8. First, I concur with the determination of the FBI that the disclosure of the identities of  
27 subjects of FBI counterterrorism investigations or intelligence activity reasonably could be  
28 expected to cause significant harm to national security. As the FBI has explained, such  
disclosures would alert those subjects to the Government's interest in them and could cause them  
to attempt to flee, destroy evidence, or alter their conduct so as to avoid detection of their future  
activities, which would seriously impede law enforcement and intelligence officers' ability to  
determine their whereabouts or gain further intelligence on their activities. In addition, as the  
FBI has explained, knowledge that they were under investigation could enable subjects to  
anticipate the actions of law enforcement and intelligence officers, possibly leading to counter-

1 surveillance that could place federal agents at higher risk, and to ascertain the identities of  
2 confidential informants or other intelligence sources, placing those sources at risk. Such  
3 knowledge could also alert associates of the subjects to the fact that the Government is likely  
4 aware of their associations with the subjects and cause them to take similar steps to avoid  
5 scrutiny.

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7 9. Second, I agree with the FBI that disclosure that an individual is not a subject of an FBI  
8 counterterrorism investigation could likewise reasonably be expected to cause significant harm  
9 to national security. As the declaration explains, if the fact that some persons are not subject to  
10 investigation is disclosed, while the status of others is left unconfirmed, the disclosure would  
11 reveal that the FBI has had an investigative interest as to those other particular persons.  
12 Allowing such disclosures would enable individuals and terrorist groups alike to manipulate the  
13 system to discover whether they or their members are subject to investigation. Further,  
14 individuals who desire to commit terrorist acts could be motivated to do so upon discovering that  
15 they are not being monitored.  
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18 10. In addition, I agree with the judgment of the FBI that where an investigation of a subject  
19 has been closed, disclosure that an individual was formerly the subject of an FBI  
20 counterterrorism investigation or intelligence activity could also reasonably be expected to cause  
21 significant harm to national security. Again, I agree that, to the extent that an individual had  
22 terrorist intentions that were not previously detected, the knowledge that he or she is no longer  
23 the subject of investigative or intelligence interest could embolden him or her to carry out those  
24 intentions. Moreover, as the FBI indicates, the fact that an investigation is closed does not mean  
25 that the subjects have necessarily been cleared of wrongdoing, as closed cases are often reopened  
26 based on new information. Even if the former subjects are law abiding, the disclosure that they  
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1 had been investigated could still provide valuable information to terrorists and terrorist  
2 organizations about the Government's intelligence and concerns, particularly where the former  
3 subjects have associates whom the FBI may still be investigating based on suspected ties to  
4 terrorist activity. Disclosure of the FBI's interest in the closed subject could alert such associates  
5 to the interest in them and lead them to destroy evidence or alter their conduct so as to avoid  
6 detection of their future activities.  
7

8 11. Third, I agree with the judgment of FBI that disclosure of the reasons for and results from  
9 an FBI counterterrorism investigation or an intelligence activity --- whether the initial predicate  
10 for opening an investigation, information gained during the investigation, or the status or results  
11 of the investigation --- could also reasonably be expected to cause significant harm to national  
12 security. As the FBI has determined, such disclosures would reveal to subjects who are involved  
13 in or planning to undertake terrorist activities what the FBI or the intelligence community knows  
14 or does not know about their plans and the threat they pose to national security. Even if the  
15 subjects have no terrorist intentions, disclosure of the reasons they came under investigation may  
16 reveal sensitive intelligence information about them, their associates, or a particular threat that  
17 would harm other investigations. More generally, as the FBI also explains, disclosure of the  
18 reasons for an investigation could provide insights to persons intent on committing terrorist  
19 attacks as to what type of information is sufficient to trigger an inquiry by the United States  
20 Government, and what sources and methods the FBI may employ to obtain information about a  
21 person.  
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25 12. Finally, I agree with the FBI that the disclosure of certain information that would tend to  
26 describe, reveal, confirm or deny the existence or use of FBI investigative or sources and  
27 methods, or techniques used in the counterterrorism investigations at issue in this case, could  
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1 likewise be reasonably expected to cause significant harm to national security. This aspect of my  
2 privilege assertion includes information that would tend to reveal whether court-ordered searches  
3 or surveillance, confidential human sources, and other investigative sources and methods were  
4 used in a counterterrorism investigation of a particular person, the reasons for and the status of  
5 the use of such sources and methods, and any results derived from such methods. The disclosure  
6 of such information could reveal not only the identities of particular subjects but also the steps  
7 taken by the FBI in counterterrorism matters. I agree with the assessment of the FBI that such  
8 information would effectively provide a road map to adversaries on how the United States  
9 Government goes about detecting and preventing terrorist attacks.  
10

11 13. Any effort to draw distinctions between disclosures that would and those that would not  
12 cause harm to national security interests would itself reveal sensitive FBI counterterrorism  
13 investigative or intelligence information. If the Government were to disclose that one individual  
14 is not now nor ever has been the subject of an investigation, but resist such disclosure when an  
15 individual is currently or once was the subject of a national security investigation, then the very  
16 act of resisting disclosure would itself reveal the information that the Government seeks to  
17 protect. For this reason, the information at issue --- whether someone is, is no longer, or never  
18 has been the subject of an FBI counterterrorism investigation --- must be treated uniformly. Any  
19 type of disclosure, whether affirmative or negative, would implicate the harms described above.  
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21 14. Plaintiff also requests that the Government produce policy and procedure documents  
22 relating to the operation of the TSDB and the TSC. Those requests encompass two classified  
23 documents that discuss a terrorist screening policy applied to a particular category of watchlisted  
24 individuals. As explained by Assistant Director McCabe in his classified declaration, disclosure  
25 of information concerning this policy that is discussed in these documents could have a  
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1 significant adverse effect on the Government's terrorist screening efforts, with equally  
2 significant consequences for the nation's security.

3 15. Any further elaboration concerning the foregoing matters on the public record would  
4 reveal information that could cause the very harms my assertion of the state secrets privilege is  
5 intended to prevent. The classified FBI declaration, submitted for *ex parte, in camera* review,  
6 provides a more detailed explanation of the information over which I am asserting the privilege  
7 and the harms to national security that would result from disclosure of that information.  
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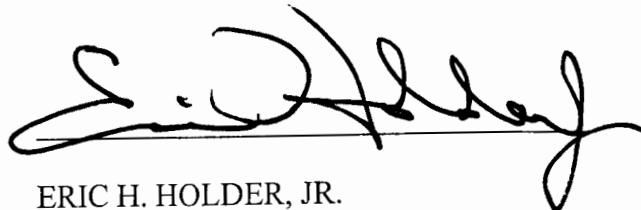
9 16. On September 23, 2009, I announced a new Executive Branch policy governing the  
10 assertion and defense of the state secrets privilege in litigation. Under this policy, the  
11 Department of Justice will defend an assertion of the state secrets privilege in litigation, and seek  
12 dismissal of a claim on that basis, only when necessary to protect against the risk of significant  
13 harm to national security. *See* Exhibit 1 (State Secrets Policy), § 1(A). The policy provides  
14 further that an application of a privilege assertion must be narrowly tailored and that dismissal be  
15 sought pursuant to the privilege assertion only when necessary to prevent significant harm to  
16 national security. *Id.* § 1(B). Moreover, “[t]he Department will not defend an invocation of the  
17 privilege in order to: (i) conceal violations of the law, inefficiency, or administrative error; (ii)  
18 prevent embarrassment to a person, organization, or agency of the United States Government;  
19 (iii) restrain competition; or (iv) prevent or delay the release of information the release of which  
20 would not reasonably be expected to cause significant harm to national security.” *Id.* § 1(C).  
21 The policy also establishes detailed procedures for review of a proposed assertion of the state  
22 secrets privilege in a particular case. *Id.* § 2. Those procedures require submissions by the  
23 relevant Government departments or agencies specifying “(i) the nature of the information that  
24 must be protected from unauthorized disclosure; (ii) the significant harm to national security that  
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1 disclosure can reasonably be expected to cause; [and] (iii) the reason why unauthorized  
2 disclosure is reasonably likely to cause such harm.” *Id.* § 2(A). Based on my personal  
3 consideration of the matter, I have determined that the requirements for an assertion and defense  
4 of the state secrets privilege have been met in this case in accord with the September 2009 State  
5 Secrets Policy.  
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7 I declare under penalty of perjury that the foregoing is true and correct.  
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9 Executed this 14 day of March, 2013, in Washington, D.C.  
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12 ERIC H. HOLDER, JR.  
13 ATTORNEY GENERAL OF THE UNITED  
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