

CLERK US DISTRICT COURT
NORTHERN DIST. OF TX
FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

2011 MAR 28 PM 2: 14

DEPUTY CLERK



UNITED STATES OF AMERICA

§

v.

§

Criminal No. 5:11-CR-0015-C

§

KHALID ALI-M ALDAWSARI

§

§

MOTION FOR PROTECTIVE ORDER

COMES NOW the United States of America, by and through its attorneys James T. Jacks, United States Attorney for the Northern District of Texas, and C. Richard Baker, Assistant United States Attorney, and hereby moves the Court for a protective order pursuant to Federal Rule of Criminal Procedure 16 ("Rule 16"). Roderique S. Hobson, Jr., counsel for defendant Khalid Aldawsari, has been consulted and has no objection to the entry of the proposed protective order.

Background

On March 9, 2011, an Indictment was returned in the above-captioned matter charging defendant Aldawsari with Attempted Use of a Weapon of Mass Destruction, in violation of 18 U.S.C. § 2332a(a)(2)(A) & (D).

On March 28, 2011, the defendant was arraigned before U.S. Magistrate Judge Nancy M. Koenig. It is anticipated that the defense will file motions for Rule 16 discovery and that the Court will enter its order for Rule 16 disclosure. The parties have agreed to jointly move for an order declaring the case complex within the meaning of the

Speedy Trial Act, and intend to cite, among other things, delays resulting from the fact that some of the evidence was collected by electronic surveillance and physical search conducted pursuant to the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801-1811, 1821-1829 (FISA). The instant motion for protective order will enable the government to produce Rule 16 discovery.

Legal Analysis

By this motion, the United States respectfully requests that the Court enter a protective order pursuant to the authority provided in Rule 16(d) of the Federal Rules of Criminal Procedure. A proposed Order will be submitted to this Court. This Order relates to discovery that may be produced by the government to the defense, including recorded conversations, summaries and transcripts of those conversations; reports of interviews (referred to as "FBI 302s"); surveillance logs; materials seized pursuant to Rule 41 search warrants executed at the defendant's and on the computers, cell phones and digital storage devices seized from the residence; toll records; cell phone records; communications, business and financial records produced pursuant to grand jury subpoena; transcripts of grand jury testimony; mirror images of the defendant's computers and other electronic storage media; emails; and other documents; as well as rough draft translations and summaries of Arabic language materials which have been translated into English. The rough draft translations and translation summaries will be provided to defense counsel under an agreement by the parties that they are being

provided for the convenience of defense counsel to expedite discovery. The defendant and his attorney have agreed that no objections will be interposed at trial based upon variances in the rough draft translation transcripts and summary transcripts and the final trial transcripts.

The documents to be produced by the government fall into two categories. The first category is the discovery materials typical in a criminal case. This category will be referred to as "general discovery materials."

A second category is referred to as "sensitive discovery material." This includes declassified information or material otherwise deemed sensitive. This category consists primarily of materials collected pursuant to FISA that are reviewed by or made available to the defendant or the defense team in this case. The materials derived from FISA authority are collectively referred to as "FISA Information."

By its terms, Rule 16 of the Federal Rules of Criminal Procedure contemplates that discovery material exchanged between the parties will be done informally and not channeled through the public record. A request is made by one party and the other party complies. This procedure is reinforced by local standard discovery orders which provide that the parties should conduct discovery informally amongst themselves without involvement of the Court (unless there is an unresolvable dispute).

Rule 16(d) provides that the district court may, for good cause, deny, restrict or defer discovery or inspection or grant other relief including the issuance of protective or

modifying orders. By this motion, the government seeks a protective order to ensure that disclosure of the sensitive information is limited to members of the defense team for their use in preparing for trial. Such protection is needed due to the sensitive nature of the information and the privacy concerns of possible witnesses.

Lawyers are, of course, subject to requirements of confidentiality during the period of preparation for trial. *See United States v. McVeigh*, 918 F. Supp. 1452, 1459 (W.D. Ok. 1996).

The attorney-client privilege and the work product doctrine protect some information from opposing counsel. The Department of Justice has used its rule-making authority to restrict public release of information in 28 C.F.R. § 50.2. Professional ethics applicable to advocates as officers of the court limit what all counsel may reveal publicly. *Id.*

As noted by the court in *McVeigh*, “[t]hese provisions are necessary to assure the fairness of the proceedings and to emphasize that trials are conducted inside the courtroom under the supervision of the presiding judge rather than on the courthouse steps.” *McVeigh*, 918 F. Supp. at 1460.

Additionally, this Court on March 9, 2011, entered its order precluding the parties, their representatives, or their attorneys from communicating with the news media concerning their case. We concede that discovery is solely for the purpose of preparation for trial, and normally a protective order is not needed to ensure that materials provided in discovery are not disclosed to the public (including the media, publishers, and others). In an abundance of caution, however, the government seeks this protective order regarding

disclosure of the sensitive information to reinforce the limitations on disclosure of discovery material.

In this case, the nature of the evidence subject to discovery makes it appropriate to enter the proposed protective order, and the entry of such an order may well expedite the resolution of this case. The FBI is in the process of seeking declassification of certain materials. One of the factors that influences the FBI's decision to declassify this type of evidence is its concern – shared by its partners in the Intelligence Community – with whether there are adequate protections in place to address the non-disclosure of the materials to those who are not a party to the criminal proceedings or outside what is necessary for the parties adequately to prepare for trial. When such protections are not in place, the prosecution's ability to obtain prospective declassification is diminished.¹ Thus, other information that could otherwise be declassified and provided readily to the defense might only be provided under the procedures of the Classified Information Procedure Act (CIPA) framework, with the attendant delay.

In addition to the sensitive nature of the information, the privacy concerns of witnesses and others also warrant the entry of the protective order. By its terms, the proposed Order strikes the appropriate balance between the government's security and privacy concerns and the defense team's need to receive, process, analyze and use the information. The discovery identifies persons who have not been charged as defendants

¹ This could also adversely impact declassification decisions in other cases.

in this case, who “have a recognized right of privacy in not being named as unindicted co-conspirators in an indictment or being identified and accused by the Government of criminal activity where such accusations are not directly relevant to the proceedings.”

United States v. Smith, 602 F. Supp. 388, 398 (M.D. Pa. 1985).

In *Smith*, the press sought access to a document containing the list of names of unindicted co-conspirators which had been provided privately by the government to the defense. In reaching its decision not to disclose this document, the *Smith* Court analyzed *Seattle Times Company v. Rhinehart*, 467 U.S. 20 (1984). The Court in *Seattle Times* stated that discovery is available to a litigant for the purpose of trial preparation and is not traditionally available to the public. 467 U.S. at 33. The Court also noted privacy interests of litigants and third parties may be impinged upon by public release of the materials. *Id.* at 35.²

Accordingly, while the disclosure of the sensitive information to the defendant and his defense team is entirely appropriate, it is equally appropriate for this Court to issue a protective order limiting release of the sensitive information to the defendant and his defense team for its use in preparing a defense for trial. *See Alderman v. United States*, 394 U.S. 165, 184-85 (1969)(disclosure of intercepted conversations to defendants was required but defendant and counsel could be subject to “enforceable orders” against

² The *Smith* court relied upon *Seattle Times* in determining not to disclose the document even though *Seattle Times* involved the civil analogue of Rule 16, Fed. R. Civ. P. 26(c), noting that the civil rule was similar to Rule 16(d)(1), which authorizes entry of protective orders in criminal cases.

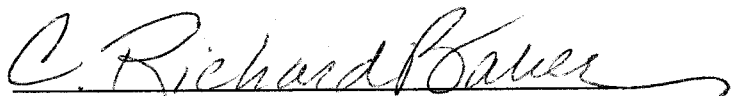
unwarranted disclosure of the materials); *United States v U.S. Dist. Court for the Eastern Dist. of Michigan*, 407 U.S. 297, 324 (1972)(same). See also *United States v. Saleeme*, 978 F. Supp. 386, 389 (D. Mass. 1997) (disclosure of all documents and records produced pursuant to discovery to be disclosed only to counsel, defendants and individuals necessary to assist counsel in preparation of the case).

Conclusion

WHEREFORE, the United States respectfully requests that the Court grant this motion and enter the proposed protective order.


Respectfully submitted,

JAMES T. JACKS
UNITED STATES ATTORNEY



C. RICHARD BAKER
Assistant United States Attorney
Texas State Bar No.01565500
1205 Texas Avenue, Suite 700
Lubbock, Texas 79401
Telephone: 806.472.7562
Facsimile: 806.472.7394
E-mail: richard.baker@usdoj.gov

CONCURRED IN AND APPROVED:



RODERIQUE S. HOBSON
Attorney for Defendant