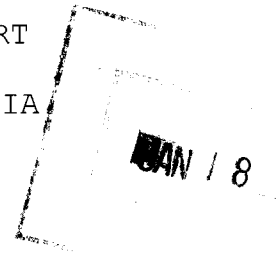


IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division



UNITED STATES OF AMERICA)
)
 V.) Crim. No. 01-455-A
)
ZACARIAS MOUSSAOUI)

GOVERNMENT'S MOTION FOR PROTECTIVE ORDER
AND INCORPORATED MEMORANDUM OF LAW

The United States moves this Court to enter a Protective Order pursuant to: Section 3 of the Classified Information Procedures Act, 18 U.S.C. App. 111 (1994) (CIPA); the Security Procedures Established Pursuant to Pub. L. 96-456, 94 Stat. 2025, by the Chief Justice of the United States for the Protection of Classified Information (reprinted following CIPA Section 9); Rules 16(d) and 57 of the Federal Rules of Criminal Procedure; the ordinary principles of contract law; the general supervisory authority of the Court; and in order to protect the national security. The proposed Protective Order will establish procedures necessary for the handling of classified information by the parties in this case so as to prevent unauthorized disclosure of such information. In support, the United States states as follows:

BACKGROUND

The Defendant, Zacarias Moussaoui, was indicted on December 11, 2001, on six counts: Conspiracy to commit acts of terrorism transcending national boundaries, in violation of 18 U.S.C. §§ 2332b(a)(2) & (c); conspiracy to commit aircraft piracy, in violation of 49 U.S.C. §§ 46502(a)(1)(A) and (a)(2)(B); conspiracy to destroy aircraft, in violation of 18 U.S.C. §§ 32(a)(7) and 34; conspiracy to use weapons of mass destruction, in violation of 18 U.S.C. § 2332a(a); conspiracy to murder United States employees, in violation of 18 U.S.C. §§ 1114 & 1117; and conspiracy to destroy property, in violation of 18 U.S.C. §§ 844(f), (i), (n). Moussaoui is detained pending his trial.

The indictment charges that Moussaoui is a member of *al Qaeda*, a foreign terrorist organization founded and managed by Usama Bin Laden. The investigation in this case, and into *al Qaeda* and Bin Laden generally, has and will involve classified material, some of which will be produced in discovery. Further, as explained below, the nature of *al Qaeda* and its practices shows that a protective order is necessary in this case.

1. The Nature of the Terrorist Organization *al Qaeda*

A. Bin Laden and *al Qaeda*

Bin Laden formed the terrorist organization *al Qaeda* a decade ago in Afghanistan. Since that time, the group has operated both as its own entity and as an umbrella organization

that supports other terrorist groups from at least a half-dozen other countries, including the Egyptian al Jihad Organization and *el Gamaa al-Islamia*, an Egyptian terrorist organization once led by Sheikh Omar Abdel Rahman. (Indictment, Crim. No. 01-455-A) (hereinafter "Indictment"), ¶ 4). During this time, it has financed and operated camps in Afghanistan and Sudan, training *al Qaeda* members and associates in explosives, kidnaping, assassination, and counter-intelligence methods. (Indictment, ¶ 7). It has members or associates in dozens of countries around the world. (Indictment, ¶ 4).

During the last few years, Bin Laden has solicited attacks on American targets world-wide. Initially, Bin Laden issued *fatwahs* (religious opinions) privately to members of *al Qaeda* declaring a religious obligation to attack American military personnel in Saudi Arabia and Somalia. (Indictment, Count One, ¶ 5-6). Later, in August 1996, Bin Laden publicly issued a "Declaration of Jihad (War)" on United States forces in Saudi Arabia, stating it was every Muslim's duty to expel the Americans from the Saudi peninsula. (Indictment, Count One, ¶ 8). Then, in February 1998, Bin Laden signed, along with other terrorist leaders, a publicly-distributed *fatwah* calling for the killing of American civilians anywhere they could be found in the world. (Indictment, Count One ¶ 9). More recently, Bin Laden has called for a jihad to release the "brothers" detained in American jails,

and has repeated this treats to attack the United States.

(Indictment, Count One, ¶¶ 13, 111).

As part of its ongoing efforts to attack United States interests, Bin Laden also forged strategic relationships with other Governments and terrorist groups. For example, Bin Laden arranged a tripartite alliance with the National Islamic Front, the ruling party in the Sudan, and Iran (and its affiliated terrorist group, Hizballah) to work against the United States, Israel and the West. (Indictment, ¶ 6). More recently, Bin Laden and other *al Qaeda* leaders formed an alliance with the Taliban, the ruling group in Afghanistan, the country which has served as the headquarters of *al Qaeda* since 1996. (Indictment, ¶ 8).

In May 2001, four members/associates of *al Qaeda* were convicted in the Southern District of New York for conspiring to murder U.S. nationals abroad, which conspiracy involved, *inter alia*, the bombings of the United States embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, in August 1998. Further, in addition to carrying out the terrorist acts in East Africa, *al Qaeda* members and associates have sought, for use against the United States, nuclear, chemical and other weapons of mass destruction. (Indictment, Count One, ¶ 4).

B. *Al Qaeda's Efforts to Avoid Detection and Capture of its Members by the United States and Other Countries*

Bin Laden's group has undertaken great efforts to protect itself from internal and external threats. For example, Bin

Laden demands undivided loyalty from *al Qaeda* members by requiring them to take an oath of allegiance to Bin Laden and *al Qaeda*. (Indictment, ¶ 1). Bin Laden's group also has investigated and killed those suspected of being collaborators with the enemies of *al Qaeda*. (Indictment, ¶ 1).

To further protect itself from outside threats, *al Qaeda* members and associates have engaged in extensive monitoring of information about efforts by American and other Governments to neutralize the *al Qaeda* threat, and to warn others in the organization about these efforts. (Indictment, ¶ 7). For example, the investigation has discovered that *al Qaeda* members submit "security reports" to *al Qaeda's* headquarters reporting on concerns about the efforts of Western intelligence and law enforcement agencies to arrest or capture *al Qaeda* members. In one report, found in Nairobi, Kenya, in August 1997, an *al Qaeda* member discussed the fact that a top Bin Laden operative had been arrested and was believed to be cooperating with Saudi, British, and American authorities. This report further discussed the concern by the author that the *al Qaeda* people in Kenya will be under scrutiny because it was common knowledge that it was the members of Bin Laden's cell in Kenya who were responsible for killing American soldiers in Somalia. Specifically, the report states that:

On the same day we heard the news, the
partisans from Mombasa called. I told them I

will get in touch with them and asked them never to call me at that number again. ... After two days they called me back at the same number so I forced them to burn that number immediately and informed Khalid that I had prohibited them from calling me here as I am one hundred percent sure that the telephone is tapped.

Al Qaeda also monitors court papers related to trials of *al Qaeda* associates. For example, one defendant in the Southern District of New York who has pled guilty to the same conspiracy to murder U.S. nationals of which the four above-mentioned defendants were convicted in May 2001, sent a document concerning the trial of Sheikh Omar Abdel Rahman, which took place in the Southern District of New York, from California, where he then lived, to Wadih El Hage, a *al Qaeda* associate in Kenya for further delivery to Usama Bin Laden.

Al Qaeda members routinely communicate in code, and, where possible, use what they believe to be secure means of communication. For example, *al Qaeda* members rarely address each other in official communications by their true names. Furthermore, the investigation has discovered instances where *al Qaeda* members and associates have communicated with each other in code. And, as noted above, one *al Qaeda* member has advised others in *al Qaeda* of his warnings to others not to use a particular telephone because he believed it was tapped.

The use of codes and other surreptitious means of

communication is part of the training regimen that *al Qaeda* provides to its followers. In April 2000, law enforcement officers in the United Kingdom searched the residence of an *al Qaeda* member. Among the many items found during the search of this residence was a training manual entitled, "Declaration of Jihad Against the Country's Tyrants - Military Series." This manual contains a section instructing *al Qaeda* followers to "[t]ake advantage of visits to communicate with brothers outside prison and exchange information that may be helpful to them in their work outside prison.¹ The importance of mastering the art of hiding messages is self-evident here."

C. The Continuing Investigation of *al Qaeda*

The Government continues in its efforts against *al Qaeda*. For example, the criminal investigation of Bin Laden's organization and other organizations affiliated with Bin Laden (the members of which may number in the hundreds) is proceeding. In particular, the investigation is focused on identifying and locating any individuals who participated in the attacks of September 11, East African Embassy bombings and/or any other past terrorist or other criminal acts that can be prosecuted in the United States. By apprehending and charging such individuals, the Government seeks to neutralize their ability to carry out any

¹ Testimony in the embassy bombings trial before Judge Sand revealed that "work" is a coded reference to terrorist operations.

further acts of mass murder, thus preventing the additional loss of life. To achieve this end, the FBI must be able to pursue every lawful means to identify *al Qaeda* members who have committed, or are conspiring to commit, terrorist acts. As part of this substantial effort, the Government has been working with, and must be able to continue working with, foreign governments to uncover evidence against, and the whereabouts of, *al Qaeda* terrorists.

Recognizing the Government's compelling interest in neutralizing the demonstrable threat to national security posed by *al Qaeda*, Judge Sand imposed a protective order similar to the one proposed in this case. As Judge Sand noted: "The case . . . involves special circumstances warranting particular control over the flow of classified information, such as have already prompted the Court to impose restrictive conditions of confinement on the Defendants and which formed the basis of the protective order [governing non-classified discovery] that the Court entered in December 1998. *United States v. Bin Laden*, 58 F. Supp. 2d 113, 121 (S.D.N.Y. 1999).²

² The restrictive prison conditions referred to were the Special Administrative Measures adopted by the Bureau of Prisons and approved by Judge Sand. In upholding these measures the Second Circuit held that these restrictions were justified to avoid the danger that the defendants "might communicate to others." *United States v. El-Hage*, 213 F.3d 74, 82 (2d Cir. 2000). The protective order regarding non-classified discovery refers to an order entered by Judge Sand that restricted the defense team's dissemination of non-classified information

2. Producing Discovery of Classified Materials

The Government expects there will be a significant amount of classified material that may be discoverable, primarily under Fed. R. Crim. P. 16.³ There may also be materials that are discoverable under the Jencks Act, as well as *Brady v. Maryland*, 383 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). To comply with our discovery obligations and the Executive Orders and Federal Regulations governing the handling, storage and dissemination of classified information, the Government seeks to provide these materials pursuant to the proposed protective order.

The government personnel assigned to this case have received "Top Secret" security clearances. This high level of clearance is necessary because many of the materials that will be reviewed, and which may be provided in discovery, are classified at the highest levels of Top Secret.⁴

produced in discovery relating to the ongoing investigation of *al Qaeda*. It is likely that the government will seek a similar additional protective order in this case.

³ Currently, the prosecution team is conducting an extensive review of the information and materials maintained by other agencies and departments.

⁴ The various level of classification are governed by Executive Order 12958, 60 F.R. 19825 (1995). Under this Executive Order "Top Secret shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security that

Government counsel have conferred with defense counsel and defense counsel have stated that they do not object to the proposed Protective Order.

MEMORANDUM OF LAW

The Classified Information Procedures Act (CIPA), 18 U.S.C. App. III, provides procedures designed to protect the rights of the defendant while minimizing the associated harm to national security in cases where classified information may be relevant to the criminal proceedings. See *United States v. Rezag*, 134 F.3d 1121, 1142 (D.C. Cir. 1998).

Section 3 of CIPA and Rules 16(d)(1) and 57 of the Federal Rules of Criminal Procedure authorize the Court to issue a protective order to prevent disclosure or dissemination of sensitive information that could compromise national security. See *United States v. Rezag*, 156 F.R.D. 514, 523 (D.D.C. 1994); *United States v. Musa*, 833 F. Supp. 752 (E.D. Mo. 1993). The legislative history of CIPA reflects the type of protection that can be sought in a protective order to ensure that classified information is not improperly revealed and disseminated:

the original classification authority is able to identify or describe." E.O. 19958 § 1.3(a)(1) (emphasis added). Similarly, "Secret shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security . . . , and "Confidential shall be applied to information . . . which reasonably could be expected to cause damage to the national security . . ." *Id.* § 1.3(a)(2) & (a)(3) (emphasis added).

The court is given authority to issue orders protecting against the disclosure of classified material in connection with the prosecution by the United States The details of each order are fashioned by the trial judge according to the circumstances of the particular case. The terms of the order may include, but need not be limited to, provisions: (1) prohibiting the disclosure of the information except as authorized by the court; (2) requiring storage of material in a manner appropriate for the level of classification assigned to the documents to be disclosed; (3) requiring controlled access to the material during normal business hours and at other times upon reasonable notice; (4) requiring the maintaining of logs recording access by all persons authorized by the court to have access to the classified information in connection with the preparation of the defense; (5) requiring the making and handling of notes taken from the material containing classified information; and (6) authorizing the assignment of government security personnel and the provision of Government storage facilities. Punishment for violation of a protective order would be a contempt of court.

S. Rep. No. 96-823, *reprinted* in 1980 U.S. Code Cong. & Ad. News 4294, 4299 (96th Cong. 2d Sess.).

The purpose of CIPA is to minimize threats by the defendant to disclose classified information in the course of litigation by requiring rulings, before trial, on the admissibility of such information. *See Id.* Such threats can arise in various circumstances, such as the following: (1) in pretrial discovery the defendant pressures the government to release classified information the threatened disclosure of which might force the

government to abandon the prosecution; (2) the government expects to disclose classified information in the prosecution, and endeavors to restrict the dissemination of the information; and (3) the defendant has acquired classified information before the initiation of prosecution and seeks to disclose such information during the litigation. See *United States v. Pappas*, 94 F.3d 795, 799-800 (2d Cir. 1996). Section 3 of CIPA provides that, on motion of the government, the court must issue a protective order to guard against the disclosure of classified information disclosed by the government to the defendant during criminal litigation. See *Id.* at 800.

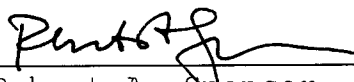
To the extent that the defendant himself does not need to know classified information to effectively assist in his defense, a protective order issued pursuant to CIPA may prohibit counsel for the defendant from disclosing classified information to the defendant that has been provided by the government in discovery. See *Rezaq*, 156 F.R.D. at 524.

CONCLUSION

The United States respectfully moves that the Court issue the attached Protective Order.

Respectfully submitted,

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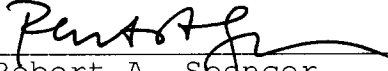
Certificate of Service

I certify that a true and correct copy of the foregoing Government's Motion for Protective Order and Incorporated Memorandum of Law was served by U.S. mail, on January 18, 2002, on the counsel listed below:

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