

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

Alexandria Division

UNITED STATES OF AMERICA)	
)	
v.)	Cr. No. 01-455-A
)	
ZACARIAS MOUSSAOUI)	
a/k/a “Shaqil,”)	
a/k/a “Abu Khalid)	
al Sahrawi,”)	
)	
Defendant.)	

**GOVERNMENT’S MOTION FOR A PROTECTIVE
ORDER PROHIBITING DISCLOSURE OF SENSITIVE
AVIATION SECURITY INFORMATION TO DEFENDANT**

The United States respectfully moves this Court, pursuant to Fed.R.Crim.Proc. 16(d), for the entry of a protective order prohibiting disclosure to the defendant of any sensitive aviation security information (“SSP”) that may be produced by the Government in discovery in this case, and prohibiting its disclosure or use in this case absent notice, further briefing and order of the Court. The Transportation Security Administration, through the Office of the United States Attorney, maintains that turning over such information to the defendant in question is unprecedented, and could have potentially catastrophic consequences for the protection of the traveling public. The United States does not object to providing such materials to defense counsel as “Particularly Sensitive Discovery Materials” subject to the Protective Order for Unclassified But Sensitive Material, entered February 5, 2002, but for its concern regarding the defendant’s access to such materials. Thus, we seek additional protection for these materials, and will provide them to defense counsel promptly upon entry of

the protective order requested here. Copies of these materials are provided for the Court's review in a separate sealed, *ex parte* addendum to this motion.

In particular, the United States respectfully requests this Court to enter a Protective Order providing that: (1) defense counsel may not disclose any SSI material provided in discovery to defendant in any form, whether oral or written, or any portion or summary thereof, nor discuss any SSI with defendant; (2) any papers filed with the Court involving, discussing, attaching, including or referring to the contents of any SSI materials be filed under seal and not be served on defendant; and (3) defense counsel must give advance notice to the government and the Court of any intention to use SSI at trial or in any hearing or other proceeding, such notice to be given sufficiently in advance of any such contemplated use as to permit sealed briefing and *in camera* argument on the admissibility of any such information and such security measures as may be necessary, and shall not use or disclose any SSI at trial or in any hearing or other proceeding absent further order of the Court. We also request that, in order to further assure that the defendant's waiver of counsel is knowing and voluntary, the Court inform the defendant at an appropriate point in the *Faretta* colloquy that he may be denied access to SSI materials if he chooses to represent himself.

Memorandum in Support

Defense counsel has requested various aviation-related items of discovery for each of the four hijacked flights including, among other things, procedure manuals for screening passengers and still and video photography from the screening and ticketing areas at the departure airports on September 11. The United States has recently received a number of responsive documents and items from the Federal Aviation Administration (FAA) and the Transportation Security Administration, including several which are "Sensitive Security

Information” and are the subject of this motion.¹ The United States has at present identified the following SSI materials for potential production in discovery: (1) an FAA security directive; (2) Screening Procedures from the Air Carrier Standard Security Program; (3) Checkpoint Operations Guide by Air Transport Association of America and Regional Airline Association in cooperation with FAA and Aviation Security Contractors Association; (4) security camera video files from Dulles airport, September 11, 2001, 5 to 6 am.; (5) still photographs of the screening area at Newark airport, September 11, 2001; and (6) certain proprietary technical specifications and parts diagrams relating to certain aircraft models. Copies have been provided under seal for the Court’s *ex parte* review.

Sensitive Security Information is subject to a statutory and regulatory scheme for protection that is, in some respects, similar to that for classified national security information. In particular, Transportation Security Administration² (TSA) statutes prohibit disclosure of information “obtained or developed in carrying out security” activities if it is determined by the

¹ The government recognizes that, in addition to being responsive to defense counsel’s discovery request, these materials might arguably be discoverable in the penalty phase under *Brady* as tending to mitigate defendant’s punishment. We fail to see any argument under which this material might be discoverable under *Brady* at the guilt phase of these proceedings.

² The Transportation Security Administration (TSA) was created by the Aviation and Transportation Security Act, (ATSA), Pub. L. No. 107-71, November 19, 2001, enacted by Congress in response to the attacks of September 11th. Pursuant to this statute, the Under Secretary of Transportation for Security has assumed those duties and responsibilities for carrying out Chapter 449 of title 49 relating to civil aviation security that were formerly held by the Administrator of the Federal Aviation Administration. See 49 U.S.C. § 44901 *et seq.* The TSA is now specifically mandated to prescribe policies and regulations to protect persons and property on an aircraft operating in air transportation against acts of criminal violence or air piracy. 49 U.S.C. § 44903 *et seq.* See also *Public Citizen, Inc. v. FAA*, 988 F.2d 186 (D.C. Cir. 1993) (describing the prior statutory regime in part and FAA practice thereunder).

Under Secretary of Transportation for Security that such disclosure would “be detrimental to the safety of passengers in transportation.” 49 U.S.C. § 40119(b)(1). SSI is also statutorily exempted from the Freedom of Information Act. *Id.*

Categories of information that constitute sensitive security information (SSI) are set out in 49 C.F.R. Part 1520, entitled “Protection of Sensitive Security Information,” which implements Section 40119. Among others, documents that detail air carrier screening procedures, airport or air carrier security programs, and Security Directives issued by the FAA or TSA are, by definition, SSI. *See* 49 C.F.R. § 1520.7.

Moreover, implementing regulations prohibit the disclosure of sensitive aviation security information except to those with an “operational need-to-know.” 49 C.F.R. § 1520.5(b). A person has a ‘need to know’ SSI when the person needs the information: (1) to carry out Department of Transportation (DOT) approved or directed security duties, or to train for such duties; (2) to manage or supervise persons carrying out such duties; or (3) to represent and advise airport and aircraft operators, contractors, or persons who receive SSI in connection with any judicial or administration proceeding. 49 C.F.R. § 1520.5(b). For some specific security information, the Under Secretary may make a finding that only specific persons or classes of persons have a need to know. 49 C.F.R. § 1520.5(b). Members of the public, including plaintiffs in civil litigation, proceeding *pro se* or otherwise, and defendants in criminal cases do not fall within this ‘need to know’ category. 49 C.F.R. 1520.5(b).³

³ Under certain conditions TSA regulations do allow persons facing administrative enforcement actions charging them with violations of TSA security regulations to have access to the SSI information contained in the pertinent portion of the enforcement investigative report. There are limitations placed on such access. 49 C.F.R. 1520.3(d). Defendant here is obviously not in this category.

Here, the disclosure of any aviation security documents or information to this defendant would unacceptably increase the risk to the traveling public. Certain of the documents in question contain information on security counter-measures which would assist a potential hijacker or terrorist in circumventing aviation security procedures intended to protect the traveling public. Given the fact that civil airliners were used as weapons against the United States on September 11, and that the defendant has been charged as a co-conspirator in those attacks, common sense dictates that it is clearly not in the national interest for such disclosure to occur. Indeed, if the defendant were allowed access to these documents, the very real possibility exists that the information would be disseminated to either unindicted co-conspirators or other, unknown attackers of civil aviation, potentially causing grave harm to the traveling public. At a minimum, such release would be “detrimental to the safety to persons traveling in transportation” 49 C.F.R. § 1520.3(b)(3).

The right of the FAA to withhold such information from the public, where disclosure would be detrimental to the public interest, has been judicially upheld. *See Public Citizen v. FAA*, 988 F.2d 186 (D.C. Cir. 1993) (holding that the FAA, upon a challenge by aviation consumer groups, had the requisite statutory authority to promulgate sensitive security regulations in secret, without public disclosure); *Ospina v. TWA*, 975 F.2d 35 (2d Cir. 1992) (noting that, on request by the government, portions of the trial proceedings below had been closed to the public due to the sensitivity of the aviation security information at issue).

Information concerning sensitive FAA hijacking profiles has long been recognized by the courts as deserving of special protection in criminal cases. Defendants have been excluded from suppression hearings when sensitive aviation security information involving hijacker profiles has been discussed. *See United States v. Bell*, 464 F.2d 667 (2d Cir.1972) (holding that

trial court's exclusion of defendant and the public from that portion of a suppression hearing dealing with the necessarily confidential hijacking "profile" abridged neither the Sixth Amendment right to confrontation nor the right to a public trial); *United States v. Miller*, 480 F.2d 1008, 1010 (2d Cir. 1973) (no violation of defendant's constitutional rights had occurred with defendant's exclusion from the courtroom during testimony concerning FAA profile); *United States v. Slocum*, 464 F.2d 1180, 1183 (3d Cir. 1972) (*in camera* proceedings excluding defendant and all other courtroom persons while taking evidence of the hijacking profile was appropriate and not reversible error); *United States v. Lopez*, 328 F. Supp. 1077, 1084 (E.D.N.Y. 1971) (over defense counsel's objections, defendant was excluded from his suppression hearing, and the courtroom cleared during the portion where sensitive details of the hijacking profile were discussed). The court in *Lopez* further enjoined defense counsel from revealing any of the information in the sealed portion of the hearing, stating that "[t]he danger in revealing the profile is so great as to warrant the public's exclusion for a limited period." *Id.* at 1088. This limitation on the constitutional right of a defendant to confront the evidence against him and to assist in his own defense, as well as the public's right to an open judicial process was justified because, in the court's view, "were even one characteristic of the profile generally revealed the system could be seriously undermined by hijackers fabricating an acceptable profile." *Id.* at 1086. It is only where the defendant and public have been excluded for more than that portion of the proceeding which specifically deals with the hijacking profile or similar sensitive aviation security information that appellate courts have taken issue with the limitations. See *United States v. Ruiz-Estrella*, 481 F.2d 723 (2d Cir. 1973) (reversing defendant's conviction because defendant was excluded for the entire suppression hearing instead of only that portion involving the secret hijacking profile); *United States v. Clark*, 475

F.2d 240 (2d Cir. 1973) (same). *See also United States v. Bell*, 464 F.2d at 671 (noting that exclusion was from suppression hearing not trial). *A fortiori*, defendant's Constitutional rights will not be violated by non-disclosure to him of SSI under the conditions sought here, as his defense attorneys would be allowed access to this information in discovery for purposes of representing his interests.

As the events of September 11 have again so tragically demonstrated, those who travel by air are uniquely vulnerable to threats of criminal violence. As set forth in the cases cited above, the FAA and the courts have long withheld information concerning airport and air carrier security procedures from criminal defendants and the public so as not to undermine the integrity of the aviation security system and to protect the flying public. The rationale for this non-disclosure is obvious: any unraveling of aviation security information would severely jeopardize the ability of the airport or air carrier to counter a threat, as any criminal element attempting to breach security could use such information to their advantage, and make an attack more difficult to prevent. The reasons supporting the denial of hijacker profile information to criminal defendants and the public in earlier times apply with just as much force today, after the attacks of September 11. In these circumstances, the Government cannot discount the possibility that SSI provided to those outside the need to know category, in particular the defendant here, could be exploited to further terrorist objectives and put the public at greater risk.

While the cases cited above support the proposition that the defendant and the public, including the press, may be properly excluded from the courtroom and the record sealed during those portions of the proceedings involving SSI, the government does not seek such relief at this time. We believe that the Court's consideration of such protective measures may be

deferred until such time after discovery as issues concerning the proposed admissibility or use of any SSI ripen. At that time, the Court's consideration of the proposed admissibility or use of any SSI evidence, and the protective measures required by such proposed use, will be more focused than they would be at present. In the meantime, the government seeks only such relief as will enable us to comply with our discovery obligations and to continue to give to SSI the protection that it must be afforded. Thus, the government is requesting an order authorizing production of SSI material to defense counsel under a prohibition on communicating it to defendant himself, and requiring defense counsel to give notice of any intended use of any SSI material sufficiently in advance to allow briefing and an *in camera* hearing on the proposed admissibility or use and the protective measures that would then be required. We do ask as well, at present, that the Court inform the defendant at an appropriate point in the *Faretta* colloquy, that he may be denied access to SSI materials if he chooses to represent himself.

Therefore, the United States respectfully requests that this Court issue a protective order providing that: (1) defense counsel may not disclose any SSI material provided in discovery to defendant in any form, whether oral or written, or any portion or summary thereof, nor discuss any SSI material with defendant, and that such material will also be subject to the provisions governing Particularly Sensitive Discovery Material of the Protective Order entered February 5, 2002; (2) any papers filed with the Court involving, discussing, attaching, including or referring to the contents of any SSI materials be filed under seal and not be served upon defendant; and (3) defense counsel must give advance notice to the government and the Court of any intention to use SSI at trial or in any hearing or other proceeding, such notice to be given sufficiently in advance of any such contemplated use as to permit sealed briefing and *in camera* argument on the admissibility of any such information and such security measures as may be

necessary, and shall not use or disclose any SSI at trial or in any hearing or other proceeding absent further order of the Court.

A proposed protective order is attached.

Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that on the ____ day of June, 2002, a copy of the Government's Motion and Proposed Protective Order was mailed first class and faxed to the following attorneys for the defendant:

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A copy was not served on defendant. The Government's Addendum to this motion has been filed Ex Parte Under Seal; copies have not been served on defense counsel or defendant.

/s/ _____
Robert A. Spencer
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