

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

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CLERK OF COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA, FLORIDA

UNITED STATES OF AMERICA

vs.

Case No. 8:03-CR-77-T-30TBM

GHASSAN ZAYED BALLUT
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**DEFENDANT GHASSAN BALLUT'S MEMORANDUM OF LAW
IN OPPOSITION TO THE GOVERNMENT'S MOTION FOR PRETRIAL
CONFERENCE AND A PROTECTIVE ORDER PURSUANT TO CIPA**

The Defendant, GHASSAN ZAYED BALLUT, by and through his undersigned counsel, pursuant to the Classified Information Procedures Act (hereinafter "CIPA") at Title 18, Appendix 3, United States Code, and Federal Rule of Criminal Procedure 16, and at the direction of the Court in the Court's Order of July 10, 2003, hereby responds and objects to the Government's Motion for Pretrial Conference and a Protective Order Pursuant to the Classified Information Procedures Act, the Government's proposed Protective Order, and the Government's proposed Memorandum of Understanding Regarding Receipt of Classified Information.

The Government's Motion and Proposals

The Government has submitted a Motion, a proposed Protective Order, and a proposed Memorandum of Understanding Regarding Receipt of Classified Information, basing the argument in its Motion largely upon CIPA, United States v. Rezaq, 134 F.3d 1121 (D.C. Cir. 1998), and United States v. Moussaoui, 2002 WL 1311736 (E.D.V.A.). The Government specifically proposes that certain classified information provided in discovery pursuant to Federal Rule of

Criminal Procedure 16 be discovered only to the Defendants' counsel and that access by the Defendants to the classified information be denied. The Government suggests that the circumstances of this case are similar to those in the cited cases. The Government summarizes its argument:

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 defense counsel from disclosing classified information to the defendant that has been provided by the government in discovery.

Government's Motion, ¶ 4. The Government cites United State v. Rezaq, supra, in support of this position.

The Government further proposes pursuant to Federal Rule of Criminal Procedure 16(d) that declassified information, specifically all declassified audio and video tapes and facsimiles along with summaries and transcripts thereof, will be the property of the United States and will be securely stored, restricted in its disclosure, and ultimately returned to the Government in a prescribed fashion. It should be noted that some 150 such audio tapes have already been copied and distributed among defense counsel, and it appears to be the intent of the Government that this proposed order would apply to these tapes as well.

CIPA and Protective Orders

The Classified Information Procedures Act ("CIPA") at Title 18, Appendix 3, United States Code, is clearly intended to control the use and handling of classified information as defined that is subject to discovery in criminal cases. There is no issue that the Court is

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authorized by this law to issue protective orders upon motion of the United States to protect against the disclosure of any classified information discovered by the United States in a criminal case. 18 App. 3 U.S.C. § 3. It also appears that CIPA is the controlling statutory law on the treatment of such classified information, and that persons can be prohibited by Court order from disclosing classified information under the provisions of CIPA.

CIPA does not, however, make any distinction between defendants and the defendants' defense counsel. CIPA also does not limit or redefine the Government's discovery obligations in criminal cases. Regardless of CIPA, the discovery requirements of Federal Rule of Criminal Procedure 16(a) remain fully intact. Most importantly, CIPA does not pretend to limit or restrict the constitutional rights of criminal defendants to have due process, to have a public trial, to confront the evidence against them, and to have effective assistance of counsel as guaranteed by the Fifth and Sixth Amendments of the United States Constitution. A defendant's right to fully utilize discovery for all lawful purposes survives CIPA. CIPA has no effect on the Government's obligations under Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), or Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972).

The most profound impact of the Government's motion is upon the Defendant's fundamental and constitutional right to effective assistance of counsel under the Sixth Amendment. If the Defendant's undersigned counsel is prevented from disclosing and discussing portions of classified documents pertinent enough to the Government's case or to the Defendant's defense to be discovered, then all effectiveness by defense counsel is lost as to that discovery, and the discovery itself becomes a nullity. In addition, it prohibits the Defendant from exercising his

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fundamental right to participate in his own defense. Further, by putting restrictions on communications between the Defendant and his counsel and by placing the defense counsel on constant guard against the merest hint of disclosure of classified information under penalty of contempt, this proposal would drive a wedge of distrust between the Defendant and his counsel that would further deteriorate the effectiveness of counsel. CIPA does not allow or provide for such a result.

By its own wording, it is clear that CIPA treats defendants and their defense counsel as the same person for all purposes. In providing for protective orders, CIPA specifically speaks of “any classified information disclosed by the United States to any defendant in any criminal case in a district court of the United States.” 18 App. 3 U.S.C. § 3 (emphasis supplied). There is no provision anywhere in CIPA allowing for discovery to the defense counsel while prohibiting disclosure to the defendant. It is the defendant, not the defense counsel, who is entitled to notice and hearing on issues covered by CIPA. In its present request, the Government requests the Court to distinguish between the defendants in this cause and their defense counsel and bases this request on CIPA, but such reliance is clearly misplaced.

CIPA contains provisions deemed sufficient by the Government of the United States to protect the Government’s interests in preventing unauthorized disclosure. CIPA allows for protective orders. 18 App. 3 U.S.C. § 3. CIPA permits the Court to allow the Government to delete items of classified information from documents before discovery and to substitute a summary or stipulation. 18 App. 3 U.S.C. § 4 and § 6(c). It requires notice from a defendant who intends to disclose classified information. 18 App. 3 U.S.C. § 5(a). It permits the sealing of records, the prohibition of disclosure of classified information, and the introduction of classified

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information at trial. 18 App. 3 § 6(d), § 6 (e), and § 8. CIPA makes provision for security procedures by authorizing the Chief Justice of the Supreme Court and the Attorney General of the United States (who heads the United States Attorney’s Office proposing this Protective Order) to prescribe rules establishing such procedures, yet even in these resulting rules no suggestion was made that defendants should be denied access to discovery provided to their defense counsel. See 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. In short, the Government already has protection under CIPA deemed sufficient by Congress, the Supreme Court, and the Attorney General. In its motion, the Government now seeks to go beyond this sufficient protection to the extent of gravely affecting the Defendant’s rights to due process and the effective assistance of counsel.

The Government cites both United States v. Rezaq, 134 F.3d 1121 (D.C. Cir. 1998), and United States v. Moussaoui, 2002 WL 1987964 (E.D. Va. 2002), in support of its request to prevent disclosure to the defendants while permitting it to defense counsel. The Government specifically represents that in Rezaq, “the district court entered a Protective Order that authorized counsel for the defendant to obtain access top classified information, but not the defendant himself without additional order of the Court.” Government’s Motion, ¶ 6. This is a complete misinterpretation of Rezaq. In fact, the district court in Rezaq followed CIPA in allowing the Government to substitute for discovery a statement admitting relevant facts pursuant to Section 4 of CIPA. This substitution was “disclosed to Rezaq’s attorney.” United States v. Rezaq, 134 F.3d at 1142. There is no suggestion anywhere in Rezaq that the attorney was prohibited from sharing this substitution with Rezaq. On the contrary, the Government’s remedy in Rezaq was the

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Court's permission to substitute a statement of admission to prevent the disclosure of classified information. Rezaq clearly does not support the Government's proposal here.

As for Moussaoui (apart from not being controlling here and currently being subject to appeal), the District Court in that case made specific findings peculiar to that case, determining that Moussaoui was charged with conspiracy to commit acts of terrorism that transcended national boundaries (including the destruction of the World Trade Center), that he had made repeated prayers for the destruction of the United States and the American people, that he admitted to being a member of the al Qaeda organization, and that he pledged allegiance to Osama bin Ladin. Based on these findings, the Court found there was strong evidence that the national security could be threatened if Moussaoui had access to the classified information. The Court further found that national security concerns outweighed Moussaoui's desire to review classified documents. United States v. Moussaoui, 2002 WL 1987964 (E.D. Va. 2002). In the present case, the Government in its motion has not even suggested that such significant factors apply. The Defendant suggests that the findings in Moussaoui were unique to that case and have no bearing here.

The Government's reliance on Rezaq and Moussaoui for its proposal that discovery of classified information be limited to defense counsel is entirely misplaced. There is in fact no applicable legal precedent for the Government's proposed Protective Order to the extent that it affects the Defendant's rights to due process and effective assistance of counsel. In addition, the Defendant requests the Court to consider the ramifications of the Government's proposal now that Co-Defendant SAMI AL-ARIAN is a pro se defendant without standby counsel to screen classified information.

Because there is no basis in CIPA and in related law for the Government's proposal that classified information be shared with defense counsel but prohibited to the defendants, the Defendant requests the Court to deny the Government's motion to the extent that it prevents the Defendant from reviewing and discussing with his counsel the discovered classified information. Instead, if the Court deems that a protective order is required, the Defendant proposes the following amendments and corrections.

Amendments and Corrections to the Government's Proposals

In its Order of July 10, 2003, the Court requests the defendants to file proposed protective orders containing any additional or alternative provisions that the defendants would request if the Court grants a protective order. Rather than reproducing the entirety of the Government's sixteen-page proposed Protective Order to address short modifications and additions, the Defendant requests that the corrections and amendments stated below be made to the Government's existing proposed Protective Order. The Defendant specifically objects to the following portions of the Government's Proposed Order for the given reasons, and proposes the following corrections and amendments:

(A) Paragraph 12, headed "Protection of Classified Information," and its subparagraphs exclude the defendants in this cause from having access to the classified information involved in this case while permitting defense counsel, employees of defense counsel, or defense witnesses to have such access. Further, subparagraph 12.a. requires the Court to make a "need to know" determination for each person and each level of classification. Subparagraph 12.b. requires security clearance by the Department of Justice Security

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Officer for each person having access to the classified information. Subparagraph 12.c. requires each person to sign the proposed Memorandum of Understanding. Subparagraph 12.d. extends the requirements of subparagraphs 12.b. and 12.c. to all other persons to obtain access. To correct this, the defendants should be included throughout paragraph 12 as persons having access to the classified information.

(B) Paragraph 13 specifically names the defense counsel and employees who shall be given access to the classified information but thereby specifically excludes the defendants in this cause. Again, to correct this, the defendants should be named as persons having access to the classified information.

(C) Paragraph 14 requires security clearance for “all persons whose assistance the defense reasonably requires,” but again excludes the defendants in this cause from this group. The defendants should be specifically included.

(D) Paragraph 16 addresses the contingency of the defendants in this cause reviewing or discussing classified matters in the proposed Secure Area as described in paragraph 15, and specifically discusses supervision to ensure that a defendant does not “obtain access to classified information the defendant is not entitled to review.” This presumes there would be classified information the defendants would not be entitled to review, and therefore this provision should be stricken.

(E) Paragraph 17 requires all defense counsel to file every pleading or other document under seal through the Court Security Officer, and further states, “The time of physical submission to the Court Security Officer shall be considered the date and time of filing.” The Court Security Officer is then to examine the pleading or document to determine if it

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contains classified information, and then is to mark those that do and unseal those that do not. No such restrictions are placed on the Government except to the extent of paragraph 18 that covers only those documents containing classified information. This provision alters the filing requirements and the computation of time rules under Federal Rules of Criminal Procedure 45(a), 45(c), and 49(d). It also fails to make any provision for the requirement of service on all other parties under Federal Rule of Criminal Procedure 49(a). A more sensible course would be to require defense counsel to submit only documents containing references to classified material under seal to the Court Security Officer before service or filing, which is the same limitation placed upon the Government in paragraph 18.

(F) Paragraph 19 concerns access to classified information by defense counsel, their employees, and each defendant “if such access should be determined by the Court to be necessary.” This provision should be stricken, as each defendant should be permitted the same access to classified information as their counsel and counsels’ employees.

(G) Subparagraphs 19.a. and 19.d. require defense counsel notes on the classified information to be stored in the secure area, without any provision allowing defense counsel to take such notes away for discovery or trial preparation upon motion to the Court or to bring such notes to court for hearing or trial without further motion. Such provision should be made.

(H) Subparagraph 19.e. prohibits defense counsel from discussing classified information outside of the secure area, but as a practical matter this provision prevents defense counsel from discussing the classified information with the defendants during trial preparation and

during trial itself, which is essential to adequate defense preparation. This provision should therefore be stricken.

(I) Subparagraph 19.f. does not include the defendants as authorized persons to whom the defense counsel can disclose classified information, and permits the Government to be heard in response to a defense request for disclosure to another person including “any defendant.” To correct this, the defendants should be included as authorized persons and excluded as persons against whom the Government can object in requests for access.

(J) Subparagraph 19.g. gives full authority to the Government to impose its own restrictions on the disclosure of classified information by defense counsel to defendants. Such a provision is not authorized by CIPA and should therefore be stricken.

(K) Paragraph 20 speaks only of “the defense” in discussing the provisions of Sections 5 and 6 of CIPA without delineating between defense counsel and the defendants. The use of “the defense” throughout paragraph 20 should be clarified to include both defense counsel and the defendants.

(L) Paragraph 21, as currently proposed, extends only to those persons directed by this Proposed Order and not to the defendants, except where actual criminal violations occur. The defendants should be included along with all other authorized persons under this provision.

(M) In paragraph 23, the Government requests a conventional Rule 16(d) protective order to cover all declassified audio and video tapes and facsimiles and any summaries transcripts thereof. This request fails to consider that some 150 such audio tapes have already been copied and distributed for the use of the defense and have been paid for by

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Criminal Justice Act funds. The request also fails to consider that the defense is undertaking great efforts using its own resources to review and transcribe these tapes. The Government offers no legal reason or rationale why the copies of these tapes should be restricted in their use , stored in a particular fashion, labeled in a particular way, returned to the Government as Government property, or otherwise subjected to any protective order. Paragraph 23 should therefore be stricken in its entirety.

(N) As to the Government's proposed Memorandum of Understanding Regarding Receipt of Classified Information, in paragraph 2 of the Memorandum the signer is required to agree that not only this agreement but also "any other nondisclosure agreement will remain binding upon me after the conclusion of the proceedings." This improperly attempts to incorporate and control any other nondisclosure agreement regardless of its separate provisions, and therefore the words "and any other nondisclosure agreement" should be stricken from the Memorandum.

Conclusion

The Defendant proposes that if the Court finds that a protective order should be issued, the above amendments and corrections be made to the text of the Government's proposed Protective Order and Memorandum of Understanding along with any others the Court deems proper. The Defendant also asks that the Court deny any protection as to declassified material, particularly that material already released to the defense. In this and all other respects, the Defendant asks the Court to deny the Government's Motion.

Respectfully submitted,

A handwritten signature in black ink, reading "Bruce G. Howie". The signature is written in a cursive style with a horizontal line underneath it.

Bruce G. Howie

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S.

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