

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

SEP 5 PM 4:46  
U.S. DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA, FLORIDA

UNITED STATES OF AMERICA :  
 :  
v. : CASE NO.: 8:03-CR-77-T-30-TBM  
 :  
SAMI AMIN AL-ARIAN, :  
SAMEEH HAMMOUDEH, :  
GHASSAN ZAYED BALLUT, :  
HATIM NAJI FARIZ :

**GOVERNMENT’S MOTION FOR A RULE 16(d) PROTECTIVE ORDER**

The United States of America, by and through Paul I. Perez, United States Attorney for the Middle District of Florida, respectfully submits its Motion for a Rule 16(d) Protective Order, and states as follows:

1. Attached hereto is a revised, proposed Protective Order, submitted solely pursuant to the authority provided in Rule 16(d) of the Federal Rules of Criminal Procedure. This Order relates only to the recorded conversations, messages and facsimiles obtained by the government pursuant to FISA-authorized interceptions directed at communication facilities utilized by defendants Sami Amin Al-Arian, Sameeh Hammoudeh, Hatim Naji Fariz and Ramadan Abdullah Shallah. These communications are referred to collectively in the Order as “FISA intercepts.” The purpose of the Order is to limit the dissemination of the FISA intercepts to members of the respective defense teams for their use in preparing a defense for trial.<sup>1</sup>

---

<sup>1</sup> In light of the decision of the Federal Bureau of Investigation to declassify all the FISA intercepts, there currently is no discoverable classified information involved in the case requiring protection under the Classified Information Procedures Act. If there is a change of circumstances, the government will advise the Court. In the meantime, consideration of the CIPA Protective Order filed on July 7, 2003 should be tabled.

258

2. The FISA intercepts total over 20,000 hours of recorded private conversations, messages and facsimiles. While most of the intercepts involve at least one of the defendants as a party to the communication, numerous other individuals are also parties. Some of these individuals are alleged to be unindicted co-conspirators; some are not. Some of these communications are relevant to some issue in this case; many of the communications probably are not relevant or useful. Some of these many communications may be of interest not to the government or the defense in this case, but to the Palestinian Islamic Jihad (PIJ) or some of its other members or leaders.

3. By its terms, Rule 16 of the Federal Rules of Criminal Procedure contemplates that discovery material exchanged between the parties will be done so 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).

4. The purpose of discovery in a criminal case is to allow the parties to know something of the other side's case so that each side will be better prepared for trial and the trial itself can be conducted expeditiously and the truth can be discovered fairly in accordance with the rules of procedure and evidence. Defense preparation may include a thorough factual investigation using material provided in discovery.

5. Even in the absence of a protective order, discovery material provided by one party to the other should not legitimately find its way into the public record, or into

the hands of the news media, a lobbyist group, a book publisher or a criminal organization. The only legitimate use for the material is to prepare the criminal case for trial.

6. In this case, notwithstanding the limitations built into Rule 16 itself discussed above, it is entirely appropriate to enter the proposed Order. Given the sensitive nature of the information, the privacy concerns of the various parties to the intercepted conversations, facsimiles, and messages, and the pro se representation by defendant Al-Arian, there is "good cause" and it is appropriate to extend this special protection to the FISA intercepts. By its terms, the proposed Order strikes the appropriate balance between the government's security and privacy concerns and the defense teams need to receive, process, analyze and use the information.

7. Admittedly, also by its terms, the proposed Order applies to FISA intercepts already provided in discovery. But, that should not present a major problem. First, these FISA intercepts have been generally described in the indictment, so the government's security and privacy concerns with respect to these communications are low. While low, the government's security and privacy concerns remain. Many of the specifics in these communications were not disclosed in the indictment. Second, if any defense counsel or defendant or anyone else who would be subject to this Order has taken any action which would constitute a violation of the Order (if it existed at the time the action occurred), obviously such action could not be sanctionable because no Order was then in effect. The Order can only apply prospectively, not retroactively.

## MEMORANDUM OF LAW

Lawyers are 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. Local Rule 4.10, Middle District of Florida, sets out guidelines governing the release of information that is not part of the public record. 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 at 1460. Because discovery is solely for the purpose of preparation for trial, normally a protective order is not needed to ensure that materials provided in discovery are not disclosed to the public (including the media, publishers, or members of criminal organizations such as the PIJ). In an abundance of caution, however, the United States seeks this protective order regarding disclosure of the FISA intercept material to ensure that all parties are aware of the limitations on disclosure of discovery material.

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 United States seeks a protective order to ensure that disclosure of the FISA intercepts is limited to pro se defendant Al-Arian and members of the other defendants’ respective defense teams for their use in preparing a

defense for trial. Such protection is needed due to the sensitive nature of the information and the privacy concerns of the various parties involved in the intercepted conversations.

Acts of terror are still being committed by the PIJ. As recently as August 19, 2003, the Palestinian Islamic Jihad, together with Hamas (another terrorist organization with goals similar to the PIJ) claimed credit for a bombing in Jerusalem which killed eighteen people. See [www.cbsnews.com/stories/2003/08/20](http://www.cbsnews.com/stories/2003/08/20). Recent media coverage indicates that investigations regarding charitable organizations located within the United States allegedly funneling money back to terrorist groups are presently on-going. See [www.islamonline.net/english/news/2002-03/21](http://www.islamonline.net/english/news/2002-03/21). As such, disclosure of the conversations intercepted may reveal investigative tactics, knowledge of which could be employed by these groups to limit the success of future FISA intercepts. Although the undersigned cannot state that protection of disclosure of this sensitive material is "vital to national security", the undersigned does believe that disclosure of the FISA intercepts to others would have a potential chilling effect on future investigations and prosecutions both in the United States and abroad.

As discussed above, the intercepted communications involve persons who have not been charged as defendants in this case. "Persons who have not been charged as defendants in a criminal case 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 noted that discovery is available to a litigant for the purposes of trial preparation and “is not the sort of information traditionally available to the public.” 467 U.S. at 2207-08. “Second, privacy interests of litigants and third parties may be impinged upon by public release of the materials.”<sup>2</sup> Id. at 2208-09.

Accordingly, while the disclosure of the FISA intercepts to the defendants and their defense teams is entirely appropriate, it is equally appropriate for this Court to issue a protective order limiting release of the intercepted communications to only the defendants and their defense teams for their use in preparing a defense for trial. See Alderman v. United States, 394 U.S. 165, 184-85 (1969); United States v. United States Dist. Court for the Eastern Dist. of Michigan, 407 U.S. 297 324 (1972) (cases which held that disclosure of impermissibly intercepted conversations (without a Title III order) to defendants was required and that defendant and his counsel could be placed under “enforceable orders” against unwarranted disclosure of the materials which they may be entitled to inspect). See also United States v. Saleeme, 978 F.Supp. 386, 389 (Mass. 1997) (disclosure of all documents and records produced pursuant to the court’s order or in discovery were subject to restrictions similar to those proposed in this case).

---

<sup>2</sup>The Smith court relied upon Seattle Times in determining not to disclose the document even though Seattle Times discussed discovery in a civil case utilizing Rule 26(c), Federal Rules of Civil Procedure, noting that the civil rule was similar to Rule 16(d)(1) which governs protective orders in a criminal case.

WHEREFORE, for the foregoing reasons, the government requests the Court enter the attached protective order.

Respectfully submitted,

PAUL I. PEREZ  
United States Attorney

By:   
Terry A. Zitek  
Executive Assistant U. S. Attorney  
Florida Bar No. 0336531  
400 North Tampa Street, Suite 3200  
Tampa, Florida 33602  
Telephone: (813) 274-6000  
Facsimile: (813) 274-6246

CERTIFICATE OF SERVICE

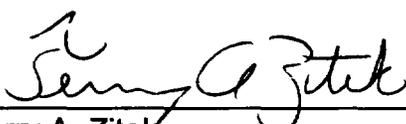
I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by facsimile and U.S. mail this 5th day of September, 2003, to the following:

Mr. Sami Amin Al-Arian  
Register No. 40939018  
Federal Correctional Institute  
846 NE 54th Terrace  
Coleman, Florida 33521-1029  
*Pro Se*

Daniel Mario Hernandez, Esquire  
902 North Armenia Avenue  
Tampa, Florida 33609  
*Counsel for Sameeh Hammoudeh*

Bruce G. Howie, Esquire  
5720 Central Avenue  
St. Petersburg, Florida 33707  
*Counsel for Ghassan Zayed Ballut*

Donald E. Horrox, Esquire  
Federal Public Defender's Office  
400 North Tampa Street  
Suite 2700  
Tampa, Florida 33602  
*Counsel for Hatim Najj Fariz*

  
\_\_\_\_\_  
Terry A. Zitek  
Executive Assistant U.S. Attorney



2. Defense counsel shall not disclose any of the FISA intercepts to any person other than their respective defendant, witnesses which they may be interviewing or preparing for trial, attorneys, law clerks, paralegals, secretaries, translators, technical and other experts, and investigators involved in the representation of their client.

3. The FISA intercepts, or any copies thereof, are now and will forever remain the property of the United States Government. Defense counsel will return the FISA intercepts, and all copies thereof, to the government at the conclusion of the case.

4. Defense counsel will store the FISA intercepts in a secure place and will use reasonable care to insure that they are not disclosed to third persons in violation of this agreement.

5. If defense counsel make, or cause to be made, any further copies of any of the FISA intercepts, defense counsel will inscribe on each copy the following notation: "U.S. Government Property; May Not Be Used Without U.S. Government Permission . . ."

6. If defense counsel release custody of any of the FISA intercepts, or copies thereof, to any person described in paragraph (1), defense counsel shall provide such recipients with copies of this protective order and advise that person that the FISA intercepts are the property of the United States Government and that an unauthorized use may constitute a violation of law and/or contempt of court.

7. Nothing herein constitutes a waiver of any right of any defendant, nor does anything herein restrict in any way the right of the defense to use the FISA intercepts in connection with any pleading or proceeding in this case.

8. A copy of this Order shall be issued forthwith to counsel for each defendant, who shall be responsible for advising his or her respective defendant, defense counsel employees and other members of the defense team, and defense witnesses of the contents of this Order.

ORDERED this \_\_\_\_\_ day of \_\_\_\_\_, 2003 at Tampa, Florida.

---

JAMES S. MOODY, Jr.  
United States District Judge