IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

UNITED STATES OF AMERICA, **Plaintiff,** **v.** **SAFYA ROE YASSIN,** **Defendant.**	**Case No. 16-3024-01-CR-S-MDH**

GOVERNMENT'S CONSOLIDATED RESPONSE IN OPPOSITION TO DEFENSE MOTIONS TO RESCIND PROTECTIVE ORDER AND COMPEL PRODUCTION OF DISCOVERY

The defendant recently filed two motions. The first motion (Doc. No. 33) asks this court to rescind the protective order (Doc. No. 31) entered by the court on March 23, 2016. The second motion (Doc. No. 34) asks this court to enter a new order compelling the Government to produce discovery (Doc. No. 34). The motion to rescind argues that the court has no authority to enter a protective order and the motion to compel argues that the scheduling and trial order entered on February 23, 2016, (Doc. No. 24) is the only court order that can or should control production of discovery in this case. Both motions lack merit and should be denied without a hearing.

The protective order was properly and appropriately entered based on the authority of Fed.R.Crim.P. 16 and 26.2, the Classified Information Procedures Act

(CIPA), and the inherent authority of this court to regulate the manner in which discovery is produced. To whatever extent the discovery production provisions in the protective order conflict with the February 23, 2016, scheduling and trial order (Doc. No. 24) (and the Government does not believe there is a conflict), then obviously the provisions of the later entered protective order are controlling. Therefore, the defense is simply mistaken when she suggests that the scheduling and trial order governs the field with respect to the production of discovery, and that the scheduling and trial order, standing alone, justifies granting the defense motion to compel production of discovery.

National security interests are implicated in this case. Both defense motions suffer from the same fatal defect and error: both ignore well-established legal authority approving the use of a protective order to govern the production of discovery in prosecutions involving national security interests. This is a case where a protective order is necessary to strike an appropriate balance between the competing interests of protecting national security and protecting a defendant's right to a fair trial. The protective order currently in place strikes an appropriate balance between those two competing interests.

The defense motion to compel production of discovery is seriously misplaced because defense counsel knows full well that the Government has been, and is, fully prepared to start producing discovery. To be clear: this is not a case where the Government is refusing to provide discovery and the issue is not whether an order to compel is required to force the Government to start producing discovery. The only relevant issue is whether and in what manner this court regulates what the defense does

with the discovery after it is produced. As in every case where national security issues are implicated, the Government was fully prepared to provide full and complete discovery to the defendant as soon as an appropriate protective order was in place governing how the defense can utilize the discovery produced in this case. The delay in producing discovery is attributable to the defendant's unwillingness to accept limitations on how the defendant can use the discovery that the Government is ready, willing, and able to produce, and the defendant's unwillingness to accept the terms of the protective order entered by the Court. We explain in detail below why the current protective order is completely and fully justified, which explanation will also serve to demonstrate why the motion to compel should be denied.

The protective order (Doc. No. 31) adopts the Government's proposal to produce discovery by grouping it into one of two categories. The first category is "sensitive discovery materials," consisting primarily of declassified investigative materials but also including other sensitive law enforcement materials and information the public disclosure of which could jeopardize ongoing national security investigations. The second category is "general discovery materials" which consists of all items not identified as sensitive discovery materials. All discovery produced by the Government will clearly identify which category a particular item of discovery belongs.

The purpose of the protective order is to prohibit and restrict the dissemination of the discovery materials to any person other than the attorneys in this case. The protective order does not preclude defense counsel from discussing the discovery with his client but it does preclude defense counsel from disseminating the discovery, or the contents of the

discovery, to any other individual except as authorized by the terms of the protective order.

The protective order merely requires that defense counsel responsibly handle the sensitive discovery materials and not use those materials in such a way that endangers individuals associated with this case or in a way that hinders any ongoing investigation, including bringing indicted and unindicted individuals to justice. The protective order does not restrict in any manner the content of the discovery that is produced to the defense but only what the defense can do with it after they receive it. The defense has not articulated, and cannot, articulate, any prejudice that they will suffer from abiding by the terms of the protective order that limit and restrict the manner in which the defense disseminates the discovery provided to them.

The protective order is fully consistent with the Federal Rules of Criminal Procedure. It is axiomatic that discovery in a criminal case is governed by Rule 16 of the Federal Rules of Criminal Procedure, which specifies the type of information subject to disclosure by the Government. See Fed.R.Crim.P. 16(a)(1). It is also axiomatic that the rule grants the district court the power to restrict or deny discovery in a criminal case for "good cause." The advisory committee notes indicate that "good cause" includes "the protection of information vital to the national security." Fed.R.Crim.P. 16(d)(1) & advisory committee's note on 1966 amendments.

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 orders. The clear purpose of the protective order entered in this case is 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 required in this case due to the sensitive national security context of some of the discovery materials.

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.

Because discovery is solely for the purpose of preparing 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, and others). In an abundance of caution, however, the Government sought the protective order regarding disclosure of sensitive information to ensure that all parties are aware of the limitations on disclosure of discovery material.

In this case, notwithstanding the limitations built into Rule 16 itself, the protective order entered by the Court is entirely appropriate in light of the sensitive nature of the information, as well as the privacy concerns of other possible parties and witness, all of

which provide "good cause" for entry of the protective order that extends special protection to what the order refers to as "sensitive discovery materials."

Congress enacted the Classified Information Procedures Act (CIPA) to protect against the unauthorized disclosure of classified information in a criminal prosecution.

> CIPA is procedural and neither creates nor limits a defendant's right of discovery. *See United States v. Mejia*, 448 F.3d 436, 455 (D.C.Cir.2006); see also *United States v. Varca*, 896 F.2d 900, 905 (5th Cir.1990) (CIPA does not expand traditional rules of criminal discovery). Instead, it clarifies the district court's existing power to restrict or deny discovery under the Federal Rules of Criminal Procedure. *Mejia*, 448 F.3d at 455; *United States v. Aref*, 533 F.3d 72, 78 (2d Cir.2008). Both CIPA and Rule 16 leave "the precise conditions under which the defense may obtain access to discoverable information to the informed discretion of the district court." *In re Terrorist Bombings*, 552 F.3d 93, 122 (2d Cir. 2008).

United States v. El-Mezain, 664 F.3d 467, 519-20 (5th Cir. 2011) (affirming district court's restrictions on discovery based on balancing the defendant's need for the information against national security concerns). It is also true that

> "CIPA imposes upon district courts a mandatory duty to prevent the disclosure of any classified materials by issuing a protective order "[u]pon motion of the United States." 18 U.S.C. app. 3 § 3 ("Upon motion of the United States, the court *shall* issue an order to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case . . ."") (emphasis added); *see In re Terrorist Bombings*, 552 F.3d at 121."

El-Mezain, 664 F.3d at 521.

Finally, the defendant should not be permitted to second guess in the first instance the Government's assessment of what is properly considered classified information, and the district court ordinarily should defer to the Government's determination of what information implicates national security interests. *See El-Mezain*, 664 F.3d at 523, *citing*

United States v. Abu Ali, 528 F.3d 210, 253 (4th Cir.2008) ("[W]e have no authority[ ] to consider judgments made by the Attorney General concerning the extent to which the information in issue here implicates national security.").

While the disclosure of the sensitive information to the defendant and her defense team is entirely appropriate, it is equally appropriate for this Court to issue a protective order limiting release of the declassified information to only the defendant and her defense team for its use in preparing a defense for trial. *See Alderman v. United States*, 394 U.S. 165, 184-85 (1969); *United States v. U.S. Dist. Court for the Eastern Dist. of Michigan*, 407 U.S. 297, 324 (1972) (cases holding 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 (D. 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).

By its terms, the protective order strikes the appropriate balance between the government's national security concerns and the defendant and defense counsel's need to receive, process, analyze and use the information provided in discovery. Once the court resolves the pending dispute, initiated by the defendant, and affirms the validity of the existing protective order, the Government is fully prepared to begin production of discovery to the defendant. With that being the case, the defense motion to compel is

moot, and there is absolutely no need for entry of an order compelling the Government to produce discovery.

Accordingly, the United States respectfully requests that the court deny the defense motion to rescind the protective order, deny the defense motion to compel production of discovery, explicitly confirm that to whatever extent the discovery production provisions in the protective order (Doc. No. 31) conflict with the February 23, 2016, scheduling and trial order (Doc. No. 24), the provisions of the later entered protective order are controlling, and grant such other and further relief in favor of the United States as the court finds just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was delivered on March 30, 2016, to the CM-ECF system of the United States District Court for the Western District of Missouri for electronic delivery to all counsel of record.

/s/ Abram McGull II

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Abram McGull II
Assistant United States Attorney