

United States v. El-Hage: Protective Order

Hon. Leonard B. Sand
Southern District of New York
July 29, 1999

This protective order to prevent the unauthorized disclosure of classified information was prepared by the Southern District of New York's United States District Judge Leonard B. Sand for the prosecution of Mohammed Odeh, Mohamed al-'Owhali, Wadih el-Hage, and Khalfan Khamis Mohamed for killing American citizens by bombing American embassies in Kenya and Tanzania on August 7, 1998, in *United States v. El-Hage*, No. 1:98-cr-1023 (S.D.N.Y. Sept. 21, 1998).

Protective Order

WHEREAS this matter comes before the Court upon the motion of the United States for a Protective Order to prevent the unauthorized disclosure or dissemination of classified national security information and documents belonging to the United States Government which may be reviewed by, made available to, or may otherwise come to be in the possession of the defendants and defense counsel in this case, and

WHEREAS the Government personnel in this case, including Assistant United States Attorneys Patrick J. Fitzgerald, Kenneth M. Karas, Michael J. Garcia, and Paul W. Butler, who have had, and will have, access to national security information and documents relating to this case, have "Top Secret" security clearances, and

WHEREAS the Government maintains and has access to storage facilities necessary for the storage, maintenance, and handling of "Top Secret" and "Secret" national security information and documents, and

WHEREAS the national security information in this case may be classified at the "Secret" and "Top Secret" levels, and

WHEREAS having considered the motion of the Government, the defendants' opposition, all other related submissions and proceedings, and having heard oral argument,

IT IS HEREBY ORDERED AND ADJUDGED that pursuant to Fed. R. Crim. P. 16(d), Sections 3 and 9 of the Classified Information Procedures Act, Title 18, United States Code, App. III ("CIPA"), and the Court's inherent authority, the following Protective Order is entered.

1. The Court finds that this case will involve classified national security information, the storage, handling and control of which requires special security precautions, and access to which requires a security clearance and a "need to know."

2. The purpose of this Order is to establish the procedures that must be followed by all defense counsel of record, their respective defendants, all other counsel involved in this case, translators for the defense, any Court personnel,

and all other individuals who receive access to classified national security information or documents in connection with this case.

3. The procedures set forth in this Protective Order and the Classified Information Procedures Act will apply to all pre-trial, trial, post-trial, and appellate aspects concerning this case, and may be modified from time to time by further order of the Court acting under Fed. R. Crim. P. 16(d), Sections 3 and 9 of CIPA, and its inherent supervisory authority to ensure a fair and expeditious trial.

4. In accordance with the provisions of CIPA and the Security procedures promulgated by the Chief Justice of the United States pursuant to that Act, this Court appoints James Londergan as the Court Security Officer (hereinafter “Administrative CSO”) who will provide security arrangements necessary to protect from unauthorized disclosure any classified information or document made available to the defense or the Court in connection with this case. The Court also appoints Charles L. Alliman, Christine E. Gunning, Earl D. Hicks, Michael P. Macisso, and Barbara J. Russell as alternate Administrative CSOs. Defense counsel and Court personnel shall seek guidance from the Administrative CSOs with regard to appropriate storage, handling, transmittal, and use of classified information. Furthermore, the Court appoints James P. Walker as the “Security Clearance CSO” whose sole responsibility will be to process the security clearances for defense counsel, their staff, and any designated Court personnel who will have access to classified information in this case. The Court may appoint alternate or additional Administrative and/or Security Clearance CSOs for either purpose at a later date.

5. No defendant, counsel for a defendant, employee of counsel for a defendant, defense witness, or Courtroom personnel required by the Court for its assistance, shall have access to any classified information involved in this case unless that person shall first have:

(a) received the necessary security clearance as determined by the Department of Justice Security Officer working in conjunction with the Security Clearance CSO, or approval from the Court (as set forth below in paragraph 8), or the Government for access to the particular classified information in question; approval by the Court shall not occur but upon a showing to the Court’s satisfaction of a “need to know” the particular classified information; and

(b) signed the Memorandum of Understanding in the form attached hereto agreeing to comply with the terms of this Order.

6. Standard Form 86, “Questionnaire for National Security Positions,” attached releases, and full fingerprints shall be completed and submitted to the Security Clearance CSO forthwith by all defense counsel, persons whose assistance the defense reasonably requires and by such courtroom personnel as the Court requires for its assistance. The Security Clearance CSO shall undertake all reasonable steps to process all security clearance applications in accordance with applicable regulations.

7. Prior security clearance and a “need to know” as determined by any government entity or the Court as applying to one person does not give that person the authority to disclose any classified national security documents or informa-

tion to any other individual. By way of example, but not limitation, defense counsel with appropriate clearances and a “need to know,” as determined by the Court or the government, are not authorized to discuss such classified information with an uncleared defendant absent written permission of either the Court or the government.

8. The Court will be the final arbiter of all classified information questions. In the event that the Department Security officer working in conjunction with the Security Clearance CSO determines, after exhausting all administrative processes of review (including meeting with counsel applying for the clearance), that any counsel is not to be granted a security clearance, the Security Clearance CSO shall advise the Court promptly of the fact that such a clearance is not forthcoming but not the underlying reasons. In that event, the Court will conduct an ex parte hearing to determine that person’s eligibility to see classified materials. In the first instance, the Court will schedule a conference with such counsel (in the absence of the Government or other counsel) at which time defense counsel will advise whether counsel wishes the Court to undertake a review of the security clearance determination in order to make an access decision. If the Court reviews such a determination, only the Court, counsel seeking the clearance, and the Security Clearance CSO shall participate in that process, absent further order of the Court. If counsel seeks a revision of this Protective Order in any manner, the Government shall be notified of the proposed amendments and provided an opportunity to be heard on the proposed amendments.

9. The substitution, departure, or removal for any reason from this case of any defense counsel, defendant, or anyone associated with the defense as a witness or otherwise shall not release that individual from the provisions of this Order or any form or document executed in connection with this Order. Because classified information remains the property of the United States Government, the persons covered in this order are bound by any subsequent conditions imposed on the classified information or documents, even if more restrictive.

10. As used herein, the term “classified national security information or document” refers to:

(a) any classified information or material, regardless of its physical form or characteristics, that is owned by, produced by or for, or is under the control of the United States government, its agencies, employees, and contractors including research and development;

(b) any document, including notes and regardless of form or characteristic, or information contained therein, which contains classified information;

(c) verbal classified information known to the defendant or defense counsel;

(d) classified documents (or information contained therein) or information disclosed to the defendant, defense counsel or others governed by this order as part of the proceedings in this case;

(e) classified documents and information which have otherwise been made known to defendant, defense counsel, or others governed by this Order and which documents have been marked or designated “CONFIDENTIAL,” “SECRET,” “TOP SECRET,” or “SENSITIVE COMPARTMENTED INFORMATION,” or concerning which the defendant or defense counsel or

others governed by this Order have been orally advised of the classified nature of the document or information;

(f) information and documents covered by Presidential Executive Order 12356; and

(g) any information or document, regardless of place of origin and including foreign classified documents, that could reasonably be believed to contain classified information, or that refers or relates to national security or intelligence matters. Any document or information including but not limited to any subject referring to the Central Intelligence Agency, National Security Agency, Defense Intelligence Agency, Department of State, National Security Council, Federal Bureau of Investigation, or intelligence agencies of any foreign government, or similar entity, or information in the possession of such agency, shall be presumed to fall within the meaning of “classified national security information or document” unless and until the Administrative CSO or counsel for the government advises otherwise in writing.

(h) This provision shall not apply to documents or information which the defense obtains from other than classified materials, or to public court documents or to documents which are provided by the Government with a marking to indicate that the document has been “declassified.” While information in the public domain is ordinarily not classified, however, such information may be considered as classified, and therefore subject to the provisions of CIPA and this Order, if it is confirmed or denied by any person who has, or has had, access to classified information and that confirmation or denial corroborates or tends to refute the information in question. Any attempt by the defense to have such information confirmed or denied at trial or in any public proceeding in this case shall be governed by CIPA and all provisions of this Order.

11. All classified documents and information contained therein shall remain classified unless and until anyone covered by this Order has been notified in writing by the appropriate attorney for the government or the Court Security Officer that the document or information has been declassified and marked declassified by the appropriate classifying authority; or the documents bear a clear indication that they have been declassified by the agency or department of government that originated the document or the information contained therein.

12. “Documents” or “associated materials” or “information” include, but are not limited to, all written or printed matter of any kind, formal or informal, including the originals, all identical copies, and all non-identical copies, whether different from the original by reason of any notation made on such copies or otherwise, including without limitation pleadings, papers, correspondence, memoranda, notes, letters, telegrams, reports, summaries, inter-office and intra-office communications, notations of any sort concerning conversations, meetings or other communication, teletypes, telefaxes, invoices, worksheets, and all drafts, alterations, modifications, changes, and amendments of any kind of the foregoing; graphic or aural records or representations of any kind, including without limitation, photographs, charts, graphs, microfiches, microfilm, video tapes, sound recording of any kind, motion pictures, any electronic mechanical or elec-

tric records or representations of any kind, including without limitation, tapes, cassettes, computers, discs, CD-ROMs, recordings, films, typewriter ribbons, correcting ribbons, and word processor discs, tapes and ribbons; and information acquired orally.

13. The Administrative CSO shall arrange for the creation, construction, maintenance and operation of a “secure room” hereinafter referred to as an “SR,” for the storage, handling, and control of classified documents and information to which the defense counsel, defendants, and other persons assisting in the preparation of the defense case are cleared for access. The Administrative CSO shall establish procedures to ensure that the SR is accessible to defendants (if such access should be determined by the Court to be necessary), counsel for defendants, employees of counsel for defendants and authorized witnesses accompanied by counsel for defendants. The Court Security Officer, in consultation with counsel for defendants, shall establish procedures to ensure that the SR is maintained and operated in the most efficient manner consistent with the protection of classified information. The government may also construct a separate SR for the storage, handling, and control of classified documents and information in accordance with the security procedures required by the Administrative CSO. For the convenience of the Court, the defense counsel, and the Government, the Government may provide classified materials to the defense pursuant to Fed. R. Crim. P. 16, CIPA, *Brady v. Maryland*, *Giglio v. United States*, and the Jencks Act by providing it to the Administrative CSO and making it available at the SR without requiring the Court to pass upon the identified recipient’s “need to know.” If it is necessary for a defendant to review or discuss classified matters, or otherwise meet with defense counsel, in the SR, this will only occur under appropriate supervision to ensure that the defendant does not escape, attempt to escape, cause physical injury to himself or others, or remove, copy, alter, or destroy classified information, or obtain access to classified information the defendant is not entitled to review, and to ensure that the defendant does not use the opportunity to review the classified materials to circumvent any applicable security restrictions, including the Special Administrative Measures imposed by the Bureau of Prisons, other prison regulations, and the other orders of this Court governing discovery in this case.

14. Classified national security documents and information or information believed to be classified shall only be kept, discussed, or reviewed in an SR.

15. Defendants, defense attorneys, and those persons whose assistance the defense reasonably requires shall not disclose or discuss classified national security documents or information, or information believed to be classified, with other defendants or with counsel for other defendants without prior consent of the Government with notification to the Administrative CSO, or the prior approval of the Court. That authorization will not be unreasonably withheld but, when granted, will be subject to all the provisions of this Order. Moreover, the Government shall attach a cover page to each installment of classified materials indicating the names of other counsel who have received the same materials. Counsel may discuss the contents of any such installment he or she receives if counsel (i) verifies that other counsel are also on the list of addressees for that particular installment of classified information and (ii) conducts the conversation in an ap-

propriate place and manner (e.g., in the SR but not on an unclassified telephone). If counsel are not certain as to which counsel have received particular materials, they should ask either an attorney for the Government or the Administrative CSO for clarification of whether particular classified information has been shared with any other counsel.

16. No one shall discuss any classified national security information or document over any standard commercial telephone instrument or office inter-communication system. Nor shall any person covered by this Order discuss or disclose such information in the presence of any person who does not have a clearance certified by the Administrative CSO as applicable to this case, and either a “need to know” as determined by the Court or written approval from counsel for the government.

17. Written materials presumed to contain classified national security information which are prepared for this case by a defendant or defense counsel shall be transcribed, recorded, typed, duplicated, copied or otherwise prepared only by persons who have received access to classified information pursuant to this order, and in accordance with conditions prescribed by the Administrative CSO.

18. Machines of any kind used in the preparation or transmission of classified information in this case may be used only with the approval of the Administrative CSO and in accordance with instructions he shall issue, including instructions as to where such machines must be operated and stored.

19. To facilitate the defendants’ filings of notices as required under Section 5 of CIPA, the Administrative CSO shall make arrangements with the respective agencies for a determination of the classification level, if any, of materials or information either within the possession of the defense or about which the defense has knowledge and which the defense intends to use in any way at trial. Nothing thus submitted by the defense to the Administrative CSO pursuant to this paragraph shall be made available to the prosecutors unless so ordered by the Court, or so designated by the defense. Any and all of these items which are classified shall be listed in the defendant’s Section 5 notice.

20. All written pleadings, filings, attachments, or documents involving classified information, or those which reasonably might cause the disclosure of classified information, or which concern or relate to national security or intelligence matters (as defined in paragraph 10 above) shall not be publicly filed, but shall be filed under seal to the Administrative CSO and shall be marked: “Filed in Camera and Under Seal with the Court Security Officer,” with separate service of copies upon counsel for the Government and co-defendants (except in the event of an ex parte application), provided that the materials be transported by, and delivered to, persons known to have the appropriate security clearance. Service upon other defense counsel with security clearances shall be effected by depositing such counsel’s copy (in an envelope marked on the outside to indicate the addressee and the fact that the document enclosed contains classified information) in the drawer of the safe in the SR which will be designated as a drawer to be shared in common by cleared counsel (the “common drawer”). Notice shall be sent to all cleared counsel by hand or by facsimile which shall simply state that a document which may contain classified information has been filed with the Administrative CSO and served upon the Government and is available in the safe in

the SR. Service shall be effected upon the Government by personal delivery by cleared counsel to one of the following persons: Assistant United States Attorneys Patrick J. Fitzgerald, Kenneth M. Karas, Michael J. Garcia, or Paul W. Butler, or Paralegal Specialists Gerard Francisco or Lillie Grant, or Intelligence Officer Harry Brady, all of whom have Top Secret clearance and who will thereafter be responsible for the documents secure storage within the United States Attorney's Office. If for any reason, none of the seven named Government personnel are available at the time of attempted service, then defense counsel shall maintain the Government's copy in the common drawer in the SR (in an envelope marked on the outside to indicate the copy is for delivery to the Government and the fact that the document enclosed contains classified information) and send a notice to the Government by hand or by facsimile indicating that the delivery of a filing which may contain classified information needs to be arranged. Thereafter, the Government may obtain the document from any cleared defense counsel (or the Administrative CSO) with access to the common drawer, and the Government personnel obtaining such documents shall sign a receipt indicating the date and time of receipt and the cleared person from whom it was received. The Government shall not have direct access to the common drawer of the SR but shall only be provided such documents by cleared defense counsel or the Administrative CSO. The date and time of physical submission to the Administrative CSO, which shall be noted on the document, shall be considered the date and time of filing. Upon receiving a pleading from a defense counsel, the Administrative CSO shall notify by the end of the next business day the Court of the fact that a pleading has been filed. Thereafter, any defense counsel with the appropriate security clearance and who has been granted access to the particular classified information in question by the government or the Court pursuant to paragraph 5(a) of this order will be permitted to review such pleadings in the SR under the same conditions as they would review other classified information. The Administrative CSO shall promptly review such pleading and shall determine, with the assistance of and in consultation with personnel from the appropriate agencies, whether any of the submitted material is classified, and the level of any classified information. If the Administrative CSO, working in conjunction with appropriate Intelligence Community member agencies, determines that the pleading or document contains classified information, the Administrative CSO shall ensure that the portion of the document, and only that portion, is marked with the appropriate classification marking and remains sealed. All reasonable efforts to declassify such materials will be undertaken by the agencies conducting the review. Portions of the pleading or documents that do not contain classified information shall be unsealed by the Administrative CSO and placed in the public record.

21. The Administrative CSO shall maintain a separate sealed record for those materials which are classified. The Administrative CSO shall be responsible for the maintaining of the secured record for purposes of later proceedings or appeals.

22. Pleadings containing classified information which are filed by any one defendant on behalf of a single defendant or other defendants, can only be disclosed to other defense counsel whom counsel knows is authorized pursuant to

paragraph 15 to discuss all the classified information contained in the document therein.

23. Persons subject to this Order are advised that all information to which they obtain access by this Order is now and will forever remain the property of the United States Government. They shall return all materials that may have come into their possession or for which they are responsible because of such access upon demand by the counsel for the government or the Court Security Officer.

24. Persons subject to this Order are further admonished that they are obligated by law and regulation not to disclose any national security classified information in an unauthorized fashion and that any breach of this order may result in the termination of their access to classified information. In addition, they are admonished that any unauthorized disclosure of classified information may constitute violations of the United States criminal laws, including without limitation, the provisions of 18 U.S.C. Sections 371, 641, 1001, 793, 794, 798, 952, and 1503; 50 U.S.C. Sections 421 (the Intelligence Identities Protection Act) and 783; and that a violation of this Order or any portion hereof may be chargeable as a contempt of Court.

25. Nothing contained in this Order shall be construed as a waiver of any right of any defendant.

26. A copy of this Order shall be issued forthwith to counsel for all defendants who shall be responsible for advising defendants, employees of counsel for defendants, and defense witnesses of the contents of this Order. Each defendant, counsel for defendant, employee of counsel for defendant, defense witness, or any other person associated with the defense to be provided access to classified information shall execute the Memorandum of Understanding described in paragraph 4 of this Order, and counsel for defendants shall file executed originals with the Court and the Administrative CSO and serve an executed original of such document upon the government. The execution and filing of the Memorandum of Understanding is a condition precedent to receiving access to classified information.

Dated: New York, New York
July 29, 1999

SO ORDERED

[Signature]

HON. LEONARD B. SAND
United States District Judge
Southern District of New York