IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

UNITED STATES OF AMERICA	*	**Case No. 10-181 (RDB)**
	*	
v.	*	
	*	
THOMAS ANDREWS DRAKE,	*	
	*	
Defendant.	*	
	*****	

OPPOSITION TO DEFENDANT'S MOTION
FOR RELIEF FROM PROTECTIVE ORDER

The United States of America, appearing through its undersigned attorneys, respectfully submits its opposition to defendant Thomas A. Drake's *Motion for Relief From Protective Order*. This motion seeks to allow J. William Leonard "to disclose and discuss" documents provided to him by the defendant and which are protected from further disclosure by this Court's Protective Order of April 29, 2010. *See* Dkt. 13. The motion was filed by the defendant on behalf of a non-party who lacks standing to bring the motion, seeking to lift a Protective Order that was requested jointly by the parties and was entered by this Court with good cause. Accordingly, the motion is improperly made before this Court. The proper alternative, as government counsel has suggested to counsel for the defendant, is for Leonard to file a Freedom of Information Act (FOIA) request with the National Security Agency (NSA), which is prepared to act expeditiously upon the request.

I. FACTS

Defendant Thomas A. Drake was indicted on April 14, 2010 and charged with five counts of willfully retaining national defense information, in violation of 18 U.S.C. § 793(e), one count of obstruction of justice, in violation of 18 U.S.C. § 1519, and four counts of making false statements, in violation of 18 U.S.C. § 1001. The charges alleged that defendant Drake illegally removed from the NSA and kept in his home a number of classified documents that contained national defense information, made false statements to law enforcement agents interviewing him about these activities, and destroyed classified and unclassified documents in order to obstruct justice. *See Indictment*, Dkt. No. 1.

In addition to producing a large volume of classified discovery, the government also provided the defendant with a set of unclassified discovery documents. Before doing so, the parties *jointly* moved the Court for a protective order, "in light of the sensitive nature of the materials which may be disclosed in this case." *Joint Motion for Protective Order*, Dkt. No. 11 (filed Apr. 29, 2010). This Court granted the motion the same day, citing the same need for protection "in light of the sensitive nature of the materials." *Protective Order* at 1.

After the defendant indicated that his defense would include challenges to whether the charged documents in fact contained "national defense information," and after hearings held pursuant to § 6(c) of the Classified Information Procedures Act (CIPA), 18 U.S.C. App. §§ 1-16, this Court ruled that the government's proposed substitutions in numerous government and defense exhibits would not provide the defendant substantially the same ability to make his defense and thus did not meet the standard under § 6 of CIPA. Simultaneously, the parties engaged in plea negotiations, and on June 10, 2011, the defendant pleaded guilty to one count of

18 U.S.C. § 1030(a)(2)(B), and admitted to exceeding authorized access to government computers. *See Information* (Dkt. No. 157), *Plea Agreement* (Dkt. No. 158).

On July 15, 2011, this Court entered the Judgment in this case. *See* Dkt. No. 169. This order sentenced the defendant to one year of probation, and it dismissed all of the remaining charges.

On May 22, 2012, the defendant filed the motion now at issue. *See* Dkt. 180. It asks this Court to lift the Protective Order to allow J. William Leonard, a private citizen not a party to the litigation who was retained by the defendant as a potential expert witness, to publicly discuss and disclose three documents provided in discovery:

- an internal NSA email, entitled "What a Wonderful Success!," that was found in the defendant's home during the FBI search on November 28, 2007 and formed the basis for Count One of the indictment;[1]

- a November 29, 2010, government discovery letter providing a written summary as to the expected trial testimony of Catherine A. Murray, an NSA employee, including a discussion of the system for classifying national security information, the levels of classification, and the reasons for the classification levels of numerous documents found in the defendant's home, including the "What a Wonderful Success!" document; and

- a follow-up discovery letter, dated March 7, 2011, that provided additional detail regarding the "What a Wonderful Success!" email.

One factual assertion by the defendant requires correction. He states that "the government took the position" that the "What a Wonderful Success!" email contained classified material as of November 2007, but that "That position soon changed." *Def. Mot.* at 3. This is incorrect. As of November 2007, the information in the document was classified, and the government's position as to this fact has not changed. In July 2010, the NSA updated the

[1] This document was provided in the government's classified discovery, but is now more appropriately analyzed under the unclassified Protective Order. As explained below, this document contained national defense information classified at the Secret level at the time it was seized from the defendant's home. By the time the supplemental discovery letter was issued in March 2011, the NSA had determined that the information no longer required the protection of that level, and the information was downgraded, prospectively, to Unclassified/For Official Use Only.

classification guide for the information in the document; the new guide determined that the information no longer required the protection of classification. Thus, going forward, the information in the document, and the document itself, are no longer classified.[2]

II. ANALYSIS

Because the defendant's motion is effectively a FOIA request submitted though the Court rather than directly to the NSA, neither the defendant nor Leonard can establish standing under Article III. "The exercise of federal judicial power is legitimate only in live cases or controversies, and one of the controlling elements in the definition of a case or controversy under Article III is standing." *Bond v. Utreras*, 585 F.3d 1061, 1068—69 (8th Cir. 2009) (quoting *Hein v. Freedom From Religion Found., Inc.*, 551 U.S 587 (2007) (internal citations and quotations omitted)). "The Supreme Court has described standing as 'perhaps the most important . . . [Article III] doctrine." *Bond*, 585 F.3d at 1069 (citing and quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)).

The Supreme Court has explained that Article III standing requires an "injury in fact": "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560—61 (1992) (internal citations and quotations omitted). "By particularized," the Court held, "we mean that the injury must affect the plaintiff in a personal and individual way." *Id.* n. 1.

Defendant Drake has suffered no injury in fact, nor does he even allege one. Indeed, his prosecution is over. With no injury, defendant Drake has no standing to litigate the protective order as to Leonard, and no standing to continue.

[2] The defendant's motion also refers to the government's position about the classification status of the document as of April 2010, when the defendant was indicted. As the Court is aware, the status of the information as of April 2010 is irrelevant. What mattered, for purposes of the charges, was whether it was classified at the time the defendant possessed it in November 2007.

Leonard, unfortunately, fares little better. Even assuming this Court denied the current motion, followed by a motion from Leonard himself to intervene in order to challenge the protective order, the proper response would be to deny the motion. Although the Fourth Circuit has not confronted this issue, a number of other courts have examined whether a third party has standing to intervene to challenge a protective order after a case has been resolved. The leading case, *Bond v. Utreras*, 585 F.3d 1061 (8th Cir. 2009), explains that "[i]ntervention for purposes of challenging a protective order is an unusual species of permissive intervention that triggers its own unique standing issues." *Id.* at 1070. Although *Bond* and the cases it cites are civil, and analyze specific Federal Rules of Civil Procedure on intervention, the principles apply here.

When a case has been dismissed, an intervenor must establish standing to challenge a protective order. *Id.* at 1071. "This conclusion flows from the established general principle, noted above, than 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed' in order '[t]o qualify as a case fit for federal-court adjudication.'" *Id.* (quoting *Arizonans for Official English*, 520 U.S. 43, 67 (1997)). Other circuits have reached the same conclusion. *See Bond*, 585 F.3d at 1072 (collecting cases, including *Deus v. Allstate Ins. Co.*, 15 F.3d 506, 526 (5th Cir. 1994); *Newby v. Enron Corp.*, 443 F.3d 416, 422 (5th Cir. 2006); *Pansy v. Borough of Strodsburg*, 23 F.3d 772, 777—78 (3d Cir. 1994); and *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 787 (1st Cir. 1988)).[3]

Moreover, a third party seeking to challenge a post-judgment protective order must demonstrate the same kind of cognizable "injury in fact" under *Lujan* as any other litigant. This

[3] The Fourth Circuit's opinion in *Shaw v. Hunt*, 154 F.3d 161, 165—66 (4th Cir. 1998), held that intervenors who successfully challenged a Congressional redistricting map were eligible for an award of attorney's fees even though their standing was in question. That case, however, involved a completely different factual situation. The intervenors there had joined the case well before the post judgment phase, and in fact had played an active role at the trial, appellate, and Supreme Court level. Leonard, by contrast, is still not a party to the case, and if he petitioned now would be joining over one year after the case's dismissal.

requires a concrete, particularized invasion of a legally protected interest. *Lujan*, 504 U.S. at 560. This requires a claim of injury to a legally cognizable right, and although a litigant need not definitively establish infringement on this right, he "must have a colorable *claim* to such a right" to satisfy Article III. *Bond*, 585 F.3d at 1073 (citing and quoting *McConnell v. FEC*, 540 U.S. 93, 227 (2003) and *Aurora Loan Servs., Inc. v. Craddieth*, 442 F.3d 1018, 1024 (7th Cir. 2006)).

The problem with Leonard's claim is that it relies not on injury to him, but instead on a general desire to complain to the press and the public. As explained in *Bond*, most documents filed in court or that are used in a judicial proceeding are presumptively open to the public. *See* 585 F.3d at 1073 (describing the public's right to access court records). However, the Supreme Court has explained that the public right of access is limited to traditionally publicly available sources of information, and "discovered, but not yet admitted, information" is not "a traditionally public source of information." *Seattle Times Co. v. Rhinehardt*, 467 U.S. 20, 33 (1984). In *Bond*, the court relied on *Seattle Times* to distinguish filed and unfiled discovery, a civil principle that corresponds to whether or not the documents are used in court. The court in *Bond* applied this distinction to reject the standing of the post judgment intervenors. 585 F.3d at 1074-75.

Here, the "What a Wonderful Success!" document was used in Court, but only in the context of sealed CIPA hearings to determine the proper scope of redactions. The expert letters were not used in court. As a result, Leonard cannot show injury in fact sufficient for Article III standing.

As government counsel has urged, the solution to Leonard's desire to discuss his opinions is for him to file a FOIA request under 5 U.S.C. § 552 with the NSA. Government counsel attempted to explore this opportunity with counsel for the defendant but was ultimately

unsuccessful. The government has no animus toward Leonard or his desire to express his opinion about the documents in question – only an interest in appropriately protecting the sensitive nature of the material and to prevent a flood of similar claims by non-parties in other completed cases. Indeed, the government consented to Leonard's request to lift the Protective Order in order to lodge his complaint with the Information Security Oversight Office, the unit of the Executive Branch specifically tasked with receiving complaints about over- or mis-classification.

The government also has coordinated with the NSA, which is prepared to act quickly with respect to any FOIA request by Leonard. The NSA has already prepared FOIA-approved versions of the documents at issue, which are attached to this opposition as exhibits A, B, and C.

As a result, the government's position is that this Court should deny the motion. Defendant Drake has no standing to litigate this issue, and neither does Leonard. However, in the event that the Court holds that Leonard does have standing to pursue modification of the Protective Order, the government requests that the Court release only the redacted versions. The redactions are very limited. As to the "What a Wonderful Success!" document, the redactions are only last names of NSA employees, a redaction to which the defendant has no objection. As to the expert disclosure letters, the redactions only remove the portions of the November 29, 2010 letter which deals with other classified documents not the subject of Leonard's request. The March 7, 2011 letter is not redacted in any way.

III. CONCLUSION

The government respectfully requests that this Court deny the defendant's motion and direct Leonard to file a FOIA request with the NSA.

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CERTIFICATE OF SERVICE

I hereby certify that I have caused an electronic copy of the *Motion to Dismiss* to be served via ECF upon James Wyda and Deborah L. Boardman, counsel for defendant.

/s/ John P. Pearson
Trial Attorney
United States Department of Justice