IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	*	
v.	*	**Criminal No. 1:10-cr-0181-RDB**
THOMAS ANDREWS DRAKE	*	

DEFENDANT'S REPLY IN SUPPORT OF
MOTION FOR RELIEF FROM PROTECTIVE ORDER

The defendant, Thomas Drake, through his attorneys, submits this reply in support of his Motion for Relief From Protective Order ("Motion") (Dkt. No. 180). In the Motion, the defense requested permission for its expert witness, J. William Leonard, to disclose and discuss three unclassified documents that he received in the course of this case pursuant the Court's Protective Order governing unclassified discovery.[1]

In its opposition, the government does not argue that a public discussion of the unclassified information would compromise national security or jeopardize the national defense. And it would not: as Mr. Leonard states in his affidavit, public discussion of these important issues will strengthen, not weaken, our national security. Nor does the government dispute Mr. Leonard's credentials or his patriotic motivation for publicizing the government's conduct in this case. Instead, the government argues that the Motion should be denied because Mr. Leonard lacks standing to seek relief from the Protective Order. This argument is baseless. The government also suggests that the better route would have been for Mr. Leonard to file a FOIA request with NSA for the documents. This argument, too, is baseless.

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[1] The three documents are the now-unclassified "What a Success" document charged in Count One of the Indictment and the government's two expert witness disclosures, both of which are unclassified.

I. Mr. Leonard is Bound by The Terms of the Protective Order and Is Required to Seek Relief From the Order Before Discussing the Unclassified Information.

The government has taken the position that Mr. Leonard is a third-party intervener who lacks standing to challenge the Protective Order entered in this case. This position is baffling. Last July, when Mr. Leonard requested relief from the Protective Order in order to file a complaint with the Information Security Oversight Office ("ISOO"), the government consented to the request and did not claim, as it does now, that Mr. Leonard was a third-party intervener who lacked standing. Now that Mr. Leonard seeks to speak publicly about his complaint, the government objects, claiming that the Court does not have jurisdiction to permit him to do so because he is a third-party intervener who lacks standing. The government is wrong. Mr. Leonard is not a third-party intervener, and the Court certainly has jurisdiction to enter an Order granting him limited relief from the Protective Order.

Far from being a third-party intervener with no connection to this case, Mr. Leonard was an expert witness for the defense, who, by virtue of his agreement to serve as an expert witness, was, and remains, bound by the terms of the Protective Order. The Order was drafted by the government and entered "in light of the sensitive nature of the information which may be disclosed." April 29, 2010, Protective Order (Dkt. No. 13). The Protective Order applies to the parties as well as "experts or consultants assisting in the preparation, trial and appeal of this matter." Id. The Order imposes the following restriction on all those bound by it, including experts, and permits the Court to grant relief from the restriction: "The contents of the Protected Material . . . shall not be disclosed to any other individual or entity in any manner except to a photocopy service as agreed by the parties or by further order of this Court." Id. (emphasis

added). In light of this explicit language – which was drafted by the government and for the government's protection – it defies credulity that the government would now assert that Mr. Leonard is not required or permitted to seek relief from the Protective Order. Although the United States may not take the terms of its own Protective Order seriously, Mr. Leonard does. Because of his respect for the Court's Order, the information protected by the Order, and the judicial process, Mr. Leonard properly sought relief from the Protective Order last July to file his complaint, and he properly seeks relief from the Order now to take his concerns public.[2]

Part and parcel of the government's baffling "lack of standing" argument is its equally perplexing suggestion that Mr. Leonard cannot seek relief from the Protective Order because this case is closed. The Protective Order remains in effect today. It was not voided or mooted when judgment was entered last year. It has not expired. In fact, at the end of Mr. Drake's guilty plea

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[2] The case law cited by the government is irrelevant. The government relies almost exclusively on an Eighth Circuit decision in a civil case, Bond v. Utreras, 585 F.3d 1061 (8th Cir. 2009), to support its claim that Mr. Leonard is a third-party intervener who lacks standing. Bond is inapplicable here. In Bond, the Eighth Circuit held that a non-party Chicago journalist did not have standing to intervene and challenge a protective order entered by the Court with the consent of the parties, in a Section 1983 lawsuit against the City of Chicago, because the case had settled and been dismissed by the time the journalist moved to intervene, the parties to the protective order were not seeking modification of the order, and the journalist could not establish "injury-in-fact." See 585 F.3d at 1072-73 (relying on Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) which defines "injury-in-fact" as "concrete and particularized invasion of a legally protected interest"). This case is nothing like Bond. This is a criminal case in which an individual bound by the terms of an enforceable Protective Order seeks relief from the restrictions imposed on him pursuant to the Order. Neither Bond nor any of the other cases cited by the government addresses Mr. Leonard's standing to seek relief from the Protective Order or the Court's power to enter an Order granting him relief from the Order. To the extent the case law on the doctrine of standing has any relevance here, Mr. Leonard's "injury-in-fact" is the restriction on his First Amendment right to freedom of speech. See, e.g., Henry v. Centeno, 2011 WL 3796749, at *3, n. 4 (N.D. Ill. Aug. 23, 2011) (ruling on parties' protective order dispute and distinguishing Bond because "[a]t issue is a litigant's right to speak, not the public's right to hear").

on June 10, 2011, former government counsel, William M. Welch II, reminded the Court and the parties on the record that the Protective Order remains in effect:

THE COURT: All right. Is there anything further from the point of view of the Government, Mr. Welch?

MR. WELCH: Just one matter. Just a reminder that the protective orders entered into in the indicted case remain in force and in effect.

THE COURT: Yes. Yes. I will address that. Thank you, Mr. Welch.

* * *

THE COURT: All right. Mr. Drake, Mr. Welch has aptly noted that the same protective orders apply with respect to information that was dealt with in this case, including information that was dealt with pursuant to Section 6(c) of the Classified Information Procedures Act, so that the confidentiality of all those matters as well as the protective orders still apply. Do you understand that?

THE DEFENDANT: I do.

See Exhibit A (excerpt from June 10, 2011, guilty plea hearing). The difference between the government's position on the Protective Order last year and the government's position on the Protective Order this year is irreconcilable. In light of these conflicting positions, one wonders how the government might have reacted if Mr. Leonard had ignored the Protective Order and chosen to discuss the information he obtained in this case without seeking leave of Court.

II. A FOIA Request Would Not Have Been Successful or Sufficient.

The government suggests that "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." This proposed "solution" is inadequate for two reasons.

First, NSA previously ignored a FOIA request for the "What a Success" document. On August 23, 2011, one month after Mr. Drake was sentenced, Steven Aftergood, the Director of the Project on Government Secrecy at the Federation of American Scientists in Washington, D.C., submitted a request to NSA for the "What a Success" email. See Exhibit B (September 15, 2011, NSA letter to S. Aftergood acknowledging his Aug. 23, 2011, FOIA request for "a declassified NSA email message entitled 'What a Success'"). In response to Mr. Aftergood's FOIA request, NSA stated:

> We have completed our search for records responsive to your request. The material responsive to your request was located in a similar FOIA request currently being processed. Your request will be processed along with the previous request, FOIA Case 64636, since the responsive material for that request is also responsive in your case. We will respond to you again once the processing of the two cases is complete.

Id. Mr. Aftergood has received no further response from NSA, and he never received the "What a Success" email. It was only after the public filing of this Motion that NSA offered to prepare the "What a Success" email for a FOIA response. Given NSA's track record and its failure to respond to prior FOIA requests for the "What a Success" document, Mr. Leonard had no reason to believe his FOIA request for the same document would have been successful.

Second, even if Mr. Leonard had received the documents pursuant to a FOIA request, he would still be bound by the terms of the Protective Order that prohibit him from disclosing and

discussing the documents. It would do Mr. Leonard no good to merely receive the documents pursuant to a FOIA request if he cannot discuss the documents because he is bound by a Court Order that prohibits such discussion. The government's proposed FOIA request solution might have worked for an ordinary citizen, such as Mr. Aftergood, who has no restrictions on his freedom of speech, but a FOIA request may not have worked for Mr. Leonard whose ability to publicly discuss the documents is restricted by a Court Order. Cf. John Doe Agency v. John Doe Corp., 493 U.S. 146, 153 (1989) ("FOIA was not intended to supplement or displace rules of discovery."). In the end, Mr. Leonard chose not to try to circumvent the Court's Order by submitting a FOIA request, as the government has proposed. He would rather play it safe, not risk violating a Federal Court Order, and receive permission to discuss his concerns directly from the Court.

For these reasons, a FOIA request would not have been a successful or sufficient alternative.

III. The Government Ultimately Does Not Dispute the Relief Requested by Mr. Leonard.

The most telling aspect of the government's opposition is not the arguments that it makes, but the arguments that it does not make. The government does not argue that Mr. Leonard's grave concerns about the willful improper classification of the "What a Success" document are invalid. It does not argue that a public discussion of the unclassified information would harm national security. It does not argue that Mr. Leonard's motivations in seeking to speak to the press about his concerns are anything less than patriotic. It does not dispute that a healthy and robust public debate of important national security issues is essential to a free, democratic

society. And it does not dispute that Mr. Leonard has a First Amendment right to speak publicly about unclassified matters. See Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 558 (1976) (holding government "carries a heavy burden of showing justification for the imposition of such a restraint."). See also id. at 559 ("[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."). In what appears to be a concession on this last point, that ultimately it cannot stop Mr. Leonard from exercising his First Amendment rights, the government submitted to the Court redacted versions of the three documents that Mr. Leonard seeks to disclose and discuss. These redacted versions are acceptable to Mr. Leonard. The defense, therefore, respectfully requests entry of the attached Order allowing Mr. Leonard to disclose and discuss the unclassified documents with the public.

WHEREFORE, the defense requests that this Honorable Court grant its Motion for Relief from the Protective Order and enter the attached Order.

Respectfully submitted,

/s/

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ORDER

Upon consideration of the Defendant's Motion for Relief from the Protective Order, the Government's Opposition, the Defendant's Reply in Support of the Motion, and for the reasons stated in the Motion and Reply, and for good cause shown, it is hereby ORDERED that defense expert witness, J. William Leonard, the former Director of the Information Security Oversight Office (ISOO), may disclose and discuss with the public the following unclassified documents: (1) the document charged in Count One of the Indictment, entitled "What a Success," as redacted by the government, a version of which is sealed as Exhibit A pursuant to the government's Motion to Seal (Dkt. No. 186) and is hereby unsealed; (2) the government's November 29, 2010, expert witness disclosure, as redacted by the government, a version of which is sealed as Exhibit B pursuant to the government's Motion to Seal and is hereby unsealed; (3) the government's March 7, 2011, expert witness disclosure, a version of which is sealed as Exhibit C pursuant to the government's Motion to Seal and is hereby unsealed; and (4) Mr. Leonard's July 30, 2011, letter of complaint to John P. Fitzgerald, Director of ISOO.

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THE HONORABLE RICHARD D. BENNETT
United States District Judge

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

UNITED STATES OF AMERICA)
)
v.) Criminal Docket No. RDB-10-0181
) (**Excerpt of proceedings**)
THOMAS DRAKE,)
Defendant)

Baltimore, Maryland
June 10, 2011
9:30 AM to 10:01 AM

THE ABOVE-ENTITLED MATTER CAME ON FOR SENTENCING
BEFORE THE HONORABLE RICHARD D. BENNETT

A P P E A R A N C E S

On behalf of the Government:

William Welch, Assistant U.S. Attorney
John Pearson, Assistant U.S. Attorney

On behalf of the Defendant:

James Wyda, Federal Public Defender
Deborah Boardman, Assistant Federal Public Defender

Reported by:

Martin J. Giordano, RMR, CRR, FOCR
U.S. Courthouse, Room 5515
101 West Lombard Street
Baltimore, Maryland 21201
410-962-4504

EXCERPT OF PROCEEDINGS OF JUNE 10, 2011

THE COURT: All right. Is there anything further from the point of view of the Government, Mr. Welch?

MR. WELCH: Just one matter. Just a reminder that the protective orders entered into in the indicted case remain in force and in effect.

THE COURT: Yes. Yes. I will address that. Thank you, Mr. Welch.

And, Mr. Wyda, anything further from the point of view of the Defense?

MR. WYDA: Not from the Defense, Your Honor.

THE COURT: All right. Mr. Drake, Mr. Welch has aptly noted that the same protective orders apply with respect to information that was dealt with in this case, including information that was dealt with pursuant to Section 6(c) of the Classified Information Procedures Act, so that the confidentiality of all those matters as well as the protective orders still apply. Do you understand that?

THE DEFENDANT: I do.

THE COURT: All right. If there will be nothing further, this Court stands in recess until 1:30 or 2 o'clock this afternoon.

THE CLERK: Yes. All rise. This Court stands in recess.

(Proceedings adjourned.)

I, Martin J. Giordano, Registered Merit Reporter and Certified Realtime Reporter, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

_____ _____

Martin J. Giordano, RMR, CRR Date

NATIONAL SECURITY AGENCY
CENTRAL SECURITY SERVICE
FORT GEORGE G. MEADE, MARYLAND 20755-6000

FOIA Case: 65272
15 September 2011

Mr. Steven Aftergood
1725 DeSales Street NW, Ste. 600
Washington, DC 20036

Dear Mr. Aftergood:

This is an initial response to your Freedom of Information Act (FOIA) request submitted via the Internet on 23 August 2011, which was received by this office on 24 August 2011, for "A copy of a declassified NSA email message entitled 'What a Success'." We interpret your request to be for a document titled "What a Wonderful Success." Your request has been assigned Case Number 65272. This letter indicates that we have begun to process your request. There is certain information relating to this processing about which FOIA and applicable Department of Defense (DoD) and NSA/CSS regulations require we inform you.

For purposes of this request and based on the information you provided in your letter, you are considered a representative of the media. Unless you qualify for a fee waiver or reduction, you must pay for duplication in excess of the first 100 pages.

We have completed our search for records responsive to your request. The material responsive to your request was located in a similar FOIA request currently being processed. Your request will be processed along with the previous request, FOIA Case 64636, since the responsive material for that request is also responsive in your case. We will respond to you again once the processing of the two cases is complete.

Any other correspondence related to your request also should include the case number assigned to your request. Your letter should be addressed to National Security Agency, FOIA Office (DJP4), 9800 Savage Road STE 6248, Ft. George G. Meade, MD 20755-6248 or may be sent by facsimile to 443-479-3612. If sent by fax, it should be marked for the attention of the FOIA office. The telephone number of the FOIA office is 301-688-6527.

Sincerely,

Michele Smith for

PAMELA N. PHILLIPS
Chief
FOIA/PA Office