IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	
	)	**FILED EX PARTE AND IN CAMERA**
v.	)	CRIMINAL NO. 02-37-A
	)	(J. ELLIS)
JOHN PHILLIP WALKER LINDH	)	

GOVERNMENT'S MOTION FOR PROTECTIVE ORDER

The United States of America, by undersigned counsel, hereby moves for a protective order pursuant to Federal Rule of Criminal Procedure 16(d)(1).

Introduction

We file the attached material with the Court today despite our conviction that the material is privileged, not discoverable under Rule 16 and not Brady. We do so in part because the material is arguably responsive to two of the 79 discovery requests contained in defense counsel's February 12, 2002 letter. By letter today, we are advising defense counsel that we view these two requests as calling for the production of nondiscoverable material; nevertheless, we have concluded that, consistent with our obligations as prosecutors and officers of the Court, the Court should be advised that the attached material exists. In particular, we determined that, however strong our belief that the material attached is not discoverable, the Court should be advised of its existence and be provided an opportunity

to review the material for itself.[1]

We ask the Court, pursuant to Federal Rule of Criminal Procedure 16(d)(1), to issue a protective order authorizing the Government not to disclose the attached material. We file this motion today because we did not want to advise defense counsel as to our position on relevancy without also advising the Court at the same time of the existence of these documents. We respectfully suggest to the Court, however, that it postpone a resolution of this motion for a protective order until the defense has had an opportunity to litigate before this Court, if it chooses to do so, its claim as to the relevancy of the two items in question. If litigated, this matter would be before this Court at the April 1, 2002 discovery hearing.

Statement of Facts

1. On or about February 12, 2002, the defendant provided the Government a discovery letter listing 79 different items. Two of them were as follows:

> #32. Any and all documents that mention, describe, summarize, discuss, memorialize or reference any request by Mr. Lindh's parents or by Mr. James J. Brosnahan that Mr. Lindh's parents and/or Mr. Brosnahan be given access to Mr. Lindh.
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> #33. Any and all documents that mention, describe, summarize, discuss, memorialize or reference the possibility of any U.S. Government official advising

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[1] We have provided the Court the email communications as we received them, even though there is significant repetition of emails.

Mr. Lindh that counsel was retained to represent him and/or that counsel had requested to see him.

2. After the United States Attorney for the Eastern District of Virginia undertook responsibility for the Lindh prosecution in January 2002, this office was made aware of the existence of December 2001 email exchanges between the Department of Justice's Professional Responsibility Advisory Office ("PRAO") and the Department of Justice's Terrorism and Violent Crimes Section ("TVCS") concerning the Lindh investigation. After receipt of defense counsel's February 12, 2002 letter, the Government sought to gather any additional documents that might exist related to the PRAO matter from the Department of Justice. We ultimately received a total of 24 emails and an "Inquiry Data Sheet," all of which are attached to this motion.

3. In summary, these documents concern advice and counsel provided by PRAO to TVCS as to the applicability of bar ethical rules to an anticipated interview of Lindh by the FBI. PRAO's responsibility is to provide guidance to all Department of Justice attorneys on the interpretation, scope and application of 28 U.S.C. Section 530B, commonly known as the McDade Act. In performance of that responsibility, a number of emails were exchanged among TVCS, PRAO and the Appellate Section of the Criminal Division between December 7, 2001 and December 20, 2001.

4. The Government believes that the attached material may be responsive to Items #32 and #33 and, therefore, we are submitting

it to the Court for its in camera review.

Position of the Government

5. The Government considers the attached material to be privileged.

First, it is the Government's position that these communications are protected by the attorney-client privilege. PRAO's advice to TVCS attorneys, and the exchanges surrounding the giving of that advice, are confidential communications between a lawyer (PRAO) and a client (TVCS). See generally, Chaudhry v. Gallerizzo, 174 F.3d 394, 402 (4th Cir. 1999); In re Grand Jury Subpoena, 204 F.3d 516, 518 (4th Cir. 2000); In re Allen, 106 F.3d 582, 600 (4th Cir. 1997), quoting Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)(the privilege serves a "salutary and important purpose: to 'encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.'"); Hawkins v. Stables, 148 F.3d 379, 383 (4th Cir. 1998)(citation omitted)("[W]hen the privilege applies, it affords confidential communications between lawyer and client complete protection from disclosure.").

In this case, a PRAO attorney rendered legal advice and counsel to a TVCS attorney who sought it for the purpose of "securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding...." See

United States v. Jones, 696 F.2d 1069, 1072 (4th Cir. 1982), quoting United States v. United Shoe Machinery Corp., 89 F.Supp. 357, 358-59 (Mass. 1950). As such, the attached emails are protected communications.

Second, it is the Government's position that these communications are protected from disclosure by the work-product privilege. In re Grand Jury Proceedings, 102 F.3d 748, 750 (4th Cir. 1996)(citation omitted)("The work-product privilege protects the work done by an attorney in anticipation of litigation.") An attorney, in performing his or her various duties, must "work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." Hickman v. Taylor, 329 U.S. 495, 510(1947). "Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their client's interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways ...."

Courts have traditionally analyzed the work product

privilege in two contexts, opinion work product and fact work product. Id. "Fact work product is discoverable only 'upon a showing of both a substantial need and an inability to secure the substantial equivalent of the materials by alternative means without undue hardship.'" Chaudhry, 174 F.3d at 403, quoting In re Grand Jury Proceedings, 33 F.3d 342, 348 (4th Cir. 1994). Opinion work product is "even more carefully protected, since it represents the thoughts and impressions of the attorney." Chaudhry, 174 F.3d at 403. "Opinion work product enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances." Id. In re Doe, 662 F.2d 1073, 1080 (4th Cir. 1981), quoting In re Murphy, 560 F.2d 326, 336 (8th cir. 1977) ("'An attorney's thoughts are inviolable, ... and courts should proceed cautiously when requested to adopt a rule that would have an inhibitive effect on an attorney's freedom to express and record his mental impressions and opinions without fear of having these impressions and opinions used against the client.'"); Fed.R.Crim.P.16(a)(2)(Rule 16 "does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or any other government agent investigating or prosecuting the case.")

The material in question qualifies as privileged work product material. Moreover, these emails generally contain the

mental impressions and opinions of the writers of the email.

Third, it is the Government's position that the material in question is protected by the deliberative process privilege. "This privilege is designed to protect the quality of administrative decisionmaking by ensuring that it is not done 'in a fishbowl.'" City of Virginia Beach v. U.S. Dep't of Commerce, 995 F.2d 1247, 1252 (4th Cir. 1993)(applying the deliberative process privilege in FOIA). To qualify for the deliberative process privilege, the information must be predecisional in nature and form part of the agency's deliberative process. Id. at 1253, citing Wolfe v. Department of Health & Human Servs., 839 F.2d 768, 774 (D.C. Cir. 1988)(en banc). Predecisional information is that which assists an agency decisionmaker in arriving at his or her decision. Id. Deliberative material "reflects the give-and-take of the consultative process." Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C.Cir. 1980). Courts also ask "whether the document is deliberative in nature, weighing the pros and cons of agency adoption of one viewpoint or another." Id.

The attached emails cover numerous decisions, including decisions concerning the FBI interview of the defendant, the possibility of an undercover interview, whether an interview summary should be sealed, whether the case should be venued in one district vs. another district, and the timing of an

indictment. Among the critical decisions for the Department of Justice in this case were when, where and how to charge the defendant. The charging event occurred in the Eastern District of Virginia on January 15, 2002. Thus, even if some of the decisions covered by these emails had already been resolved or tentatively decided, in general they can be characterized as predecisional and deliberative.

6. Because we are mindful that this is an ex parte filing, we will not make a relevancy and Brady argument in this pleading. Rather, if defense counsel moves to compel production of Items #32 and #33, the Government will present its argument to this Court in its March 29, 2002 filing, unless the Court directs otherwise.

WHEREFORE, the Government respectfully requests that a protective order be issued pursuant to Federal Rule of Criminal Procedure 16(d)(1).

Respectfully submitted,

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