U.S. Department of Justice

United States Attorney

Eastern District of Virginia

RECEIVED
AUG 22 2002
CLERK, U.S. DISTRICT COURT
ALEXANDRIA, VIRGINIA

2100 Jamieson Avenue
Alexandria, Virginia 22314

August 22, 2002

Under Seal

Hon. Leonie M. Brinkema
United States District Judge
401 Courthouse Square
Alexandria, VA 22314

Re: U.S. v. Zacarias Moussaoui; Crim. No. 01-455-A

Dear Judge Brinkema:

We write seeking the Court's assistance in securing the return of two documents that contain classified information that were inadvertently produced to Mr. Moussaoui in discovery in this case.

[redacted] These documents [redacted] were inadvertently produced as unclassified documents, in electronic form, to defense counsel and Mr. Moussaoui on June 12, 2002 [redacted] and June 7, 2002 [redacted]. On July 29, 2002, in accordance with the Court's order on hard-copy discovery, a paper copy of these documents was delivered to Mr. Moussaoui.

The documents should be classified because they contain national security information. [redacted]

Accordingly, we want to replace the unclassified version of the two documents given to standby counsel with a classified version. They have agreed to this exchange. In addition, we want to have a walled-off FBI team enter Mr. Moussaoui's cell at the Alexandria Detention Center to retrieve the hard copy of the documents and the disks on which they were originally produced (and replace those disks with ones that do not contain the documents).

A proposed order is enclosed with this letter.

REDACTED

We note that we have not served a copy of this letter or the proposed order on the defendant. We have served a copy on standby counsel.

Respectfully submitted,

Paul J. McNulty
United States Attorney

By: /s/
Robert A. Spencer
Kenneth M. Karas
David J. Novak
Assistant U.S. Attorneys

cc: Frank W. Dunham, Jr.
Alan H. Yamamoto
Edward B. MacMahon, Jr.

United States District Court

EASTERN DISTRICT OF VIRGINIA
401 COURTHOUSE SQUARE
ALEXANDRIA, VIRGINIA 22314-5799

CHAMBERS OF
LEONIE M. BRINKEMA
DISTRICT JUDGE

TELEPHONE (703) 299-2116
FACSIMILE (703) 299-2238

August 23, 2002

UNDER SEAL

Robert A. Spencer, Esq.
Assistant United States Attorney
Eastern District of Virginia
2100 Jamieson Avenue
Alexandria, Virginia 22314

Re: United States v. Zacarias Moussaoui, Criminal No. 01-455-A

Dear Mr. Spencer:

I am in receipt of your letter of August 22, 2002 in which you request the Court's assistance in retrieving two classified documents inadvertently produced to Mr. Moussaoui in hard copy and on CD ROM. Specifically, you ask that I issue an order authorizing a walled-off FBI team to enter Mr. Moussaoui's cell at the Alexandria City Adult Detention Center to replace the classified documents with unclassified versions of the same. Your request is denied for two reasons.

First, it is unclear from your letter whether the documents at issue were classified when produced or were classified after the fact. If the documents are so sensitive, I do not understand why they were not initially classified. Moreover, it is unlikely that the defendant would appreciate the sensitive nature of the documents if they have no classification on them.

Second, given the massive amounts of material produced in this case, there is a significant danger that any agents sent to Mr. Moussaoui's cell would have to rummage through all of his materials. That would risk serious intrusions into his pro se work product, which a "walled off" FBI team would not solve. If you remain concerned that Mr. Moussaoui's continued possession of these documents could cause serious harm to the national security, I will consider issuing an order directing him to return the documents forthwith. Such an order may be served on the defendant by a deputy Marshal who would collect the materials from him. You may find in the final analysis that less harm will be done by not drawing the defendant's attention to these documents.

Sincerely,

/s/

Leonie M. Brinkema
United States District Judge

cc: Frank Dunham, Esq. (standby counsel)
Alan Yamamoto, Esq. (standby counsel)
Edward MacMahon, Jr., Esq. (standby counsel)
Christine Gunning (Court Security Officer)

U.S. Department of Justice

United States Attorney

Eastern District of Virginia

2100 Jamieson Avenue
Alexandria, Virginia 22314

RECEIVED
AUG 29 2002
CLERK, U.S. DISTRICT COURT
ALEXANDRIA, VIRGINIA

August 29, 2002

Under Seal

Hon. Leonie M. Brinkema
United States District Judge
401 Courthouse Square
Alexandria, VA 22314

Re: U.S. v. Zacarias Moussaoui; Crim. No. 01-455-A

Dear Judge Brinkema:

I write, respectfully, once again in our effort to recover seven documents that were mistakenly produced as unclassified FBI 302s but which should have been classified. I have been informed that as of 5:00 p.m. on August 28, despite their hard work and valiant effort, the Marshal's Service could not find two of the seven documents. Unfortunately, one of the remaining two documents is the most critical of the seven (for reasons I can explain in a more secure forum). Accordingly, I write to request that the Court permit the United States to re-possess the hard copies of the 302s produced to the defendant and to then re-print these 302s without the two unaccounted for 302s.

I realize that the Court will likely greet this request with reluctance, but I believe that several additional facts support the request.

First, one of the Deputy Marshals told me that it appeared that the defendant had not yet begun to review the hard copy 302s that have been produced to him, and a Deputy Marshal told me that, yesterday, the defendant told him that they could take the documents as long as they left the videotapes. Therefore, allowing the United States to re-possess the 302s and re-print them will permit the defendant access to his discovery room and still permit the United States to protect the source information contained in the 302s at issue. In addition, as far as I know, the defendant will not be deprived of any work product if we take back and re-produce the 302s. We will, of course, strive to re-print the 302s as quickly as possible.

Second, the Court yesterday ordered that the defendant be granted access to the secure website set up by standby counsel. Thus, it seems likely that much of the defendant's review of documents will again be done electronically instead of by reviewing the hard copy provided by the government.

Third, it appears from an ongoing review of 302s produced as unclassified documents to the defendant in this case that there are additional 302s that may contain classified information. Thus, permitting us to take back and reprint the 302s we have provided to the defendant would allow the United States to correct any such additional mistakes in under-classification by classifying or redacting particular documents.[1]

Accordingly, we respectfully request that the Court issue an order permitting the United States to re-take possession of the 302s produced in hard copy to the defendant and to re-produce such 302s without the unaccounted for two 302s listed in the Court's August 27th Order.

I note again that I intend to serve a copy of this letter on standby counsel but not on the defendant. Also, I enclose for the Court's consideration a copy of the two documents that have not been recovered.

Respectfully submitted,

Paul J. McNulty
United States Attorney

By: /S/
Robert A. Spencer
Assistant U.S. Attorney

cc: Hon. John Clark (w/o documents)
Frank W. Dunham, Jr. (w/o documents)
Alan H. Yamamoto (w/o documents)
Edward B. MacMahon, Jr. (w/o documents)
Christine E. Gunning (w/o documents)

REDACTED

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[1] Additional classification mistakes appear to consist of including [redacted] Such information could be redacted without compromising the value of the discovery information produced to the defense. Also, we could, of course, provide a list of any such proposed redactions or re-classifications before doing so.

U.S. Department of Justice

United States Attorney

Eastern District of Virginia

2100 Jamieson Avenue
Alexandria, Virginia 22314

RECEIVED
SEP - 5 2002
CLERK, U.S. DISTRICT COURT
ALEXANDRIA, VIRGINIA

September 5, 2002

Under Seal

Hon. Leonie M. Brinkema
United States District Judge
401 Courthouse Square
Alexandria, VA 22314

Re: U.S. v. Zacarias Moussaoui; Crim. No. 01-455-A

Dear Judge Brinkema:

I write again regarding the issue of recovering information that was produced to defendant Moussaoui as unclassified FBI reports but which should have been classified. I understand that the Court is meeting with Court Security Officers on this issue, and I take the liberty of submitting this letter to ask the Court to impose a temporary freeze until the situation is more formally resolved.

In short, we ask that the Court take steps to prevent defendant Moussaoui from having access to the discovery material at issue until the Court resolves the question whether the government can recover such information. We appreciate the opportunity to present legal authority to the Court showing that the Court has the discretion to recover inadvertently produced national security information, and we are hurrying to provide a brief on that subject. In the meantime, we ask that the defendant not be given access to the room that contains the discovery materials.

The defendant now has access to national security information [redacted] the discovery by the defendant of this information [redacted] The access to this material by the defendant is a situation that, even if of our own making, is improper and unacceptable. Simply put, it is illegal and dangerous for the defendant to possess the material, and there must be some way that we can correct the situation.

REDACTED

Accordingly, we respectfully submit that it is a reasonable request that the defendant not be allowed access to the material at issue during the time the Court considers our request and our brief on the issue. We respectfully request that the Court order the United States Marshal to prevent the defendant from having access to the discovery materials until the Court has ruled

finally on the issue.

I note again that I intend to serve a copy of this letter on standby counsel but not on the defendant.

Respectfully submitted,

Paul J. McNulty
United States Attorney

By: /s/
Robert A. Spencer
Assistant U.S. Attorney

cc: Hon. John Clark
Frank W. Dunham, Jr.
Alan H. Yamamoto
Edward B. MacMahon, Jr.
Christine E. Gunning

U.S. Department of Justice

United States Attorney

Eastern District of Virginia

2100 Jamieson Avenue
Alexandria, Virginia 22314

RECEIVED
SEP - 5 2002
CLERK, U.S. DISTRICT COURT
ALEXANDRIA, VIRGINIA

September 5, 2002

Under Seal

Hon. Leonie M. Brinkema
United States District Judge
401 Courthouse Square
Alexandria, VA 22314

Re: U.S. v. Zacarias Moussaoui; Crim. No. 01-455-A

Dear Judge Brinkema:

We respectfully request that the Court order the documents set forth on the attached list (identified by Bates number and FBI serial number) removed from the defendant and returned to the United States.

We believe that the Court has ample authority to effect the return of classified documents that were inadvertently produced to the defendant as unclassified. First, the documents (FBI 302s created by government employees) are the property of the United States and the Court has authority to order that the property be returned to the United States. See United States v. Rezaq, 156 F.R.D. 514, 528 (D. D.C. 1994), *opinion vacated in part on other grounds on reconsideration*, 899 F.Supp. 697 (D.D.C. 1995) (court ordered an unredacted original document that was inadvertently produced in a criminal terrorism case returned to the government, citing government's assertion that the document was government property). It is well settled that classified information is the property of the United States. See United States v. Fowler, 932 F.2d 306, 309-10 (4th Cir. 1991) (copies of classified government documents were property of the United States).

Second, courts routinely order the return of privileged documents inadvertently disclosed in civil cases. See, e.g., In re Grand Jury Investigation, 142 F.R.D. 276 , 282 (M.D.N.C. 1992) (finding attorney client privilege not waived and ordering that the government return all copies and originals of the documents at issue); Fry v. McCall, 1998 WL 273035 (S.D.N.Y. 1998) (ordering the return of any and all copies of privileged document).

Finally, because the 302s at issue are classified and the defendant is not cleared to possess them, they constitute contraband. The U.S. Marshal's Service or the Alexandria Detention Center, therefore, have the authority to enter the defendant's cell and remove the contraband.

The defendant, of course, has no expectation of privacy in a jail cell. Hudson v. Palmer, 468 U.S. 517, 527-30 (1984) (those in custody have no expectation of privacy in their cells).

I note again that I intend to serve a copy of this letter on standby counsel but not on the defendant. Thank you for your attention and consideration.

Respectfully submitted,

Paul J. McNulty
United States Attorney

By: /s/
Robert A. Spencer
Assistant U.S. Attorney

cc: Hon. John Clark
Frank W. Dunham, Jr.
Alan H. Yamamoto
Edward B. MacMahon, Jr.
Christine E. Gunning
(All with attachment)

REDACTED

U.S. Department of Justice

United States Attorney

Eastern District of Virginia

2100 Jamieson Avenue
Alexandria, Virginia 22314

RECEIVED
SEP - 6 2002
CLERK, U.S. DISTRICT COURT
ALEXANDRIA, VIRGINIA

September 5, 2002

Under Seal

Hon. Leonie M. Brinkema
United States District Judge
401 Courthouse Square
Alexandria, VA 22314

Re: U.S. v. Zacarias Moussaoui; Crim. No. 01-455-A

Dear Judge Brinkema:

Of the 43 documents listed in the attachment to our September 5, 2002, letter to the Court, 13 were produced to defendant Moussaoui in electronic format on four CDs that he still possesses.[1] Accordingly, we respectfully request that the Court order that the Court Security Officer obtain those four CDs [redacted] from the defendant's discovery room and that the United States re-produce those CDs without the 13 documents as soon as

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[1] These documents are:

FBI Serial Number	Discovery Number	Produced on CD Number
[redacted]		

REDACTED

possible.

I apologize for approaching the Court again on this issue, and I greatly appreciate the Court's consideration.

A proposed order is attached. Again, I intend to serve a copy of this letter on standby counsel but not on the defendant.

Respectfully submitted,

Paul J. McNulty
United States Attorney

By: /s/
Robert A. Spencer
Assistant U.S. Attorney

cc: Hon. John Clark
Frank W. Dunham, Jr.
Alan H. Yamamoto
Edward B. MacMahon, Jr.
Christine E. Gunning

U.S. Department of Justice

United States Attorney

Eastern District of Virginia

2100 Jamieson Avenue
Alexandria, Virginia 22314

RECEIVED
SEP - 9 2002
CLERK, U.S. DISTRICT COURT
ALEXANDRIA, VIRGINIA

September 9, 2002

Under Seal

Hon. Leonie M. Brinkema
United States District Judge
401 Courthouse Square
Alexandria, VA 22314

Re: U.S. v. Zacarias Moussaoui; Crim. No. 01-455-A

Dear Judge Brinkema:

Another of the 43 documents listed in the attachment to our September 5, 2002, letter to the Court [redacted] was produced to defendant Moussaoui in electronic format on a CD [redacted] that he still possesses. Accordingly, we respectfully request that the Court order that the Court Security Officer obtain that CD from the defendant's discovery room and that the United States re-produce that CD without document as soon as possible.

I apologize for approaching the Court again on this issue, and I greatly appreciate the Court's consideration.

REDACTED

A proposed order is attached. Again, I intend to serve a copy of this letter on standby counsel but not on the defendant.

Respectfully submitted,

Paul J. McNulty
United States Attorney

By: /s/
Robert A. Spencer
Assistant U.S. Attorney

cc: Hon. John Clark
Frank W. Dunham, Jr.
Alan H. Yamamoto
Edward B. MacMahon, Jr.
Christine E. Gunning

U.S. Department of Justice

United States Attorney

Eastern District of Virginia

2100 Jamieson Avenue
Alexandria, Virginia 22314

RECEIVED
SEP 10 2002
CLERK, U.S. DISTRICT COURT
ALEXANDRIA, VIRGINIA

September 10, 2002

Under Seal

Hon. Leonie M. Brinkema
United States District Judge
401 Courthouse Square
Alexandria, VA 22314

Re: U.S. v. Zacarias Moussaoui; Crim. No. 01-455-A

Dear Judge Brinkema:

I seek the Court's authorization to re-produce hard copy FBI reports of interview ("302s") to defendant Moussaoui without producing 302s previously identified by the United States. The re-printing of the 302s will be completed within three business days of the Court's authorization, and I ask that the Court grant an additional day to permit us adequately to index and check the documents.

The electronic version of 302s produced in discovery have, I believe, already been removed from the defendant by the U.S. Marshal Service and the Court Security Officer, and the Court has already ordered the United States to re-produce the relevant CDs to the defendant, without documents previously identified by the United States, to the defendant.

I further ask that the Court Security Officer maintain custody of the documents removed from defendant Moussaoui's discovery room pursuant to the Court's orders.

I attach a proposed order.

Respectfully submitted,

Paul J. McNulty
United States Attorney

By: /8/
Robert A. Spencer
Assistant U.S. Attorney

cc: Hon. John Clark
Frank W. Dunham, Jr.
Alan H. Yamamoto
Edward B. MacMahon, Jr.
Christine E. Gunning
Zacarias Moussaoui