IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAIFULLAH PARACHA (ISN 1094),	)	
Petitioner,	)	
v.	)	Civil Action No. 04-2022 (PLF)
BARACK H. OBAMA, *et al.*,	)	
Respondents.	)	

RESPONDENTS' RESPONSE TO PETITIONER'S EMERGENCY APPLICATION FOR IMMEDIATE ACCESS TO ALL PUBLICLY AVAILABLE WIKILEAKS DOCUMENTS RELEVANT TO PETITIONER'S CASE

Respondents respectfully submit this response to Petitioner's Emergency Application for Immediate Access to All Publicly Available WikiLeaks Documents Relevant to Petitioner's Case, Dkt. No. 363 ("Pet'r's Emergency Application"). Petitioner Saifullah Paracha (ISN 1094) seeks an order requiring the Government to allow his counsel to have "full and unfettered access" from counsel's home and office computers to the purported detainee assessments posted on the WikiLeaks website. *See id* at 1. Specifically, Petitioner seeks express permission for his counsel to "view, download, print, copy, disseminate, and discuss" the purported detainee assessments and their contents outside the Secure Facility "without fear of any sanctions, legal or otherwise," on the grounds that the purported detainee assessments have been widely disseminated and review of the reports at the Secure Facility would be burdensome. *Id* at 1-2.

Petitioner's application should be denied. In response to a number of requests from petitioners' counsel in the Guantanamo habeas cases, the Government recently issued guidance to all counsel regarding access to the purported detainee assessments on the WikiLeaks website. The guidance addresses the interests of petitioners' counsel who seek

to review and potentially make use of these materials in their clients' cases. *See* Exhibit A, hereto. Pursuant to that guidance, counsel may view the purported detainee assessments or other potentially classified information posted on the WikiLeaks website, or on other websites that reproduce materials found on the WikiLeaks site, from any non-U.S.-Government-issued computers. Without having to travel to the Secure Facility, counsel may submit discovery requests for copies of any official government documents purportedly referenced on the site. In addition, copies of the purported detainee assessments from the WikiLeaks site will be made available at the Secure Facility, and may be used by counsel for any purpose authorized by the Protective Order. Counsel may also make public or private statements about the purported detainee assessments within the parameters established by the Protective Order.

Petitioner's counsel is not entitled, however, to download, print, copy, disseminate, and discuss these documents and their contents without restriction. Although the Government has not confirmed or denied that any individual reports released by WikiLeaks are official government documents, as habeas counsel cleared for access to classified information subject to the terms of the Protective Order governing this Guantanamo habeas case, Petitioner's counsel is legally obligated to refrain from mishandling or making unauthorized use or disclosures of potentially classified information the purported detainee assessments may contain. Unfettered public use, dissemination, or discussion of these documents by cleared counsel could be interpreted as confirmation (or denial) of the documents' contents by an individual in a position of knowledge, with corresponding harm to national security. The unauthorized disclosure of potentially classified information that the purported detainee assessments may contain does not alter its status or counsel's obligations under the Protective Order.

For these reasons, discussed more fully below, Petitioner's Emergency Application should be denied.

ARGUMENT

A. Petitioner's Request To Provide His Counsel with an Unlimited Right To Make Use of, Disseminate, and Publicly Discuss the Purported Detainee Assessments is Inconsistent With Counsel's Obligations Under the Protective Order.

On April 24, 2011, numerous media outlets reported that the WikiLeaks website had leaked what purport to be so-called "detainee assessments," Defense Department assessments prepared in the early-to mid-2000s of the evidence supporting the detainability of current and (now) former Guantanamo Bay detainees. *See* Pet'r's Emergency Application at 2 n.2. Many of these purported detainee assessments are marked *SECRET//NOFORN* or contain other indicia that the reports may contain classified information. Although the Government has confirmed that purported detainee assessments were leaked to WikiLeaks, the Government has neither confirmed nor denied that any particular individual report appearing on the WikiLeaks website is an official government document. *See* Exhibit A at 1.

Indeed, for purposes of addressing habeas counsel's requests for access, the Government cannot distinguish between any purported detainee assessments that may, in fact, be authentic government documents and any that are not. In the case of an unauthorized, mass public disclosure such as that involved here, if the Government were to acknowledge in one instance that a disclosed document were not an official government report, but refused to confirm whether the next document were genuine or not, that very act of refusal would in effect reveal the information the Government seeks to protect – the authenticity of the purportedly classified document. *See Bassiouni v. CIA*, 392 F.3d 244, 245-46 (7th Cir.2004); *Phillippi v. CIA*, 655

F.2d 1325, 1330-31 (D.C. Cir. 1981); *People for the Am. Way Found. v. NSA*, 462 F. Supp. 2d 21, 29-30 (D.D.C. 2006).[1]

Thus the Government must refrain from confirming whether any particular reports disseminated by WikiLeaks are genuine detainee assessments or not, to avoid the risk of even greater harm to national security than may have already been caused by WikiLeaks' disclosures. As the D.C. Circuit only recently observed, "[i]t is one thing . . . to speculate or guess that a thing may be so or even . . . to say that it is so; it is quite another for one in a position to know of it officially to say that it is so." *ACLU v. U.S. Dep't of Defense*, 628 F.3d 612,621-22 (D.C. Cir. 2011) (internal quotation marks and citation omitted). Official acknowledgment by an authoritative source that publicly disclosed documents are in fact authentic government reports may remove "lingering" and "unresolved doubt [s] . . . in the minds . . . of potential or actual adversaries" regarding the truth of information reported. *Frugone v. CIA*, 169 F.3d 772, 774 (D.C. Cir. 1999). As a result, official acknowledgment "might well be new information that could cause damage to the national security," *Afshar* v. *Dep't of State*, 702 F.2d 1125, 1130 (D.C. Cir. 1983), by "lead[ing] [our adversaries] to take some action that otherwise would not be taken." *Stein* v. *U.S. Dep't of Justice*, 662 F.2d 1245, 1259 (7th Cir. 1981).

Given that the Government has confirmed that purported detainee assessments were leaked to WikiLeaks, but that the Government can neither confirm nor deny that any individual report is an official government document, they must all be treated as potentially containing

[1] Even if *none* of the purported detainee assessments disseminated by WikiLeaks were official government reports, the dilemma would be the same. If the Government confirmed on the occasion of one purported "leak" of government information that none of the documents in question were genuine, but on the occasion of the next "leak" refused to confirm or deny whether any of the disclosed documents were official government records or not, its reticence would in effect confirm that at least some of the documents (and the information they contain) were authentic. Thus, the Government cannot in any instance confirm or deny the authenticity of so-called "leaked" government documents without sooner or later compromising important national security interests, and so "'must maintain silence uniformly.'" *See Tooley* v. *Bush*, No. 06-0306, 2006 WL 3783142, *20 (D.D.C. Dec. 21, 2006) (citing, *inter alia*, *Bassiouni*, 392 F.3d at 246).

classified information for purposes of addressing Petitioner's demand that his counsel be endowed with an unconditional right to make use of, disseminate, and publicly discuss them. For "reasons . . . too obvious to call for enlarged discussion," *CIA* v. *Sims, 471* U.S. 159, 170 (1985), "the protection of [such potentially classified] information must be committed to the broad discretion of the [Executive Branch], and this must include broad discretion to determine who may have access to it," and under what conditions. *Dep't of Navy* v. *Egan,* 484U.S. 518, 529 (1988) (granting of security clearance is committed by law to the Executive Branch); *People Mojahedin Organization of Iran* v. *Dept. of State, 327* F.3d 1238, 1242 (D.C. Cir. 2003) ("[U]nder the separation of powers created by the United States Constitution, the Executive Branch has control and responsibility over access to classified information . . . .").[2]

In vindication of this authority, counsel access to and use of classified information in this and other Guantanamo habeas cases is governed by the Protective Order. *See* Protective Order, ¶ I.B.11.[3] Pursuant to the Protective Order no counsel involved in these cases may have access to classified information without, *inter alia,* receiving the necessary security clearances. *Id.,* ¶ I.D.16.a. All classified information the Government provides to petitioners' counsel, and all classified information petitioners' counsel otherwise possess or maintain, must be stored, maintained, and used only in the Secure Facility. *Id.,* ¶ I.D.21. Counsel are expressly prohibited from copying or reproducing any classified information in any form except inside the Secure

[2] As the Supreme Court repeatedly has stressed, courts should be especially "reluctant to intrude upon the authority of the Executive in military and national security affairs," *see Egan,* 484 U.S. at 529-30 (citing cases), including the Executive's judgment as to what constitutes classified information, who should have access to it, and on what terms.

[3] The Protective Order defines "classified documents" and "classified information" broadly to include "any classified document or information that was classified by any Executive Branch agency ...," and "any document or information ... now or formerly in the possession of a private party that was derived from United States government information." Protective 'Order, ¶ I.B.8.a, b. "Access to classified information" is also broadly defined to mean "having access to, reviewing, reading, learning, or otherwise coming to know in any manner any classified information ...." *Id.,* ¶ 1.B.12.

Facility, *id.*, ¶ I.D.24, and from disclosing classified documents or information to any person, except those persons authorized by the Protective Order, the Court, and counsel for the Government, *id.*, ¶ I.D.28. Additionally, paragraph I.D.31 of the Protective Order specifically prohibits counsel from making private or public statements revealing personal knowledge from non-public sources regarding the classified status of information that is present in the public domain, or disclosing that counsel has personal access to classified information confirming, contradicting, or otherwise relating to the information already in the public domain.[4] Petitioner's request that his counsel be permitted to use, disseminate, and publicly comment upon purported detainee assessments available on WikiLeaks – at least so far as he would exceed what is already allowed under the guidance – cannot be reconciled with the terms of the Protective Order.

Granting Petitioner's request could also be detrimental to the interests of national security, given the access to classified information that petitioners' counsel enjoy but that members of the public at large do not. Reliance on the purported detainee assessments leaked to WikiLeaks in unclassified public writings by habeas counsel known to have access to classified information could be taken as implicit authentication of the reports and the information contained therein. The same holds true for private and public statements by counsel either revealing personal knowledge from non-public sources regarding the classified nature of the purported detainee assessments, or disclosing that counsel had access to classified information confirming, contradicting, or otherwise relating to the information already in the public domain. Implicit authentication of individual reports by counsel raises a serious prospect of harm to the

[4] In exercise of its authority and responsibility to control access to classified information, the Government has also determined as a condition of granting habeas counsel access to classified information that counsel must execute a Classified Information Nondisclosure Agreement (attached as Exhibit B). Under this agreement counsel, "[i]ntending to be legally bound," *id*, ¶ 1, agree, *inter alia*, that they will not make unauthorized disclosures of classified information; that, if uncertain about the classified status of information, they will obtain official confirmation that the information is unclassified before disclosing it; and that they will comply with all laws and regulations prohibiting the unauthorized disclosure of classified information. *Id.*,¶ 3. Any breach of these undertakings may result in the termination of counsel's access to classified information, among other possible consequences. *Id.*, ¶ 4.

Government's national security interests. *Cf. Al-Haramain Islamic Found., Inc.* v. *Bush,* 507 F.3d 1190, 1204 (9th Cir. 2007) (permitting plaintiffs to whom a classified document had been inadvertently disclosed to attest to its contents from memory could be "tantamount to release of the document itself"); *Bareford* v. *General Dynamics Corp.,* 973 F.2d 1138, 1144 (5th Cir. 1992) (testimony by former Navy officer and former company employee who had access to classified information "would inevitably lead to a significant risk that highly sensitive information . . . would be disclosed").

Furthermore, counsel's unfettered use and discussion of the purported detainee assessments risks the inadvertent disclosure of any related classified information to which counsel have been granted access for purposes of litigating these habeas cases. Counsel lack the informed expertise and "unique insights" of responsible Executive Branch officials needed to arrive at proper judgments regarding "what adverse [e]ffects might occur as a result of public disclosure" of national security information. *See Salisbury* v. *United States,* 690 F.2d 966, 970 (D.C. Cir. 1982) (citation omitted). In other circumstances where "classified and unclassified information cannot [easily] be separated," courts have recognized that "it is appropriate [to] . . . restrict the parties' access not only to evidence which itself risks the [direct] disclosure of a state secret, but also those pieces of evidence . . . which press so closely upon highly sensitive material that they create a high risk of inadvertent or indirect disclosures." *Bareford,* 973 F.2d at 1143-44. *See also Fitzgerald v. Penthouse Int'l, Ltd.,* 776 F.2d 1236, 1243-44 (4th Cir. 1985) (precluding testimony by expert witness with knowledge of classified information); *cf. El-Masri* v. *United States,* 479 F.3d 296, 308 (4th Cir. 2007) (dismissing entire action at pleading stage to safeguard against disclosure of state secrets). That is the case here, as well, calling for limitations such as those established in the Government's guidance, which while taking into account

counsel's legitimate interest in access to the purported detainee assessments, also protect the interests of national security.

Because Petitioner's request is irreconcilable with habeas counsel's obligations under the terms of the Protective Order, and presents the risk of further disclosures that could be harmful to the interests of national security, his request must be denied.

B. The Public Disclosure of Purported Detainee Assessments by WikiLeaks Does Not Alter Their Potentially Classified Status or Counsel's Obligations.

Notwithstanding the leeway that the Government's guidance already provides to habeas counsel to make use of and discuss the purported detainee assessments, Petitioner suggests that, because the documents "have been widely disseminated" on the WikiLeaks website and in other media, his counsel should be just as free as any member of the public to view, download, print, circulate, or comment on them. Pet'r's Emergency Application at 2. That suggestion is misguided, and foreclosed by precedent.

Classified information that has been disseminated to the public through an unauthorized disclosure is not automatically declassified as a result of the disclosure. *See* Executive Order 13,526, § l.1(c) ("[c]lassified information shall not be declassified automatically as a result of an unauthorized disclosure of identical or similar information."). Parties seeking access to such information on the ground that it already lies in the public domain must show not simply that a disclosure has been made, but that the information in question has been "officially acknowledged." *Fitzgibbon v. CIA,* 911 F.2d 755, 765 (D.C. Cir. 1990); *Public Citizen v. U.S. Dep't of State,* 11 F.3d 198, 202 (D.C. Cir. 1993).

For an item of intelligence information to be "officially acknowledged" it must, among other criteria, "have been made public *through an official and documented disclosure."* *Fitzgibbon,* 911 F.2d at 765; *Alfred A. Knopf, Inc. v. Colby,* 509 F.2d 1362, 1370 (4th Cir. 1975)

(holding that "classified information was not in the public domain unless there had been an official disclosure of it"). *See also Frugone*, 169 F.3d at 774 ("we do not deem 'official' a disclosure made by someone other than the agency from which the information is being sought"); *Afshar*, 702 F.2d at 1130-31 (distinguishing between·"official acknowledgment by an authoritative source" and "[u]nofficial leaks"). As explained above, the distinction between official and unofficial disclosures of purportedly classified information is a "critical" one, *ACLU*, 628 F.3d at 621 (citing *Fitzgibbon*, 911 F.2d at 765), inasmuch as official acknowledgment regarding the truth of information reported in the public realm might constitute "new information" that could be damaging to national security. *Afshar*, 702 F.2d at 1130; *see generally supra*, at 4 (and cases cited therein).

Because the Government has not confirmed that any individual detainee assessments disseminated by WikiLeaks are in fact official government reports, their presence on the WikiLeaks site, or other web sites, does not strip any potentially classified information contained therein of its status, or confer upon Petitioner's counsel an unfettered right of access to the reports. Counsel's access to and use of the purported detainee assessments remain subject to the obligations imposed by the Protective Order, with which the Government's guidance comports.

C. The Government's Guidance To Habeas Counsel Regarding Access to and Use of the Purported Detainee Assessments Appropriately Addresses Petitioner's Interests.

Petitioner also alludes to the burden it would place on his counsel if he were forced to travel to the Secure Facility to review and make use of the purported detainee assessments posted on WikiLeaks. Pet'r's Emergency Application at 2-3. Petitioner's complaint about burden rings especially hollow considering that this case was just recently stayed, for an indefinite period, at Petitioner's own request. Order dated May 4, 2011, Dkt. No. 367. Counsel will have no conceivable use for these documents, at least for legitimate purposes of litigating this case,

unless and until the stay is lifted. Moreover, the inconvenience of traveling to the Secure Facility is a burden that all counsel who undertook representation of petitioners in these cases voluntarily assumed. It cannot justify compromising the interests of national security by providing counsel *carte blanche* to disseminate and publicly comment on the purported detainee assessments and their contents.

In any event, the guidance that the Government recently issued to all petitioners' counsel, *see* Exhibit A, addresses counsel's legitimate interests in accessing the purported detainee assessments for whatever value they may offer in preparing their clients' habeas cases. The guidance provides detailed instruction to habeas counsel regarding appropriate access to and use of the purported detainee assessments, and is consistent with the Protective Order.

Specifically, the guidance expressly permits counsel to view the purported detainee assessments available on the WikiLeaks website, or on other websites that reproduce such information on the WikiLeaks website, from any non-U.S.-Government-issued computers. *See* Exhibit A at 1. The purported detainee assessments from the WikiLeaks website will also be made available to counsel at the Security Facility.[5] There counsel may use them in preparation of written submissions or for any other purpose authorized by the Protective Order. *Id* at 1-2. If, after viewing the purported detainee assessments, counsel wish to submit a discovery request for one or more official government documents purportedly referenced in the materials available on WikiLeaks and other websites, counsel may submit a request by UNCLASSIFED letter or e-mail to the Justice Department counsel assigned to the case so long as the request does not discuss the

[5] To reiterate, in making the purported detainee assessments available at the Security Facility, the Government is neither confirming nor denying that any individual detainee assessment posted on WikiLeaks or any other website is an official government report.

contents of the requested documents.[6] *Id* at 2. Additionally, the Government's guidance confirms that counsel may make private or public statements about the purported detainee assessments available on WikiLeaks or on other websites, so long as they do not make statements (as prohibited by the Protective Order) revealing personal knowledge from non-public sources regarding the classified status of the purported detainee assessments, or disclosing that counsel has had personal access to classified information confirming, contradicting, or otherwise relating to the information the purported detainee assessments contain. Exhibit A at 3; Protective Order, ¶ I.D.31.[7]

Counsel may, therefore, review and evaluate the purported detainee assessments available on the WikiLeaks website and other web sites reproducing them, make discovery requests based on their review of the purported detainee assessments, and discuss the information contained in the purported detainee assessments within the bounds already established by the Protective Order, all without having to travel to the Secure Facility. The purported detainee assessments from the WikiLeaks website will be made available at the Secure Facility for preparation of classified filings to be handled in accordance with the same security procedures and safeguards already stipulated by the Protective Order. The Government's guidance thus provides habeas counsel significant latitude to review and make use of the purported detainee assessments available on WikiLeaks, on terms consistent with the provisions of the Protective Order, while at the same time protecting the Government's paramount interests in preventing potentially harmful disclosures of national security information.

[6] Under the terms of the guidance, requests for discovery by UNCLASSIFED mail and e-mail must be limited to a short, plain statement requesting production of the relevant document(s). Exhibit A at 2. Alternatively, more detailed discovery requests may be made at the SECRET//NOFORN level, in accordance with the procedures stipulated in the Protective Order. *Id*

[7] What is more, the limitations prescribed by the guidance with respect to the purported detainee assessments do not apply to secondary reporting such as news articles, blogs, transcripts of broadcasts, and the like. Counsel may download, print, copy, or otherwise access, maintain, disseminate, and transport secondary reporting that discusses or refers to information contained in the purported assessments. Exhibit A at 2-3.

CONCLUSION

Fore the foregoing reasons, the Court should deny Petitioner's Emergency Application for Immediate Access to All Publicly Available WikiLeaks Documents Relevant to Petitioner's Case.

Dated: June 15, 2011

Respectfully submitted,

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