

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAIFULLAH PARACHA,)	
)	
)	
Petitioner,)	
)	
v.)	Civil Action No. 04-CV-2022 (PLF)
)	
GEORGE W. BUSH,)	
President of the United States,)	
<i>et al.</i> ,)	
)	
Respondents.)	

**RESPONDENTS’ OPPOSITION TO PETITIONER’S MOTION FOR
RELEASE OF PAPERS AND TO COMPEL DISCOVERY**

Petitioners’ motion for release of papers and to compel discovery is yet another in a continuing series of baseless motions challenging the application of the Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba, 344 F. Supp. 2d 174 (D.D.C. 2004) (“protective order”). See Motion to Vacate Order Entered December 16, 2004, Applying Protective Order (dkt. no. 20); Opposition to Motion to Designate Protected Information (dkt. no. 27); Motion to Suppress Factual Return (dkt. no. 32). At issue in this matter is whether respondents have an obligation under the protective order to release to petitioner’s counsel a letter that is presumptively classified under the protective order governing this case, notwithstanding the fact that petitioner’s counsel: 1) does not have appropriate security clearance to view presumptively classified materials such as the letter; 2) has refused to comply with the terms of the protective order; and 3) has filed a motion to vacate the protective order. Respondents have no such obligation. Accordingly, petitioner’s motion for release of papers and to compel discovery should be denied.

BACKGROUND

1. Protective Order Procedures Governing Correspondence Between Counsel and Detainees.

Petitioner's motion attacks application of the protective order and the revised procedures for counsel access to detainees at Guantanamo Bay ("GTMO") with respect to the handling and treatment of detainee mail. The protective order and counsel access procedures were entered in the coordinated GTMO cases by Judge Green after the parties had negotiated at length, certain issues were litigated, and Judge Green considered a proposed protective order and counsel access procedures and made her own revisions to them. On December 16, 2004, Judge Green further applied the protective order and counsel access procedures to this case. See Order Applying Amended Protective Order and Procedures for Counsel Access to Detainees at the United States Naval Base in Guantanamo Bay, Cuba (dkt. no. 13).¹

The protective order and counsel access procedures contain, inter alia, detailed provisions regarding correspondence between counsel and detainees. Upon counsel's compliance with the terms of the protective order,² correspondence is processed according to its designation into one of two distinct categories: legal mail or non-legal mail. See Revised Procedures for Counsel

¹ The protective order specifically incorporated "by reference all terms and conditions established in" the counsel access procedures appended to the protective order "to the extent they place limitations on petitioners' counsel in their access to and interaction with petitioners or handling of information." See Protective Order, ¶ 6.

² The protective order and revised counsel access procedures require counsel to submit several documents prior to being permitted access to a detainee. See Protective Order ¶ 18 (requiring counsel to file a Memorandum of Understanding acknowledging the protective order with the Court and submit copies to the Court Security Officers and government counsel); Revised Counsel Access Procedures, ¶ III.C (explaining that counsel shall submit a "Notification of Representation" and a signed representation regarding the source of any counsel fees). To date, petitioner's counsel has not submitted any of the required documents.

Access, ¶ II.E (defining legal mail). Special procedures exist for legal mail that are intended to balance national security interests with the need to maintain the normally privileged nature of such communications. Pursuant to the legal mail procedures, counsel must send appropriately marked legal mail to the Privilege Team³ at the offices of the Court Security Officers (“CSOs”) for the GTMO litigation. Id. at ¶ IV.A.1, 2. Upon receipt and assuming no physical contraband is present, the mail is forwarded to military personnel at GTMO within two business days. Id. at ¶ IV.A.3. After the mail arrives at GTMO, military personnel deliver it to the detainee without opening the envelope or mailer. Id. at ¶ IV.A.4. If counsel wants confirmation that the mail has been delivered to the detainee, counsel is responsible for providing a stamped, self-addressed envelope, which the detainee is responsible for mailing to counsel as outgoing mail. Id.

Outgoing legal mail – mail sent from detainees to counsel – is processed in a similar fashion. Pursuant to the protective order, all written communications from a detainee must be treated and handled as classified information, unless and until determined otherwise by the Privilege Team or a court. Id. at ¶ IV.A.6. Consequently, the detainee must label the correspondence appropriately and then turn it over to military personnel, who seal and send the correspondence to the offices of the CSOs in the manner required for classified materials. See id. at ¶ IV.B.1-3; Protective Order, ¶ 16. Following arrival, the CSOs inform counsel that a letter

³ The Privilege Team is “comprised of one or more Department of Defense attorneys and one or more intelligence or law enforcement personnel who have not taken part in, and in the future, will not take part in, any domestic or foreign court, military commission or combatant status review tribunal involving the detainee.” See Revised Procedures for Counsel Access, ¶ II.D. The primary function of the Privilege Team is to review correspondence and other documents generated by counsel and the detainees to determine its appropriate classification level while maintaining the privileged nature of the materials. Thus, the Privilege Team is not permitted to disclose materials reviewed except with consent of the Court or petitioners’ counsel or in certain situations implicating immediate national security threats. See id. at ¶ VII.

has arrived from GTMO and courier the document to the secure work facility for habeas counsel in the Washington, DC area, where the letter is held for inspection and review by appropriately cleared counsel who have complied with the protective order. Upon request, counsel may submit the correspondence to the Privilege Team for classification review of the information contained in the correspondence. See Revised Procedures for Counsel Access, ¶ VII.A.

In contrast to the legal mail procedures, the protective order also creates a process by which detainees may send and receive non-legal mail, which “includes, but is not limited to, letters [to and] from persons other than counsel, including family and friends of the detainee.” Id. at ¶¶ IV.A.5, V.B.4. Unlike legal mail, the contents of any non-legal mail is reviewed by military personnel at GTMO under standard operating procedures applicable outside the context of this litigation. See id. Once cleared for release to the detainee or the intended recipient, the mail is then forwarded accordingly.

2. Application of Protective Order Mail Procedures to Correspondence Between Petitioner’s Counsel and Detainee Saifullah Paracha.

On or about December 23, 2004, petitioner’s counsel sent a package of legal mail to respondents’ counsel and to the CSOs for delivery to petitioner at GTMO See Declaration of Gaillard T. Hunt, ¶¶ 5-6. This package curiously contained a collection of documents marked as “Interrogatories,” which were not directed to respondents, but to petitioner’s counsel’s own putative client, Saifullah Paracha. See id., Attachment 1. Instead of simply writing a letter to Mr. Paracha, petitioner’s counsel apparently intended to serve interrogatories pursuant to Federal Rule of Civil Procedure 33 on his own client. See Declaration of Gaillard T. Hunt, ¶¶ 5-6. Because petitioner’s counsel had shared the mail with respondent’s counsel and it was deemed

not to raise any security-related issues, the mail was forwarded was forwarded to GTMO on or about December 28, 2004, for direct delivery to the detainee. See Exhibit 1 (e-mail from Andrew Warden to Jennifer Campbell).

On January 18, 2005, petitioner's counsel filed a motion to vacate the protective order. The motion argues that the protective order and counsel access procedures should be abandoned in their entirety because they are not justified as a matter of law. In the motion petitioner's counsel gives no indication that he is amendable to abiding by the terms of the existing protective order or counsel access procedures. Indeed, counsel's refusal to comply with the protective order is evidenced by the fact that he has not adhered to the protective order's threshold requirements for access to detainees. See supra note 2. Moreover, even if counsel were to follow these procedures, he would not be authorized to view classified information because he has not obtained a valid United States security clearance. See Revised Procedures for Counsel Access, ¶ III.A.

On January 28, 2005, petitioner's counsel received an e-mail from the CSOs notifying him that a communication from petitioner-detainee had arrived at their offices in Washington, DC. See Declaration of Gaillard T. Hunt, ¶ 7. Due to the communication's presumptively classified contents, the CSOs delivered the communication to the secure work facility for habeas counsel and placed it in the safe that houses the classified information pertaining to this case. See id. at Attachment 4 (January 28, 2005 e-mail from Jennifer Campbell to G.T. Hunt).

Thereafter, petitioner's counsel requested access to the communication. See id. (e-mails between Andrew Warden and G.T. Hunt). In a series of e-mails and phone calls about the issue, respondents explained that because petitioner's counsel does not have appropriate security

clearance, he is not authorized to access any classified information in this case, including presumptively classified mail from detainees, or the secure habeas work space. Furthermore, in light of petitioner's counsel's refusal to comply with the protective order and his pending motion to vacate the order, respondents rejected petitioner's counsel's request to submit the communication to the Privilege Team for classification review in accordance with the terms of the protective order and then release to petitioner's counsel those portions of the communication deemed to be unclassified. Finally, given petitioner's counsel's intent to continue his challenge to the protective order, respondents' offered to return the communication to GTMO for review in accordance with the standard operating procedures for outgoing detainee mail not covered by the protective order (i.e., non-legal mail). Petitioner's counsel rejected this offer and filed the instant motion seeking to compel respondents to release the communication and, to the extent the communication is not the "answers to the interrogatories," to compel respondents to produce the answers within 20 days. See Pet. Mem. at 5-6. For the reasons explained below, the motion is without merit and should be denied.

ARGUMENT

1. Petitioner's Counsel Lacks A Valid United States Security Clearance To View Classified Information Under the Protective Order.

As a threshold matter, the terms of the protective order prohibit petitioner's counsel from having access to the letter from petitioner-detainee because petitioner's counsel does not have a valid United States security clearance. Under the protective order, the information contained in letter must be treated as classified information until determined otherwise. See Revised Procedures For Counsel Access, ¶ IV.A.6. In order for habeas counsel in the GTMO cases to

access classified information, the protective order requires that counsel “must hold a valid current United States security clearance at the Secret level or higher.” See id. at ¶ III.A.1.

Petitioner’s counsel does not have authorized security clearance, as his application is currently pending with the CSOs. For this reason, petitioner’s counsel has no right under the protective order to compel release of the presumptively classified letter.

A contrary holding would not only violate the express terms of the protective order, but may lead to the unauthorized disclosure of classified national security information to petitioner’s counsel. Indeed, it is entirely possible that the letter from petitioner-detainee contains classified information. Although petitioner’s counsel contends that the letter “cannot contain classified information because detainees such as petitioner are not allowed access to classified information[,]” see Pet. Mem. at 5, this argument mistakenly assumes that the only way petitioner-detainee could acquire classified information is through government sources. To the contrary, petitioner-detainee may be in possession of classified information from non-government sources, including, for example, information gathered during his past activities and associations. In the event the letter contains such classified information, it must be handled accordingly and released only to persons authorized to view classified information. Because petitioner’s counsel does not have the requisite authorization to view classified information, his request to compel release of the letter must be denied.

2. In Light Of Petitioner’s Counsel’s Refusal To Comply With The Protective Order, Petitioner’s Counsel Is Not Authorized To View The Letter Or To Request Classification Review Of The Letter By The Privilege Team.

In addition to lacking a valid security clearance, petitioner’s counsel is not entitled to view the letter because he has refused to comply with the terms of the protective order. As

explained above, petitioner's counsel has not followed any of the threshold requirements under the protective order that would entitle him to access classified information. See supra note 2. Consequently, respondents are under no obligation to disclose presumptively classified information to him until he agrees to comply with these terms and obtains appropriate security clearance.

Respondents also have no legal obligation to submit the letter to the Privilege Team for classification review. Classification review by the privilege is a mechanism created entirely by the terms of the protective order. Therefore, Privilege Team review is reserved only for those counsel who have agreed to comply with the terms of the protective order. Unlike the habeas counsel in all other GTMO cases, petitioner's counsel has repeatedly refused to abide by the protective order and, in furtherance of this position, has filed a motion to vacate the protective order. In light of this position, respondents cannot be compelled to submit the letter to classification review under the terms of the protective order when petitioner's counsel has failed to comply with its terms.

Petitioner's counsel essentially wants to have it both ways with respect to the protective order – he does not want to abide by the order's provisions, but he wants to receive its benefits. Petitioner's counsel thus far has refused to comply with the protective order's terms, but now – perhaps realizing the order may further his own interests – he has changed his mind and wants Privilege Team review. This position is all the more remarkable given the fact that petitioner's counsel devotes an entire section of his motion to vacate the protective order to perceived deficiencies in the Privilege Team process. See Motion to Vacate Order Entered December 16, 2004, Applying Protective Order (dkt. no. 20), at 28-31. Petitioner's counsel simply cannot

refuse to comply with the protective order and then demand that respondents to provide him with only those procedures in the order that prove most beneficial to him. This position is entirely unjustified and inequitable. If petitioner's counsel wants the ability to send and receive communications pursuant to the protective order, he must agree to be bound by the entire order. Thus far in this litigation, petitioner's counsel has steadfastly refused to comply with the terms of the order. For this reason, respondents should be under no legal obligation to provide petitioner's counsel with beneficial process under the order until he agrees to be bound by its provisions.

This is not just a matter of principle in the abstract. Rather, respondents' position is occasioned by practical necessity. Petitioner's counsel seeks, through his demands regarding the mail at issue, to create special, extra-protective-order procedures for his case alone. For example, his request that the Privilege Team review the mail and then create a redacted version of it suitable for disclosure to counsel is not contemplated under the protective order or the counsel access procedures. The Privilege Team reviews materials for classification purposes; it does not undertake to redact classified materials or create redacted versions of mail to avoid classification issues, as petitioner's counsel requests. Given that more than 30 Guantanamo Bay detainee cases are currently pending, respondents simply cannot be asked or required to create special, extra-protective-order procedures for any case in which counsel for a petitioner thinks they are warranted. Such a situation would create an untenable situation in which the government would have to shoulder the undue burden of administering and working under different regimes in similar cases.

3. The Letter May Be Released To Counsel Following Review By Standard Operating Procedures For Outgoing Detainee Mail Not Covered By The Protective Order.

Because petitioner's counsel intends to maintain his challenge to the protective order and refuses to comply with its terms, access to the letter may be had only through the procedures for outgoing detainee mail not covered by the protective order, *i.e.* non-legal mail. Contrary to petitioner's counsel's suggestion that respondents have denied him access to the letter, respondents have proposed a suitable alternative procedure that will permit counsel to continue his refusal to accept the protective order and will permit him access to the letter. Under the non-legal mail procedures, the letter must be reviewed by military personnel at GTMO under standard operating procedures for outgoing detainee mail not covered by the protective order. Following this evaluation, an appropriate non-classified version of the letter will be released to petitioner's counsel. See Declaration of Gaillard T. Hunt, Attachment 4. The fact that petitioner's counsel rejected this approach because it would not be "done in less than a week or so" (even though litigation on this issue may end up taking longer than any such review) only underscores the point that petitioner's counsel wants to receive the benefits of the protective order that help him but will not agree to comply with any other provisions of the order. See id.

4. Respondents Cannot Compel Petitioner-Detainee To Respond To The "Interrogatories."

Finally, in the event that the letter presently stored at the secure facility turns out to be something other than the "answers to the interrogatories," petitioner's counsel requests that the Court compel respondents to deliver the answers to him within twenty days. See Pet. Mem. at 5-6. This demand is wholly without merit and evidences a complete misunderstanding of

respondents' role with respect to communications between counsel and detainees. Respondents simply facilitate the delivery of mail between counsel and detainees. Respondents certainly have no control over whether detainees choose to respond to mail sent to them by habeas counsel. The absurdity of petitioner's counsel's request is magnified by the fact that he served the interrogatories on his own client. In fact, it appears as though petitioner's counsel is essentially asking the Court to impose sanctions against his own client for failing to respond to the interrogatories. Respondents have absolutely no role in this dispute. If petitioner's counsel wants petitioner-detainee to answer his interrogatories, that is a matter exclusively between those parties. Respondents only obligation is to deliver the communications to the appropriate recipients. Respondents have no power to force petitioner-detainee to answer his lawyer's interrogatories.

CONCLUSION

For the reasons stated above, petitioners' motion for release of papers and to compel discovery should be denied.

Dated: February 28, 2005

Respectfully submitted,

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