

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

UNITED STATES OF AMERICA

v.

Case No. 8:20-cr-206-TPB-AEP

MUHAMMED MOMTAZ ALAZHARI

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**MOTION TO RECONSIDER ORDER TREATING DEFENDANT’S MOTION TO COMPEL
AS A HIGHLY SENSITIVE DOCUMENT**

NOW COMES Defendant, Muhammed Alazhari, by and through undersigned counsel, and moves this Court to reconsider its order of December 20, 2022, treating Mr. Alazhari’s motion to compel as a “highly sensitive document.”

MEMORANDUM OF LAW

BACKGROUND

In Count One of the indictment, Mr. Alazhari is charged with attempting to provide material support to a designated foreign terrorist organization, the Islamic State of Iraq and al-Sham (ISIS). Before Mr. Alazhari was indicted, he was charged by way of a criminal complaint. Doc. 5. In the affidavit attached in support of the complaint, the FBI affiant alleged the following facts:

58. On May 14, 2019, 12 visits were made to a known TOR-based website that hosts unofficial propaganda and photographs related to ISIS. The website view originated from IP address 71.84.66.241, which resolved to an address in Riverside, California that is registered with Charter Communications and at which **AL-AZHARI** resided at his grandmother’s residence at the time, before he returned to

Tampa in June 2019. The following items were accessed on May 14, 2019, at the TOR-based website:

a. A blog page containing links to donate to the site in Bitcoin.

b. A blog containing information on military operations carried out by Caliphate fighters in Iraq, Syria, and Nigeria.

c. A posting with reference to the memorial of martyr Abu Wardah.

d. Postings of the day's news regarding the Islamic State media.

e. A blog page entitled "West Africa State pictorial report (1); Partial results of the attack carried out by the Khalifate fighters against Nigerian army barracks in Brono."

f. 17 pages of links posted by "Abu Jihad" containing links to Al-Furqan and Al-I'atizam Establishment (which public information reveals is ISIS's media arm) media files. Most of the linked files were articles promoting the Islamic State, including editorials for prominent ISIS figures like Abu Musab Al-Zarqawi and Anwar al-Awlaki, news of battles carried out by ISIS fighters, and open letters from ISIS to various countries.

g. A blog site discussing Al-Furqan before the Caliphate and the history of jihad.

Doc. 5 at 29-30 (footnotes omitted).

TOR stands for "the onion router." TOR is an anonymizing network that conceals its users' IP addresses. As a government agent testified in a different case, with TOR-based websites, "there is no practical mechanism to trace a user's actual IP address." *United States v. Dove*, No. 8:19-CR-33-T-36CPT, 2020 WL 9172971, at *2

(M.D. Fla. Sept. 4, 2020), *report and recommendation adopted*, No. 8:19-CR-33-CEH-CPT, 2021 WL 838737 (M.D. Fla. Mar. 5, 2021). TOR conceals a user's IP address by transmitting user communications through a network of nodes. *United States v. McLamb*, 220 F. Supp. 3d 663, 667 (E.D. Va. 2016), *aff'd*, 880 F.3d 685 (4th Cir. 2018). These onion-like layers of additional IP addresses prevent the true IP address of the user from being visible like it would typically be on a clear-web site. However, as the Government's complaint affidavit indicates, the Government was able to bypass TOR's protections to identify the IP address of the visitor to the ISIS website.

In discovery, the Government has declined to provide any information related to its TOR operation. The Defense therefore researched and drafted a motion to compel such discovery. In the course of this research, the Defense discovered an exhibit filed on the public docket in at least two federal cases with similar issues ("Exhibit 2"). The document is partially redacted, purports to be the work of a U.S. government agency, and is marked "Top Secret." Outside of these public docket filings, Exhibit 2 is widely available on public internet sources. A Google search for Exhibit 2's title yields 102,000 results. All of the top results apparently provide the document itself, and most of these date back to 2013.

The Government has filed a notice indicating the applicability of the procedures provided by the Classified Information Procedures Act (CIPA), 18 U.S.C. app. III. Under CIPA, the defendant must provide notice to the Government and the Court anytime he "reasonably expects" to disclose classified information in the course of the proceedings. *Id.* § 5. Having determined that it is necessary to file

Exhibit 2 in support of the motion to compel, the Defense corresponded with the Government to determine whether the publicly available document is in fact classified and subject to CIPA. The Government never provided an answer. In an abundance of caution, Mr. Alazhari therefore filed an appropriate notice under CIPA § 5. Doc. 289.

On December 15, 2022, following the filing of Mr. Alazhari's CIPA § 5 notice, the Government moved this Court to treat Mr. Alazhari's motion to compel as a "highly sensitive document." Under a standing order of this Court, a party may move to treat a filing as a highly sensitive document. *In re: Administrative Orders of the Chief Judge*, No. 3:21-mc-1-TJC, Doc. 14 (M.D. Fla. Feb. 10, 2021). A highly sensitive document "is a document that contains sensitive or confidential information that may be of interest to the intelligence service of a hostile foreign government and whose use or disclosure by a hostile foreign government would likely cause significant harm." *Id.* at 1-2. "The Court anticipates that few documents filed in this Court will qualify as [highly sensitive documents]." *Id.* at 2. Where the Court grants a motion to treat a filing as a highly sensitive document, the document is maintained under seal in paper format by the Clerk. *Id.* at 4. The standing order does not otherwise restrict the conduct of the parties, such as by requiring a gag order or other protective order. The standing order notes, "There is a strong presumption favoring public access to court filings. Like other sealed filings, [a highly sensitive document] designation should be used only when necessary to protect highly classified or highly confidential information." *Id.* at 5.

Under the standing order, the Government's motion to treat the Defense motion as a highly sensitive document was itself sealed. *See id.* at 3. In its motion, the Government does not claim ownership of the information within Exhibit 2 and does not claim a classified-information privilege or any other privilege for the document. The Government requests that the Court treat the entire filing – the motion, its memorandum of law, and all of its exhibits – as a highly sensitive document due for sealing. The Government suggests a number of national-security harms that may occur through a hostile foreign government's possession of Exhibit 2, but does not explain how the harms would flow from a public filing of the motion, why treatment as a highly sensitive document would prevent these harms, or why no other alternative will serve the Government's purposes. On December 20, 2022, this Court granted the Government's motion without a response from Mr. Alazhari. In so doing, the Court found only that the standing order's requirements are met and that the interests of justice require sealing.

On January 9, 2023, in compliance with this Court's order, Mr. Alazhari filed the motion under seal and in paper format under the "highly sensitive document" procedures. Much of the motion merely involves typical, if somewhat novel, legal argument. In support of its requested relief, the motion posits two ways in which the Government may have bypassed TOR's protections in the operation it has openly described in the complaint affidavit. The first way is no secret whatsoever – the use of what the Government euphemistically calls a "network investigative technique."

This investigative technique has been described in many reported cases for several years. *See, e.g., United States v. Taylor*, 935 F.3d 1279 (11th Cir. 2019).

The motion also posits a second way in which the Government may have determined the IP address. Exhibit 2 goes to the likelihood that the Government relied on this second method. The motion discusses the legal ramifications of the Government's use of either method. Three news outlets have expressed to defense counsel an interest in reporting on the motion. Their ability to do so is frustrated by the Court's order treating the motion as a highly sensitive document.

ARGUMENT

This Court should reconsider its order treating the defense motion to compel as a highly sensitive document because the Court did not make necessary findings, and because the Government made no showing that would support such findings. "The press and public enjoy a qualified First Amendment right of access to criminal trial proceedings." *United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1028 (11th Cir. 2005) (citing *Globe Newspaper Co. v. Superior Court for the County of Norfolk*, 547 U.S. 596, 603 (1982); *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1310 (11th Cir. 2001)) (footnote omitted). Similarly, the public and press enjoy a common-law right of access to judicial records. *See Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-98 (1978). Open proceedings have been "an indispensable attribute of an Anglo-American trial for centuries" and are "rooted in the principle that justice cannot survive behind walls of silence, and in the traditional Anglo-

American distrust for secret trials.” *Ochoa-Vasquez*, 428 F.3d at 1028-29 (internal quotations and citations omitted).

A party seeking the sealing of documents may overcome the presumption of openness “if it can show ‘an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.’” *Id.* at 1030 (quoting *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501, 510 (1984); *United States v. Valenti*, 987 F.2d 708, 713 (11th Cir. 1993)). When sealing documents, “a court must articulate the overriding interest ‘along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.’” *Id.* (quoting *Press-Enterprise*, 464 U.S. at 510) (footnote omitted). That is, the Court must articulate the reason for sealing and the evidence that supports sealing. *See id.* (citation omitted).

Here, this Court should reconsider its order treating the defense motion to compel as a highly sensitive document because the Court did not make a finding as to whether there is an overriding interest involved, whether sealing is essential to that interest, or whether sealing of the motion and its exhibits is narrowly tailored to preserve that interest. *See id.* (reversing and remanding where the district court failed to articulate its findings). On reconsideration, this Court should deny the Government’s motion to treat the defense motion as a highly sensitive document. One may assume that the Government’s proffered national-security concerns suffice as “overriding” interests and “higher values.” *See id.* But what the Government cannot show is that sealing Mr. Alazhari’s motion is “essential” to serving its

national-security interest. That is because the document is already plastered all over the web and available on PACER in at least two cases, and has been for nearly a decade. Whatever the likelihood that hostile foreign governments are interested in the document, they need not look to this Court's docket to satisfy that interest. Any interested foreign government has already read the document in detail and can do so again, because the document is an internet connection and a few keystrokes away.

Secondly, the Government has not shown that the sealing of the entire filing is "narrowly tailored" to preserve its interests. Only Exhibit 2 bears classification markings. Much of the motion is a discussion of the law of search and seizure, the facts of the case, and the possibility of the Government's use of a "network investigative technique." The Government provides no reason why this material should be sealed, or why the entirety of Exhibit 2 should be sealed. To the extent the memorandum of law discusses aspects of Exhibit 2 (it does so very little), as the party bearing the burden of overcoming the presumption of openness, the Government should have proposed redactions, each of which must be considered under the *Ochoa-Vasquez* "essential to preserve higher values" test. The same test should apply to each item of information in Exhibit 2, which could also be subject to appropriate redactions.

In short, the Government made no attempt to make the showings necessary for a complete sealing of Mr. Alazhari's motion, and this Court made none of the necessary findings to justify the sealing. This Court should therefore reconsider its order.

WHEREFORE Mr. Alazhari prays this Court will reconsider its sealed order of December 20, 2022, treating his motion to compel as a “highly sensitive document.”

DATED this 10th day of January 2023.

Respectfully submitted,

A. FITZGERALD HALL, ESQ
FEDERAL DEFENDER

/s *Samuel E. Landes*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th of January 2023, a true and correct copy of the foregoing was filed with the Clerk of the Court using the CM/ECF system, which will send a notice of the electronic filing to:

AUSA Patrick Scruggs.

/s *Samuel E. Landes*

Samuel E. Landes, Esq.
Assistant Federal Defender