

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

No. CR 14-00196 CRB

Plaintiff,

**ORDER GRANTING MOTION FOR
PROTECTIVE ORDER**

v.

KWOK CHEUNG CHOW, a/k/a “Raymond
Chow,” a/k/a “Hai Jai,” a/k/a “Shrimpboy,”
et al.

Defendants.

Now pending is the government’s Motion for Protective Order (dkt. 279). That Motion states that the government and almost all defense counsel have negotiated¹ a protective order to govern disclosure of the discovery materials in this case, which counsel for 24 of the 25 defendants who have appeared before the Court² have signed. Mot. at 1-2. Only counsel for Defendant Kwok Cheung Chow has not signed the protective order. Id. at 2. The government therefore moves the Court to act pursuant to Federal Rule of Criminal Procedure 16(d) and require all parties, including Defendant Chow and his counsel, to comply with the protective order. Id. Defendant Chow opposes the government’s Motion.

¹ The government’s reply brief explains that Magistrate Judge Joseph C. Spero assisted with the parties’ negotiations, which spanned between April 3, 2014 and April 25, 2014. Reply (dkt. 299) at 1-2.

² A 26th defendant has appeared in this case but apparently anticipates substituting counsel in the near future and therefore is not included in the government’s count. Mot. at 2 n.1.

1 See generally Opp'n (dkt. 292). The Court has carefully considered the parties' papers and
2 GRANTS the government's Motion.

3 Central to Defendant Chow's opposition brief is the contention that the government
4 has failed to demonstrate good cause for the protective order. Id. at 3.³ The concept of good
5 cause stems from Rule 16(d)(1), which provides that "At any time the court may, for good
6 cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. The
7 court may permit a party to show good cause by written statement that the court will inspect
8 ex parte." The Rule does not require a party to demonstrate good cause; it requires that the
9 Court act for good cause. There is good cause here.

10 The government explained in its Motion that many of the materials at issue contain
11 information which the government would otherwise seek to redact or limit from exposure,
12 such as "sensitive materials that, if improperly disclosed, could be used to expose the true
13 identities of undercover employees involved in the investigation, thereby placing them in
14 harm's way." Mot. at 3. There are also "sensitive materials that, if improperly disclosed,
15 could be used to identify individuals who have not yet been charged by the United States, but
16 whose ongoing criminal activities are still under investigation." Id. There are also "sensitive
17 materials identifying numerous individuals who are not believed to have engaged in any
18 criminal activities, but who were nonetheless captured on FBI surveillance or documented in
19 FBI reports." Id. And there are "sensitive materials that, if improperly disclosed, could
20 conceivably raise witness safety issues." Id.

21 Defendant Chow complains that these are "merely . . . conclusory unsupported
22 statement[s]," and argues that the Court should require the government to make a showing ex
23 parte. Opp'n at 10. The government offered in its Motion, and again in its reply brief, to
24 make an ex parte showing if the Court needed more information. Mot. at 6 n.7; Reply at 4.
25 Of course no ex parte showing is required under Rule 16(d)(1) ("[t]he court may permit").
26 Moreover, the Court needs no additional showing here. On numerous occasions in the
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28 ³ Indeed, Defendant Chow uses the term "good cause" no fewer than 16 times in his opposition
brief. See id. at 3, 3 n.7, 5, 6, 7, 9, 10, 11, 12, 14.

1 course of authorizing the Title III wiretaps, the Court personally reviewed the materials at
2 issue. In light of its familiarity with the materials, the Court finds the government’s
3 representations as to the sensitive material to be entirely accurate.

4 The government also explained in its Motion that the sensitive material is so
5 interwoven that to redact or extract it would be “an enormous, time-consuming, and
6 expensive task” for it to undertake. Mot. at 3-4. Again, in light of the Court’s familiarity
7 with the materials, the Court finds the government’s representations as to the interwoven
8 nature of the sensitive material to be entirely accurate.

9 Given the volume of sensitive material and the fact that it is so enmeshed with non-
10 sensitive material, the protective order negotiated between the government and all of the
11 other defendants in this case is both practical and appropriate. It enables the defendants to
12 have nearly immediate access to the materials,⁴ which they may use immediately in the
13 service of their defense, and it outlines a clear process through which defendants can
14 challenge the government’s “SUBJECT MATERIALS” designations. Any defendant may
15 identify the challenged materials, state the reasons why the materials should not be
16 designated “SUBJECT MATERIALS” subject to the protective order, meet and confer with
17 the government, give the government a reasonable opportunity to respond, and, if the parties
18 cannot agree on a resolution, bring the matter to the attention of the Court. See Ex. 1
19 (protective order) ¶ 1. The burden will then be on the government to establish that the
20 materials are indeed properly SUBJECT MATERIALS subject to the protective order.

21 Defendant Chow argues that “[t]his is nothing more than [the government] deflecting
22 their responsibility onto Mr. Chow when, after five years of investigation, they are in the
23 better position to identify protected material.” Opp’n at 13. He urges the Court “to require
24 the Government to complete their ‘herculean task’ which is a result of their herculean
25 investigation.” Id. And he bemoans the burden of challenging the government’s
26 designations, claiming that such motions “will create a significant drain on defense resources

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28 ⁴ The government represents that approximately 10,000 pages of reports and two 1 terabyte hard
drives containing digital audio and video recordings have already been disclosed to the 24 defendants
who have agreed to the protective order. Reply at 3 n.2.

1 creating the need to file ongoing motions to unprotect material which will absolutely place
2 Mr. Chow in jeopardy of ineffective assistance of counsel.” *Id.* at 9. The Court recognizes
3 that this process is not perfect, but concludes that it is, as the government states, “the only
4 way to produce the discovery in this case in an expeditions manner.” Reply at 4. To follow
5 the traditional path of selecting “Rule 16/Brady disclosures” from the vast amount of
6 materials collected in a multi-year government investigation would entail many months of
7 delay. The Court cannot abide by defendants sitting in custody (and their lawyers sitting on
8 their hands) while the government engages in such time-consuming line-by-line redaction.

9 The protective order negotiated between the government and all of the other
10 defendants in this case is not only practical, it is lawful. Defendant Chow cites no authority
11 for the proposition that he has a First Amendment right to disclose information that is
12 properly the subject of a protective order. Such disclosure risks not only bodily harm to
13 undercover agents, but reputational harm to individuals who would be collateral damage.⁵ In
14 the case of public officials, there is also a risk of unfairly undermining their abilities to
15 govern. An investigation of government corruption conducted by means of wiretap will
16 include speculative discussions about numerous public officials, when those individuals are
17 not parties to the discussions, cannot interject to defend themselves, and never went on to act
18 in a corrupt or criminal manner. Indeed, grand jury proceedings are intended to protect the
19 innocent from public comment at a time in which there is only speculation of wrongdoing.
20 See DeGeorge v. U.S. Dist. Court for Cent. Dist. of Cal., 219 F.3d 930, 937 (9th Cir. 2000)
21 (recognizing “the traditionally non-adversarial and secret nature of grand jury
22 investigations.”); United States v. Providence Tribune Co., 241 F. 524, 526 (D.R.I. 1917)
23 (“Secrecy is also required in order that the reputations of innocent persons may not suffer
24 from the fact that their conduct is under investigation, or has been investigated, by a grand

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27 ⁵ In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 101 F.R.D.
28 34, 44-45 (C.D. Cal. 1984), a civil case holding that “[t]he fact that some of the documents submitted
in connection with the motions for summary judgment are papers produced from third parties does not
take those documents out of the category to which the public has a presumptive right of access,”
certainly does not control this criminal discovery issue.

1 jury.”); Federal Rule of Criminal Procedure 6(e)(2) (outlining obligations of secrecy in grand
2 jury matters).

3 Although Defendant Chow complains that the government is “violating [his] Due
4 Process [rights] by failing to turn over exculpatory evidence” pursuant to Brady v. Maryland,
5 373 U.S. 83 (1963), the process he challenges would require the government to quickly turn
6 over to him the Brady and Rule 16 materials to which he is entitled. Defendant Chow makes
7 passionate arguments about his desire to counter the government’s having “already
8 wrongfully convicted [him] in the eyes of the public,” see, e.g., Opp’n at 2, however he cites
9 to no authority suggesting that a defendant can flout a protective order to distribute Brady
10 material to the media. Put another way, Brady requires the disclosure of evidence favorable
11 to an accused, not the disclosure of such evidence to the media.⁶

12 This is not to say that the Court fails to recognize the media’s—indeed the
13 public’s—interest in this case. That interest is significant. The Court on Friday received a
14 letter from the law firm of Davis Wright Tremaine LLP, written on behalf of non-party news
15 organizations The Center for Investigative Reporting, The Los Angeles Times, The
16 Sacramento Bee and the San Francisco Chronicle, which expresses concern “about the
17 blanket nature and unlimited scope of the proposed Protective Order.” The letter
18 thoughtfully discusses the right of access to criminal proceedings established in Richmond
19 Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), and how such access includes pretrial
20 criminal proceedings and records. The Court does not quarrel with any of this authority, or
21 with the “importance of public oversight” of the judicial process. The distinction here is that
22 this Motion pertains to criminal discovery materials, not criminal proceedings and records.
23 Defendant Chow asserts that he “intends to litigate these matters frequently if necessary.”
24 Opp’n at 13. He is free to do so, as are the other defendants. Presuming the parties cannot
25 agree on a resolution, the Court will adjudicate defendants’ challenges to the government’s

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27 ⁶Finally, Defendant Chow complains that the protective order “must be reciprocal in this case
28 to maintain the integrity of the process.” Opp’n at 14. Judge Spero correctly rejected this notion in the
parties’ negotiations. See Reply at 6. The government is already in possession of the materials in
question. To the extent that the defendants turn over their own discovery materials, they are free to seek
a reciprocal protective order as to those materials.

1 "SUBJECT MATERIALS" designations, and at that point it will carefully weigh the relevant
2 interests, not least of which is the public's right to access. In the meantime, the defendants
3 will have the materials in their possession and be able to use them to mount their defenses.

4 For the foregoing reasons, the Motion is GRANTED.

5 **IT IS SO ORDERED.**

7 Dated: May 19, 2014



CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

United States District Court
For the Northern District of California

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