

EXPERT ANALYSIS

Informer's Privilege Prevents Disclosure Of Confidential Informant in Islamic State-Related Prosecution

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In an Islamic State-related criminal case, a federal court in Minneapolis applied the government-informant privilege to preclude pre-indictment disclosure of an FBI confidential informant. The court's ruling means that, at least for now, the government can maintain its informant's secrecy. *United States v. Abdulkadir*, No. 15-mj-984, 2015 WL 9581871 (D. Minn. Dec. 31, 2015).

BACKGROUND

In a criminal complaint filed in the U.S. District Court for the District of Minnesota, the government claims that Khaalid Adam Abdulkadir made death threats against FBI agents in various Twitter posts. Abdulkadir's alleged tweets came after the government's investigations and prosecutions of Islamic State recruits.

In April 2015 the FBI arrested and charged six men with conspiring to provide material support to IS.¹ On Dec. 9, FBI agents arrested Abdirizak Mohamed Warsame and charged him with conspiring to provide material support to IS.²

The criminal complaint against Abdulkadir alleges that a "confidential human source" informed the FBI that, within hours of Warsame's arrest, Abdulkadir posted two tweets containing threatening communications. The tweets threatened to kill cops and FBI agents, with one stating, "They will find on the floor body's dropping fast #kill them FBI."³

Within 10 days after the filing of the criminal complaint, Abdulkadir's attorneys filed a motion seeking "immediate disclosure" of the "confidential human source" who supplied the Twitter information to the FBI. The government acknowledged that its informant was responsible for alerting law enforcement to the Twitter communications, but it asserted the government-informant privilege and said disclosure was not required.

GOVERNMENT-INFORMANT PRIVILEGE

The government-informant privilege protects from compelled disclosure the identity of informers who supply information about legal violations to the appropriate law enforcement personnel. The U.S. Supreme Court solidified this common law doctrine in *Roviaro v. United States*, 353 U.S. 53 (1957).

Despite the name's implication, the privilege belongs to the government and not the informer. Nonetheless, it protects informers from retaliation or retribution while encouraging citizens to communicate their knowledge of violations of law to government officials.



The privilege is not absolute; rather, it must “give way” in certain circumstances.⁴ For example, it does not protect communications between the informer and law enforcement that “will not tend to reveal” the informer’s identity. And, of course, it does not apply after law enforcement discloses the informer’s identity.

TIPSTER OR PARTICIPANT?

As a final limitation on the privilege, courts will compel disclosure of the informer’s identity where his identity or communication “is relevant and helpful to the defense” or “is essential to a fair determination of a cause.”⁵ This limitation effectively means that the court will order identity disclosure where the informant’s information is material to the defense.

The defendant has the burden to show materiality, “which requires more than speculation.”⁶ In assessing materiality, courts apply a balancing test that weighs the public interest in protecting the free flow of information to law enforcement officers against the criminal defendant’s right to prepare a defense.⁷

Courts generally do not order disclosure where the confidential informant is a mere “tipster,” meaning a person who merely conveys information but does not witness or participate in the alleged crime.⁸

THE COURT’S RULING

The court held that Abdulkadir failed to show that the FBI’s confidential informant was material to his defense. With no specific facts or circumstances alleged, the court easily applied the privilege to prevent disclosure.

In doing so, the court noted that the case remains in the pre-indictment stage and that it will permit Abdulkadir to renew his motion at a later date. If the informer merely notified the FBI about Abdulkadir’s Twitter posts — and did not participate in drafting them — then Abdulkadir will have a difficult time overcoming the privilege.

NOTES

¹ Press Release, FBI, Six Minnesota Men Charged with Conspiracy to Provide Material Support to the Islamic State of Iraq and the Levant (Apr. 20, 2015), <http://1.usa.gov/1L8gUYL>.

² Press Release, FBI, Tenth Minnesota Man Charged with Conspiracy to Provide Material Support to ISIL (Dec. 10, 2015), <http://1.usa.gov/1QUQIMQ>.

³ Criminal Complaint at ¶ 10, *United States v. Abdulkadir*, No. 15-mj-984 BRT (D. Minn. Dec. 11, 2015).

⁴ *United States v. Roviario*, 353 U.S. 53, 60 (1957); *United States v. Abdulkadir*, 2015 WL 9581871, at *2 (D. Minn. Dec. 31, 2015).

⁵ *Roviario*, 353 U.S. at 60-61; *United States v. Whitley*, 734 F.2d 1129, 1137 (6th Cir. 1984).

⁶ *Abdulkadir*, 2015 WL 9581871 at *2 (quoting *United States v. Lapsley*, 334 F.3d 762, 764 (8th Cir. 2003)).

⁷ *Roviario*, 353 U.S. at 62; *Abdulkadir*, 2015 WL 9581871 at *2.

⁸ *Abdulkadir*, 2015 WL 9581871 at *2 (quoting *Carpenter v. Lock*, 257 F.3d 775, 770 (8th Cir. 2001)).



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