



SPECIALIST PROSECUTOR'S OFFICE
ZYRA E PROKURORIT TË SPECIALIZUAR
SPECIJALIZOVANO TUŽILAŠTVO

In: KSC-BC-2020-05
The Specialist Prosecutor v. Salih Mustafa

Before: Pre-Trial Judge
Judge Nicolas Guillou

Registrar: Dr Fidelma Donlon

Filing Participant: Specialist Prosecutor

Date: 1 October 2020

Language: English

Classification: Public

Observations on a redaction regime

Specialist Prosecutor's Office

Jack Smith

Counsel for the Accused

Julius von Bóné

I. INTRODUCTION

1. In accordance with the Order¹ of the Pre-Trial Judge, the Specialist Prosecutor's Office ('SPO') hereby provides observations regarding a redaction system. The SPO requests the Pre-Trial Judge to adopt a redaction regime pursuant to which the parties may redact information contained in material falling within their disclosure obligations under Article 21(6) of the Law² and Rules 102-104³ according to a set of pre-approved categories.

2. The regime proposed will improve the efficiency of the proceedings, in particular, the expeditiousness of the disclosure process, while ensuring that the proceedings are conducted with full respect for the rights of the accused and due regard for the protection of witnesses, victims and other persons at risk on account of the activities of the court. Such a redaction regime also enhances the ability of judicial panels at all stages of proceedings to effectively and efficiently exercise oversight of the disclosure process, as required by the Law and Rules.

II. SUBMISSIONS

3. Drawing on cumulative experience and practice at other courts,⁴ and consistent with the applicable legal framework,⁵ the Pre-Trial Judge⁶ should adopt a redaction

¹ Order for Submissions on the Redaction System, KSC-BC-2020-05/F00022, 28 September 2020, public ('Order').

² Law No.05/L-053 on Specialist Chambers and Specialist Prosecutor's Office, 3 August 2015 ('Law'). All references to 'Article' or 'Articles' herein refer to articles of the Law, unless otherwise specified.

³ Rules of Procedure and Evidence Before the Kosovo Specialist Chambers, KSC-BD-03/Rev3/2020, 2 June 2020 ('Rules'). All references to 'Rule' or 'Rules' herein refer to the Rules, unless otherwise specified.

⁴ See, for example, International Criminal Court ('ICC'), Chambers Practice Manual (December 2019), pp.31-34; ICC, *Prosecutor v. Yekatom*, ICC-01/14-01/18-64-Red, Public Redacted Version of 'Decision on Disclosure and Related Matters', 23, January 2019, paras 23-26. See also ICC, Chambers Practice Manual (May 2017) p.3 (noting that the Manual, including the redaction system, reflects best practices based on 'the experience and expertise of judges across trials at the Court') and pp.28-30 (addressing a redaction regime).

⁵ See Articles 21(6) and 35(2)(f) and Rules 80, 106, 108 and 111 (providing for exceptions to disclosure, including to protect persons at risk and avoid prejudice to investigations).

⁶ Art.39(1) and (3) and Rule 95 (setting out the authority of the Pre-Trial Judge to issues such orders as may be required for the preparation of a fair and expeditious trial, including ensuring timely disclosure).

regime pursuant to which the disclosing party: (i) applies redactions according to a set of categories (and related justifications) which have been pre-approved by the Pre-Trial Judge; (ii) lifts such redactions in-line with an established timeframe approved by the Pre-Trial Judge; and (iii) seeks case-by-case approval for other redactions falling outside of the identified categories. Streamlining the redactions regime in this manner is essential to ensuring the fairness and expeditiousness of proceedings, in particular the disclosure process. It provides for a consistent and predictable process across the pre-trial and trial stages, where the parties and panel(s) have a common understanding of the nature of redactions applied, thereby facilitating better and more efficient judicial oversight of the disclosure process.

4. The redactions regime outlined below achieves such objectives. The SPO requests the Pre-Trial Judge to approve the following categories of redactions to be applied directly by the disclosing party:

Category A: Protection of future or ongoing investigations (Rule 108(1)(a)).

Category A.1: Locations of interviews and accommodation

- *Justification*: Disclosure unduly attracts attention to the movements of the parties' staff, victims, witnesses, and other persons at risk on account of the activities of the court and poses an objective risk to ongoing or future investigations. Redaction allows the parties to continue using these locations safely. The information is in principle not relevant to the other party.
- *Timeline*: Redactions to this information should be lifted when the location is no longer used in ongoing or future investigations.

Category A.2: Staff members and contractors

- *Information covered*: Identifying and contact information of party, Registry or court staff or contractors (excluding investigators), who travel frequently to, or are based in, the field.

- *Justification:* Disclosure of this information may put the persons and/or the ongoing investigation at risk. In view of the ongoing or future work in the field of those individuals, any interference with them would jeopardise ongoing and/or further investigations.
- The disclosing party will indicate staff members or contractors in accordance with the following codes:
 - A.2.1: translators/interpreters;
 - A.2.2: stenographers;
 - A.2.3: psycho-social experts;
 - A.2.4: other medical experts;
 - A.2.5: other staff members falling within this category;
 - A.2.6: other contractors falling within this category.

Category A.3: Investigators

- *Information covered:* Identifying and contact information of investigators.
- *Justification:* The parties have a limited pool of investigators. In the course of their employment, investigators in particular work on multiple cases, involving multiple locations and multiple accused persons. Disclosure of the investigators' identity may put the persons and/or the ongoing investigation at risk. It may also pose security risks to witnesses, or other persons, they interview or contact.
- In accordance with paragraph 6 below, the disclosing party will indicate the unique pseudonym of the investigator, in addition to the category code (e.g. A.3.1., A.3.2., A.3.3. etc).

Category A.4: Intermediaries

- *Information covered:* Identifying and contact information of intermediaries.
- *Justification:* Disclosure of this information may put the persons and/or the ongoing investigation at risk. It may also pose security risks to witnesses or other persons with whom they have contact. Non-disclosure ensures that intermediaries can continue assisting the disclosing party in the investigation in a safe and effective manner.
- In accordance with paragraph 6 below, the disclosing party will indicate the unique pseudonym of the intermediary, in addition to the category code (e.g. A.4.1., A.4.2., A.4.3., etc).

Category A.5: Leads and sources

- *Information covered:* Identifying and contact information of leads and sources.
- *Justification:* To ensure they are not intimidated or interfered with which, in turn, could prejudice ongoing or further investigations.
- Where the lead or source provides material that is disclosed, and provided there are no additional security concerns and the lead or source is not protected under Article 35(2)(e) of the Law and Rule 107, the identity of the lead should be disclosed as the source in the context of that disclosure.
- The disclosing party will indicate leads and sources in accordance with the following category-codes:
 - A.5.1: Individual leads and sources;
 - A.5.2: Non-governmental organisations;
 - A.5.3: International organisations;

- A.5.4: National governmental agencies;
- A.5.5: Academic institutions;
- A.5.6: Private companies; and
- A.5.7: Other sources.

Category A.6: Means used to communicate with witnesses

- *Justification:* Disclosure may compromise investigative techniques and the location of witnesses. The information is in principle not relevant to the other party.

Category A.7: Other redactions under Rule 108(1)(a)

- *Justification:* Disclosure may prejudice ongoing or future investigations.

Category B: Protection of victims, witnesses, members of their families and other persons at risk on account of the activities of the court (Rule 108(1)(b)-(c)).⁷

Category B.1: Contact information of witnesses

- *Information covered:* Contact information, including phone numbers, locations/addresses and email addresses.
- *Justification:* Non-disclosure is necessary to protect the safety, dignity, privacy and well-being of the person concerned.

Category B.2: Identifying and contact information of family members of witnesses

⁷ See, for example, ICC, Appeals Chamber, ICC-01/04-01/07-475, Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I entitled 'First Decision on the prosecution request for authorisation to redact witness statements', 13 May 2008, para.56 (interpreting similar language to encompass 'other persons at risk on account of the activities of the court' in order to reflect the intention of protecting individuals at risk).

- *Information covered:* Identifying information of family members or other persons at risk, including photographs, as well as contact information including phone numbers, locations/addresses and email addresses.
- *Justification:* Family members of witnesses are extremely vulnerable given they have not agreed to be part of the court process (and may not even be aware of it) and are at risk of being associated with the court. Non-disclosure is necessary to protect the safety, dignity, privacy and well-being of the family members.
- *Timeline:* Redactions to contact information should be ongoing. Where a redaction to identifying information is applied solely to protect a witness for whom redactions are no longer justified, redactions should be lifted when the identity of the witness is disclosed. Where the redaction to identifying information is applied for the family member's own security and that family member's identity is of no relevance to any known issue in the case, redactions under this category should be ongoing. For redactions falling outside the above scenarios, the disclosing party should make an application to the relevant panel.

Category B.3: Identifying and contact information of 'innocent third parties'

- *Information covered:* Identifying and contact information of other persons at risk as a result of the activities of the court, including phone numbers, locations/addresses, email addresses and photographs.
- *Justification:* These individuals have not agreed to be part of the Kosovo Specialist Chambers court process (and may not even be aware of it) and are at risk of being perceived as potential witnesses or collaborators with the court. Non-disclosure is necessary to protect their safety, dignity, privacy and well-being.

- *Timeline*: Redactions to contact information should be ongoing. For individuals of no relevance to any known issue in the case, redactions to identifying information should be ongoing. Otherwise, the disclosing party should make an application to the relevant panel.

Category B.4: Location of witnesses admitted into a witness protection programme

- *Information covered*: Location of witnesses admitted into a witness protection programme and information revealing the places used for present and future relocation of such witnesses (including before they enter witness protection).
- *Justification*: The confidentiality of these places needs to be maintained to avoid compromising the protection programme and the security of witnesses. The information is in principle not relevant to the other party.

Category B.5: Other redactions under Rule 108(1)(b)-(c)

- *Justification*: Disclosure may cause grave risk to the security of victims, witnesses, members of their families and other persons at risk on account of the activities of the court or be otherwise contrary to the public interest or the rights of third parties.

Category C: Protection of reports, memoranda and internal documents (Rule 106).

- *Legal basis*: In accordance with Rule 106, and subject to Rule 103, internal work product is not subject to disclosure. Where internal work product exists in material subject to disclosure, redaction should not require approval of a panel but should be identified with the code 'C' in the material disclosed.

Category D: Protection of privileged communication and information (Rule 111(1)).

- *Legal basis:* In accordance with Rule 111(1), communications made in the context of the professional relationship between a person and his or her Specialist Counsel should not be subject to disclosure, subject to certain exceptions. Such redactions should not require approval of a panel but should be identified with the code 'D' in the material disclosed. Category D redactions may not be applied to information falling under Rule 111(2)-(6), instead an application to the relevant panel should be made.

5. When a specific redaction falls under one of the categories outlined above, the disclosing party should include the relevant code in the redaction box. This format will allow the reader to immediately recognise the type of underlying information that is redacted in the text and the corresponding justification. In the event that the information redacted falls under more than one category, all relevant codes should be indicated.

6. In addition, any person's identity redacted under categories A.3 and A.4 should be assigned a unique pseudonym, which will accompany the relevant redaction code(s). The purpose of such pseudonyms is to allow the reader of the redacted material to identify whether the same person is referenced across multiple statements. A pseudonym should not be included if doing so would defeat the purpose of the underlying redaction, but the disclosing party should make clear which redactions do not include pseudonyms on that basis.

7. Category A-D redactions should, pursuant to Rules 106 and 108(1), be applied, *mutatis mutandis*, to equivalent information from other national or international law enforcement agencies, including the Kosovo police and prosecution, ICTY, KFOR, UNMIK, and EULEX Kosovo.⁸ Where such redactions are applied, an identifier for the agency in question should be included in addition to the relevant redaction code.

⁸ See Law, Art.37(1) providing that evidence collected by such entities may be admissible before the Specialist Chambers. As such, information falling within the categories should receive equivalent protections before the Specialist Chambers.

8. Redactions should be lifted by: (i) the disclosing party in accordance with relevant timelines;⁹ (ii) an agreement between the parties; or (iii) an order of the panel deciding otherwise. If the information falls under more than one category, the redaction should be lifted when all deadlines have expired. When a disclosing party wishes to maintain redactions after the relevant deadline for lifting of the redaction, it should apply to the relevant panel.

9. Should the receiving party consider that a specific redaction is unwarranted or no longer justified and should be lifted, it should raise the request as soon as possible on an *inter partes* basis with the disclosing party. The parties should then consult in good faith with a view to resolving the matter. In the event of inability to agree, the receiving party may seek the relevant panel's intervention through a written application, thereby creating an obligation for the disclosing party to justify the redaction in question.

10. The redaction regime outlined above should not apply to the non-disclosure of witnesses' identities prior to the commencement of trial and to the non-disclosure of entire items of evidence. In such cases, the party should submit a discrete application to the relevant panel. When the disclosing party seeks to apply redactions which are not based on the categories discussed above, the disclosing party should mark the redaction with letter code 'E'. Disclosure of the relevant material should then also be accompanied by an application to the relevant panel justifying the requested redactions. To the extent possible and unless otherwise provided under the Law or Rules, a redacted version of the application should be provided to the receiving party, and any observation by the receiving party should be submitted to a panel in accordance with Rules 9 and 76.

⁹ Whenever a timeline for lifting redactions is triggered (either by date or circumstances), the disclosing party will lift redactions and disclose the relevant material without seeking the prior leave of the panel, unless such an application is necessary under the Law, Rules or judicial order. Unless indicated otherwise above in respect of particular categories, and subject to the Law, Rules and judicial order, redactions applied pursuant to the categories should be ongoing.

11. Finally, redactions authorised by prior proceedings which are not covered by the categories outline above but are retained by reason of Rule 81(1)(a) of the Rules do not require approval of the panel but should be marked with the letter code 'F' and the case and decision number.

12. The SPO respectfully request the Pre-Trial Judge to adopt a redactions regime as outlined above.

Word count: 2,533



Jack Smith
Specialist Prosecutor

Thursday, 1 October 2020

At The Hague, the Netherlands.