

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

<b>UNITED STATES OF AMERICA</b>	)	
	)	
<i>v.</i>	)	<b><i>Criminal No. 10-86-P-H</i></b>
	)	
<b>JACKIE DARRELL TAYLOR, JR.,</b>	)	
	)	
<b><i>Defendant</i></b>	)	

**MEMORANDUM DECISION AND ORDER  
ON MOTION FOR APPROVAL OF SEARCH PROCEDURE**

The government seeks an order approving the use of a procedure to screen emails obtained through its June 4, 2010, execution of a search warrant on Microsoft, Inc. (“Microsoft”) for materials potentially subject to the attorney-client privilege. *See* Motion for Approval of Government’s Search Procedure to Protect Privileged Materials (“Motion”) (Docket No. 31). The defendant objects, stating that he declines to consent for fear that any such consent may be construed as a waiver of the privilege and that the Motion is in any event premature and should not be ruled upon until any suppression motion pertaining to the seized emails is filed on or before the deadline of July 22, 2010, and adjudicated by the court. *See* Response to Government’s Motion To Approve Search Procedure To Protect Privileged Materials (“Response”) (Docket No. 33). He adds that he does not agree that the government’s proposed process is appropriate, although he does not detail the ways in which it may be deficient or propose an alternative process. *See id.* at 2.

Neither side cites caselaw pertaining to so-called “taint team” or “filter team” processes employed by the government to screen potentially privileged materials from among those netted through a seizure of electronic or hard-copy documents. However, my own research suggests that, in the circumstances presented, the entry of such an order is appropriate. *See, e.g., United States v.*

*Jackson*, Criminal Action No. 07-0035(RWR), 2007 WL 3230140, at \*5 (D.D.C. Oct. 30, 2007) (“[G]overnment taint teams seem to be used primarily in limited, exigent circumstances in which government officials have already obtained the physical control of potentially privileged documents. In such cases, the potentially[]privileged documents are already in the government’s possession, and so the use of the taint team to sift the wheat from the chaff constitutes an action respectful of, rather than injurious, to, the protection of privilege.”) (citations and internal punctuation omitted).

The government appropriately proposes to use a “filter agent” and a “filter Assistant United States Attorney,” or “filter AUSA,” to screen the seized emails, with resort to *in camera* review by the court if there is a question as to the applicability of the privilege to a given document or the existence of an exception thereto. *See* Motion. However, the government contemplates that it, rather than the defendant, would seek court review to resolve such questions. *See id.* at 2.

My research persuades me that it is appropriate to add certain additional protections for the benefit of the defendant, including (i) a proviso that he be afforded the opportunity to seek court review prior to the turnover of any arguably privileged documents to the prosecution, *see In re Search of 5444 Westheimer Rd. Suite 1570*, Misc. Action No. H-06-238, 2006 WL 1881370, at \*3 (S.D. Tex. July 6, 2006) (noting that courts have upheld “taint team” review in circumstances in which, *inter alia*, “the members of the taint team would not be involved in the prosecution, and the defendants would have the opportunity to object to any privilege determinations made by the taint team[,]” with such objections ultimately being resolved by the court before materials were turned over to the prosecution team), and (ii) an explicit statement that he retains the right to file a motion to suppress bearing on the instant materials, *see id.* at \*3 n.6. Like the court in *In re Search of 5444 Westheimer Rd.*, I emphasize that my decision “is based upon the expectation and presumption that

the Government's privilege team and the trial prosecutors will conduct themselves with integrity.”  
*Id.* at \*3 (citation, internal quotation marks, and footnote omitted).

The Motion accordingly is **GRANTED**, with modifications, as follows:

1. The government's “filter agent,” who has not been, and will not be, involved in the prosecution of the instant matter, will review the materials received from Microsoft. S/he will use the “header” information on the emails to filter out any emails purporting to be either to or from the defendant's current attorney, J. Hilary Billings, Esq., or his previous attorney, Dennis Charney, Esq., without reviewing the content of those emails. S/he will review the content of the remaining emails to ensure that no privileged information may be contained within them. S/he shall maintain a log detailing the disposition of each document in question.

2. The government will assign a “filter AUSA” who has not been, and will not be, involved in prosecution of the instant matter, with whom the filter agent can discuss any issues that may arise and to whom the filter agent may forward emails that the filter agent has determined may contain arguably privileged information.

3. When the foregoing review is completed, the filter agent shall return all materials determined to be privileged to the defendant and notify him whether any arguably privileged documents have been determined not to be privileged or to be subject to an exception to application of the privilege. With respect to those arguably privileged documents that the government has deemed not to be covered by the privilege or to be subject to an exception to the privilege, if any exist, the filter agent and/or filter AUSA shall supply to the defendant a log describing any such document by date, sender, recipient, and subject matter, sufficient to enable the defendant to assess the government's determination. The defendant may challenge any such determination by motion filed with the court within 10 days of his receipt of said log.

4. Only those materials not filtered out, and not containing privileged or arguably privileged communications, will be sent to the case agent or the AUSA assigned to this case.

5. No arguably privileged materials shall be sent to the case agent or the AUSA assigned to this case unless and until (i) the defendant fails to object, within 10 days of his receipt of the government's log, to the government's determination that the material in question is non-privileged or is subject to an exception to the privilege, or (ii) upon a timely objection by the defendant, the court rules that the material in question is non-privileged or is subject to an exception to the privilege.

6. The court's approval of the filter process does not foreclose the defendant from filing a motion to suppress bearing on the materials in question.

**SO ORDERED.**

Dated this 16th day of July, 2010.

/s/ John H. Rich III  
John H. Rich III  
United States Magistrate Judge

**Defendant (1)**

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JR**

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**Plaintiff**

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