



**SPECIAL COURT FOR SIERRA LEONE**

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Date:	27 <sup>th</sup> February 2007	Case No: SCSL-03-01	The Prosecutor v Charles Taylor
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Document(s): **Defence Reply To 'Confidential Prosecution Response To Defence Motion To Lift The Redactions Of Identifying Information Of Fifteen Core Witnesses ' - SCSL-03-01-PT-195**

Document Dated: 26 February 2007 Received by Court Management at 10:15 on the 27<sup>th</sup> February 2007.

- Reasons Given By Defence Team:** This reply was due on the 26<sup>th</sup> February 2007. Unfortunately because Lead Counsel was in Pakistan and because of the slow e mail server resulting in several hours of delay, his Legal Assistant who was in Freetown did not receive the final approved version of the Reply until after the filing deadline. We ask that the Trial Chamber accepts this late filing in the interest of justice, given the importance of the matters addressed, especially since there is no prejudice to the Prosecution.

Signed:

THOMAS P K GEORGE

Dated: 27<sup>th</sup> February 2007

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THE SPECIAL COURT FOR SIERRA LEONE

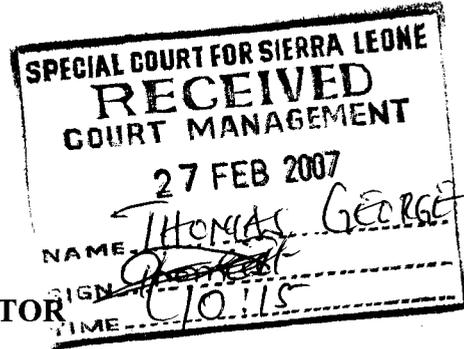
Case No.SCSL-03-01-PT

IN TRIAL CHAMBER II

**Before:** Hon. Justice Julia Sebutinde, Presiding  
Hon. Justice Richard Lussick  
Hon. Justice Teresa Doherty

**Registrar:** Mr. Lovemore G. Munlo, SC

**Date:** 26 February 2007



THE PROSECUTOR

-v-

CHARLES TAYLOR

PUBLIC

**DEFENCE REPLY TO "CONFIDENTIAL PROSECUTION RESPONSE TO  
DEFENCE MOTION TO LIFT THE REDACTIONS OF IDENTIFYING  
INFORMATION OF FIFTEEN CORE WITNESSES"**

Office of the Prosecutor

Mr. Stephen Rapp  
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Mr. Karim A. A. Khan  
Mr. Roger Sahota

## I Introduction

1. The Defence file this Reply to the *Confidential Prosecution Response to Defence Motion to Lift the Redactions of Identifying Information of Fifteen Core Witnesses* filed on 19 February 2007 (“Prosecution Response”). In support of the requested relief, the Defence rely upon the arguments advanced in their “Public Defence Motion to Lift the Redactions of Identifying Information of Fifteen Core Witnesses” filed on 07 February 2007 (“Defence Motion”).
2. The Defence does not accept that a change of circumstances *must* be shown by the Defence before the requested relief is granted, given that the Trial Chamber’s original Decision on Protective Measures, dated 05 May 2006,<sup>1</sup> was, in part, predicated upon the Defence not objecting to the original Prosecution Motion for Protective Measures “*providing that such measures can be reviewed by the parties and, if necessary, the Trial Chamber, as the Defence’s preparations for trial advance.*”<sup>2</sup>
3. The Defence submit that, to the extent that a change of circumstances needs to be shown, the factors detailed in paragraphs 11-17 of this Reply, individually and cumulatively, constitute a change in circumstances justifying reconsideration of the protective measures ordered in relation to the specified witnesses.
4. The Prosecution argues in its Response that the Trial Chamber should dismiss the Defence Motion in relation to 13 of the witnesses.<sup>3</sup> Specifically, the Prosecution submit that (a) the Defence have not met their burden to demonstrate that the existing balance between witness protection and the rights of the Accused must be changed; (b) the existing protective measures protect the right of the Accused to have adequate preparation time; (c) the circumstances have not changed; (d) disclosure of the requested material to the Defence only would increase the security risk of these 13 witnesses.<sup>4</sup> In relation to two witnesses, who have verbally waived their right to protective measures related to the

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<sup>1</sup> *Prosecutor v. Taylor*, SCSL-03-01-PT-99, Decision on Confidential Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure and Urgent Request for Interim Measures and on Confidential Prosecution Motion for Leave to Substitute a Corrected and Supplemented List as Annex A of the Confidential Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure and Urgent Request for Interim Measures, 05 May 2006.

<sup>2</sup> *Prosecutor v. Taylor*, SCSL-03-01-PT-94, Defence Response to “Prosecution Motion for immediate Protective measures for witnesses and for Non-Public disclosure and Urgent request for interim measures”, 25 April 2006, para 2. *Also see* para, 4(ii) and Defence Motion, para 6.

<sup>3</sup> Prosecution Response, para. 3.

<sup>4</sup> Prosecution Response, para. 12.

release of their identities, the Prosecution requests that the Protective Measures Order set out in the 05 May 2006 Protective Measures Decision be amended for the Prosecution to allow disclosure of their identities.<sup>5</sup>

5. The Defence welcomes the Prosecution request for the amendment of the Protective Measures Order in relation to two witnesses who have waived their right to delayed disclosure and accordingly requests orders for the disclosure of the identities of these witnesses to the Defence forthwith. The Defence respectfully submits that the Prosecution have failed to rebut the arguments raised by the Defence concerning the requested orders sought in relation to the remaining 13 witnesses.

## **II. The Defence have met their burden in demonstrating that the protective measures in place have to be varied in relation to the 13 witnesses subject to the request**

6. Contrary to the position of the Prosecution,<sup>6</sup> the Defence submit that the names and identities of the specified witnesses can be safely disclosed to the Defence in this case. This is particularly so given that protections would remain in place were the Defence Motion granted. Specifically, the Defence would remain bound by the general terms of the Trial Chamber's Decisions on witness protection and regarding the custody and use of confidential material disclosed by the Prosecution. It would remain bound to undertakings it has provided the Prosecution. In addition, the Defence remains bound by SCSL and national Codes of Professional Conduct, as well as internal protocols.<sup>7</sup>
7. The Defence is not in a position to demonstrate a negative (namely the *lack of need* for the redactions of the identities in respect of each individual witness) in any more substantial a manner simply because the Prosecution has never given specific reasons for the need for protection on a witness by witness basis in the first place. This fundamental deficit in the Prosecution position militates against the Defence being able to adequately respond and reply to unsubstantiated assertions. The Defence maintains the position advanced in its Response dated 25 April 2006 to the original Prosecution's Motion for immediate Protective measures for witnesses dated 04 April 2006.<sup>8</sup>

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<sup>5</sup> Prosecution Response, para. 3.

<sup>6</sup> Prosecution Response, paras. 13-14.

<sup>7</sup> Defence Motion, paras. 20-22.

<sup>8</sup> *Prosecutor v. Taylor*, SCSL-03-01-PT-94, Defence Response to "Prosecution Motion for immediate Protective measures for witnesses and for Non-Public disclosure and Urgent request for interim measures", 25 April 2006, para 4(i): That it was premature for such blanket orders and that a witness by witness

8. The Defence, with respect, does not cavil from its originally stated position that the measures sought by the Prosecution should only be ordered upon a showing of “exceptional circumstances”.<sup>9</sup> The Prosecutor’s unwillingness to justify the need for protective measures on a case-by-case basis as well as its *ex parte* filings allegedly explaining the need for those protective measures make it practically impossible for the Defence to respond in any more meaningful way than it has.

9. The result of the “protection by category” approach imposed in this case<sup>10</sup> has been to leave the Defence in the dark regarding much of the Prosecution’s case and their investigations have been meaningfully hindered and compromised before the case has started. Accordingly, it is unfair, in the respectful submission of the Defence, for the Prosecution to complain about a lack of detail or substance in the Defence Motion when this is a result of its own policy which has fettered and limited the Defence ability to reply.

**III. The existing protective measures do not sufficiently protect the right of the Accused to have adequate preparation time in relation to certain core witnesses**

10. As explained in the Defence Motion,<sup>11</sup> in light of all new circumstances detailed below, coupled with the failure of the Prosecution to ever show “exceptional circumstances” existing on a witness by witness basis, the Defence is seriously disadvantaged in not having the identities of certain core witnesses at this time.

**IV There are changed circumstances which justify the disclosure request of the identities of 13 core witnesses**

11. The Prosecution submits that there are no changed circumstances.<sup>12</sup> The Defence respectfully disagree. On any assessment of the evidence, it would not have escaped the notice of a diligent Prosecutor that the initial Protective Measures Order was made in May 2006. This, of course, predates Mr. Taylor’s transfer to The Hague. Accordingly, the

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approach was required by the Prosecution to properly allow the Defence a right to challenge what was contended to be “exceptional” circumstances requiring the sought measures.

<sup>9</sup> *Ibid.*

<sup>10</sup> The almost all pervasive protection ordered in this case to almost all witnesses renders the disclosure of any of the six or so names of witnesses that the Defence is in possession of “exceptional”. This practice amounts to a reversal of the plain meaning of the object, purpose and plain reading of the Rule 69(A) by any yardstick. This position was stated in *Prosecutor v. Taylor*, SCSL-03-01-PT-155, Defence Response to “Confidential Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure with Four Annexes, one of which filed *Ex Parte*”, 08 January 2007, para. 12.

<sup>11</sup> Defence Motion, paras. 7, 11, 13-16.

<sup>12</sup> Prosecution Response, para. 15.

geographical divorce between the court and location of trial is a new circumstance, contrary to the Prosecution's contention.

12. A final trial date of 04 June 2007 was set on 23 January, 2007.<sup>13</sup> The trial date was unknown and not set at the time when the 05 May 2006 Protective Measures Decision was rendered. Again, having a fixed trial date constitutes a change in circumstances. The Prosecution are not being asked to provide protection to an unknown commencement date. One may reasonably expect that having a specified start date to be of assistance to the Prosecution in determining the necessary protective measures needed.
13. The date for submitting the Pre-Trial Brief was set on the Status Conference held on 26 January 2007. As the trial preparations progress and more material is being disclosed to the Defence, the Defence is increasingly confident in its original assessment that the Prosecution has a tendency to redact heavily, even where documents are already in the public domain.<sup>14</sup> On 22 September 2006, the Prosecution provided the Defence with a Provisional Witness List listing over 260 witnesses whose identities, (all save for six), have not been disclosed to the Defence. Again, this fact constitutes, in the Defence submission, a material change in circumstances since the 05 May Protective Measures Decision.
14. The Defence accepts the Prosecution's assertion in paragraph 16(a) that some of the redacted materials have been in the Defence's possession for some time and others have been disclosed more recently. The Defence, however, is not concerned with disclosure *at large*. Rather, it has focused on the disclosure of the identifying material of the 13 specific witnesses subject to the Defence Motion. In this context, the Defence notes that the Prosecution has sought protective measures with this Trial Chamber in relation to 73 witnesses only. Close to 200 witnesses are protected by protective measures ordered by other Trial Chambers. In assessing the requirement for protection, due consideration should be given to the fact that, as the Prosecution has closed its case in all its trials, save the present case, all other Defence teams for each of the accused before the SCSL, have the names of the witnesses which the Prosecution now seek to withhold only from the Taylor Defence.

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<sup>13</sup> *Prosecutor v. Taylor*, SCSL-03-01-PT-164, Joint Decision on Defence Motions on Adequate Facilities and Adequate Time for the Preparation of Mr. Taylor's Defence, 23 January 2007, para. 21.

<sup>14</sup> *See below*, paras. 25-26.

15. Regarding the Prosecution's position on its Pre-Trial Brief,<sup>15</sup> the Defence respectfully submits that an Indictment amounting to 9 pages and a Case Summary of 12 pages, neither of which gives any indication as to which witnesses will testify, in relation to which counts, and in what manner (either *viva voce* or *92bis*) cannot be compared with a Pre-Trial Brief.
16. In relation to the geographical disjunction between the location of the trial and those of the investigations, the Prosecution claims that this is not unique to the Special Court for Sierra Leone ("SCSL") and is common to the International Criminal Tribunal for the former Yugoslavia ("ICTY").<sup>16</sup> The Defence recognises that the ICTY is indeed also based in a location removed from the crime scene. However, Mr. Taylor is not only removed from the locations of investigation, he is also removed from the SCSL. In the case of the ICTY, the whole Tribunal is removed from the crime scene. Thus, all parties face these dilemmas, not just the Defence.

**V. Disclosure of the requested material, to the Defence only, would not increase the security risk of these 13 witnesses**

17. The Prosecution suggests that disclosure to the Defence only would increase the risk for witnesses. The Prosecution makes sweeping statements as to the Defence's lack of comprehension of the seriousness of witness protection. The Defence makes the following submissions in response.
18. In paragraph 18, the Prosecution states that the distinction offered by the Defence between disclosure to the Defence and to the public is not helpful because it is difficult to envision a circumstance in which it would be appropriate to disclose unredacted statements to the public at large. Whether there may or may not be circumstances that would justify disclosure to the public at large is an irrelevant consideration in respect of the present request. The Defence did not request disclosure to the public at large but to the Defence only. This distinction is critical. Provided that the Defence will not disclose redacted materials to the public, it cannot be fairly said that there would be any increased danger to the 13 specified witnesses. The Defence have striven to act in good faith and with professionalism in their investigations and in its approach to this case. Despite this, it

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<sup>15</sup> Prosecution Response, para. 16(b).

<sup>16</sup> Prosecution Response, para. 16(c).

appears that the Prosecution remains entrenched in its view that the efforts made by the Defence are insufficient to protect the witnesses.

19. In the absence of any evidence to support its allegations, the Prosecution bases its assumptions on misrepresentations or misunderstandings of Defence submissions. In paragraphs 19, the Prosecution misinterprets the Defence submission that disclosure of certain identities is necessary to “conduct interviews with potential witnesses which could assist in assessing the credibility of these fifteen witnesses” to mean that “the Defence will be disclosing the identity of these witnesses to those members of the public whom the Defence interviews in order to assess the credibility of the witnesses”
20. It has not, at any stage, been the intention of the Defence to disclose to anyone the identities of protected witnesses. There is, however, nothing improper about inquiring about protected witnesses as long as it is not evident that the person whose information is being sought actually is or maybe a witness. Indeed, the Defence do this in relation to its own witnesses. The very experienced Prosecution Investigators working on this case should be able to explain some of the ways it is possible “conduct interviews with potential witnesses which could assist in assessing the credibility”<sup>17</sup> of these 13 persons without disclosing that the person whose information is requested is a witness in this case. If not, the Defence stands ready to assist in explaining how this can be done. This is the normal, regular manner by which investigations are ordinarily conducted. The Defence position is absolutely clear from paragraph 22 of the Motion. The Defence is surprised that despite this, its position appears to have been somehow misunderstood.
21. Contrary to what is contended in paragraph 20 of the Prosecution Response, the Defence has never articulated a position that the security of a putative witness must have been threatened or breached before witness protection measures are to be considered. Indeed, such a contorted view is simply unsustainable given the consistent position of the Defence on the issue of witness protection in the present case. The Defence simply states, in line with the established jurisprudence on this matter, that there must be a genuine subjective fear that is objectively justified.<sup>18</sup>

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<sup>17</sup> Defence Motion, para. 18; quoted in Prosecution Response, para. 19.

<sup>18</sup> *Prosecutor v. Taylor*, SCSL-03-01-PT-155, Defence Response to “Confidential Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure with Four Annexes, one of which filed *Ex Parte*”, 08 January 2007, para. 13.

22. At paragraph 20, the Prosecution also opines that “the Defence must intend to test the substantive contents of these redacted statements in interviews with persons who may have relevant knowledge. The Defence has no control over these individuals and how they may use the information given to them.” The Prosecution assertion is an unsupported conjecture and utterly baseless. On the contrary, the members of the Defence Team are all experienced in conducting investigations and are aware of the seriousness of the situation and the need to be cautious in respect of witnesses for the Prosecution or the Defence. The Defence refers once again to paragraph 22 of the Motion as representing its actual position.
23. The Defence fail to understand how concerns about the fairness of Mr. Taylor’s trial expressed in Liberia would cause any danger to witnesses in Sierra Leone.<sup>19</sup> Even if, which is not accepted, the situation in Liberia were held to have deteriorated, this is irrelevant to the Motion falling for consideration in that the witnesses whose identities are being sought by the Defence are Sierra Leoneans or Liberians no longer living in Liberia. Thus, the security problems in Liberia have no impact on their safety elsewhere.
24. In subsection E, paragraphs 25-31 of its Response, the Prosecution refers to some examples that allegedly support its concern in respect of the Defence’s conduct. The main example is that the Defence referred to submissions made by a protected witness in a public filing.<sup>20</sup> The Defence redacted these submissions in order to ensure that no identifying information would be disclosed to the public. On the request of the Prosecution, upon reasons being properly articulated, the Defence withdrew these parts and filed them confidentially.<sup>21</sup> The Prosecution’s concerns are, therefore, now moot.

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<sup>19</sup> Prosecution Response, para. 22.

<sup>20</sup> *Prosecutor v. Taylor*, SCSL-01-03-PT-140, Defence Motion for Urgent Reconsideration of “Decision on Defence Motion for Leave to File an Oversized Motion: “Defence Motion on Adequate Time and Facilities For the Preparation of Mr. Taylor’s Defence”, 12 December 2006, para. 24.

<sup>21</sup> The Defence accepts that the Chief of Prosecutions had relayed some concerns to an intern helping in Freetown who was assisting the Defence. It is also accepted that these concerns were passed on, in general terms, to lead counsel in Pakistan. These concerns were considered imprecise and baseless, especially as defence had already significantly edited the account of TFI-151 to remove any possibility, however remote, of that witness being identified. However, once the written submissions regarding confidentiality were filed by the Prosecution and considered by lead counsel, the Defence was more fully apprised of the Prosecution concerns and accordingly did the necessary to prevent the Motion from entering the public domain. Despite an attempt at an accommodation with the Prosecution, and despite several measures and actions undertaken before and since by the Defence which are known to the Prosecution (and which should assure it and establish beyond doubt the good faith, confidentiality, and respect held by the Defence for the fair administration of justice) this matter has been raised yet again. This is notwithstanding that the OTP

25. As regards the public transcripts which were redacted more heavily when disclosed to the Defence, the Prosecution submits that it made redactions to the transcripts available on the internet, and that it notified the Registrar of those redactions which had “erroneously *in the view of the Prosecution* been placed in the public domain”.<sup>22</sup> The Defence notes this account with surprise. It is not readily identifiable what business the Prosecution has in redacting public sessions in publicly available transcripts absent an order of a Trial Chamber. If the Registry has improperly and inadvertently disclosed something that should not have been made public, the only proper course would have been for the Prosecution to request the Trial Chamber seized of the matter to make the necessary order.
26. The Prosecution’s position is rendered even more remarkable, in the respectful submission of the Defence, when regard is had to the allegations set out at paragraph 30 of the Prosecution Response. The Prosecution criticises the Defence for disclosing in a public Annex portions of transcripts that were published on the SCSL website. The Prosecution states: “The Defence did this with full knowledge that the Prosecution felt it necessary to redact portions of transcripts which had, erroneously in the view of the Prosecution, been placed in the public domain, and without waiting for a determination on the matter”.<sup>23</sup> This assertion is false. The Defence had simply not been informed that “there was to be a determination on the matter” contrary to the Prosecutor’s contention. In any event, it defies credulity for the Defence to be blamed for including as an annexure a *more redacted* version of a transcript than is publicly available to the world at large, on the SCSL official web site in a *less redacted* form. The criticism of the Defence may, perhaps, be considered to be tad unfair in these circumstances.

## VI Confidential Filing

27. The Prosecution have given no reasons as to why its Response requires a “confidential” filing. The Defence expressed concern over the proclivity of the Prosecution to file confidentially absent a showing of good cause or need in the very first

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*withdrew* its motion dated 14 December 2006 requesting refile on a confidential basis of the Defence Motion dated 12 December 2006. It is hoped that the present clarification will be an end to that matter and so prevent a collateral issue from distracting the parties further. In addition, if further issues arise in the future, the Prosecution is invited to contact Defence counsel directly.

<sup>22</sup> Prosecution Response, para 30.

<sup>23</sup> Prosecution Response, para. 30.

Response it filed on the issue of witness protection.<sup>24</sup> Nothing in the present Response discloses information that could lead to the identification of any witness. The Defence submits that the public has the right to know and be apprised of developments in this case, constrained only by the need to ensure witness protection and a fair trial.

## VII Conclusion

28. In its Response to the Prosecution Motion for Immediate Protective measures, dated 25 April 2006, the Defence stated that “in due course, however, the Trial Chamber may have to perform a balancing act, in the case of specific witnesses, between their anonymity / continued non-disclosure of their names and the rights of the Defence to prepare for Trial.”<sup>25</sup> The Defence have not contested the need for disclosure until the very last possible moment. Trial is imminent. The Defence submit that in the circumstances of this case, the requested disclosure of the names and statements of fifteen witnesses is a proportionate response, reasonable and necessary to ensure a fair trial of the accused, even when properly balanced with the rights and safety of witnesses in the case. Accordingly, the Defence prays that its Motion be granted for the reasons detailed therein and as further explained in this Reply.

Respectfully submitted,



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**Karim A. A. Khan**

**Lead Counsel for Mr. Charles Taylor**

Done in Freetown this 26<sup>th</sup> Day of February 2007

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<sup>24</sup> *Prosecutor v. Taylor*, SCSL-03-01-PT-94, Defence Response to “Prosecution Motion for immediate Protective measures for witnesses and for Non-Public disclosure and Urgent request for interim measures”, 25 April 2006, para. 1. The Defence noted “No identifying information of any witness is included in this Response and the Defence can see no other justification requiring confidential filing, but does so out of an abundance of caution.”

<sup>25</sup> *Ibid*, para 5.

## Table of Authorities

1. *Prosecutor v. Taylor*, SCSL-03-01-PT-94, Defence Response to “Prosecution Motion for immediate Protective measures for witnesses and for Non-Public disclosure and Urgent request for interim measures”, 25 April 2006.
2. *Prosecutor v. Taylor*, SCSL-03-01-PT-99, Decision on Confidential Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure and Urgent Request for Interim Measures and on Confidential Prosecution Motion for Leave to Substitute a Corrected and Supplemented List as Annex A of the Confidential Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure and Urgent Request for Interim Measures, 05 May 2006.
3. *Prosecutor v. Taylor*, SCSL-01-03-PT-140, Defence Motion for Urgent Reconsideration of “Decision on Defence Motion for Leave to File an Oversized Motion: “Defence Motion on Adequate Time and Facilities For the Preparation of Mr. Taylor’s Defence”, 12 December 2006.
4. *Prosecutor v. Taylor*, SCSL-03-01-PT-155, Defence Response to “Confidential Prosecution Motion for Immediate Protective Measures for Witnesses and for Non-Public Disclosure with Four Annexes, one of which filed *Ex Parte*”, 08 January 2007.
5. *Prosecutor v. Taylor*, SCSL-03-01-PT-164, Joint Decision on Defence Motions on Adequate Facilities and Adequate Time for the Preparation of Mr. Taylor’s Defence, 23 January 2007.
6. *Prosecutor v. Taylor*, SCSL-03-01-PT-176, Public Defence Motion to Lift the Redactions of Identifying Information of Fifteen Core Witnesses, 07 February 2007.

7. *Prosecutor v. Taylor*, SCSL-03-01-PT-185, Confidential Prosecution Response to Defence Motion to Lift the Redactions of Identifying Information of Fifteen Core Witnesses, 19 February 2007.