IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

UNITED STATES OF AMERICA	*	
	*	
v.	*	**Criminal No. 10 CR 00181 RDB**
	*	
THOMAS ANDREWS DRAKE,	*	
	*	
Defendant.	*	
	******	

GOVERNMENT'S MEMORANDUM OF LAW
REGARDING APPLICATION OF LEGAL PRIVILEGES UNDER CIPA

The United States of America, by and through William M. Welch II, Senior Litigation Counsel, and John P. Pearson, Trial Attorney, Public Integrity Section, Criminal Division, United States Department of Justice, respectfully files this motion regarding the application of evidentiary privileges under the Classified Information Procedures Act (hereinafter "CIPA") and the National Security Act of 1959. This Court is fully authorized to redact and substitute unclassified, protected information in the context of a CIPA hearing. In short, because CIPA does not alter the rules of evidence, CIPA requires a district court to consider the assertion of legal privileges, whether common law or statutory, when assessing the admissibility of classified information. The National Security Agency (NSA) possesses a statutory privilege against the disclosure of information relating to its activities. *See* Title 50, United States Code, Section 402, Section 6. Therefore, CIPA permits the government to invoke that privilege in the context of CIPA hearings, given that the district court's determination of the adequacy and admissibility of proposed substitutions for classified documents necessarily implicates the disclosure of other protected information contained with the classified documents.

I. CIPA Is A Procedural Statute And Does Not Foreclose The Consideration Of Substitutions For NSA Information Protected By A Statutory Privilege.

CIPA is a procedural tool that allows a court to address the use, relevance and admissibility of classified information in a criminal case. *See United States v. Rosen*, 557 F.3d 192, 194-95 (4th Cir. 2009); *United States v. Moussaoui*, 591 F.3d 263, 282 (4th Cir. 2009); *United States v. Smith*, 750 F.2d 1215, 1217 (4th Cir. 1990) (stating CIPA "is merely a procedural tool requiring a pretrial court ruling upon the admissibility of classified information."). *See also United States v. Stewart*, 590 F.3d 93, 130 (2nd Cir. 2009). Section 6(c) expressly grants a district court the authority to modify and restrict relevant evidence in order to accommodate both the legitimate interest of the defendants in defending the case and the important governmental interests in protecting national security. *United States v. Collins*, 603. F.Supp. 301, 304, 306 (S.D. Fla. 1985); *see* S. Rep. 96-823, 1980 USCCAN 4294, 4302 (substitutions are "clearly preferable to disclosing information that would do damage to the national security" so long as a defendant's right to a fair trial is not prejudiced).

Section 6(c)(1) allows the district court to order substitutions in lieu of the disclosure of classified information. Ths provision must be read broadly in light of the "particular facts of each case" and because the CIPA procedures vest "district courts with wide latitude to deal with thorny problems of national security in the context of criminal proceedings."" *United States v. Abu-Ali*, 528 F.3d 210, 247 (4th Cir. 2007). *See also United States v. North*, 713 F.Supp. 1452, 1453 (D.D.C. 1988) (stating that CIPA's legislative history "shows that Congress expected trial judges to fashion creative solutions in the interests of justice for classified information problems."). A court's determination of the adequacy of a substitution or summary under Section 6(c) is a question of admissibility. *See e.g. United States v. Moussaoui*, 382 F.3d 453,

480 (4th Cir. 2004)(stating that a district court's "role in compiling the substitutions . . . is little removed from the judicial task of assessing the admissibility of evidence.").

Because CIPA is a procedural statute, CIPA never altered "the existing law governing the admissibility of evidence." *Smith*, 780 F.2d at 1106. The Fourth Circuit as well as other "circuits that have considered the matter agree with the legislative history cited that ordinary rules of evidence determine admissibility under CIPA." *Id.* (citing *United States v. Wilson*, 750 F.2d 7 (2nd Cir. 1984); *United States v. Wilson*, 732 F.2d 404 (5th Cir. 1984). Accordingly, under CIPA, "in assessing admissibility, [a district] court must consuder not just the relevance of the evidence, but also the applicability of any government privilege, such as military or state secrets." *United States v. Rosen*, 557 F.3d 192, 195 (4th Cir. 2009) (citing *Smith*, 780 F.3d at 1107, 1110). In fact, even under CIPA, a district court must consider those privileges traditionally reserved for non-classified information, such as the attorney-client and marital privileges, if potentially applicable to the question of the admissibility of classified information. *See Smith*, 780 F.3d at 1107 (citing attorney-client privilege, marital, state secrets, and informant's privileges as examples of potentially applicable privileges).

II. NSA's Statutory Privilege Authorizes the Redaction or Substitution of Protected Information.

NSA possesses a statutory privilege that protects against the disclosure of information relating to its activities. Codified at Title 50, United States Code, Section 402, Section 6(a), and commonly known as the National Security Act of 1959, this statute states as follows:

> Except as provided in subsection (b) of this section, nothing in this Act or any other law . . . shall be construed to require the disclosure of the organization or any function of the National Security Agency, or any information with respect to the activities thereof, or of the names, titles, salaries, or number of the persons

employed by such agency.[1]

Various courts of appeal have recognized this statutory privilege and affirmed the non-disclosure of information relating to the activities of NSA. The invocation of this statutory privilege most often occurs in the FOIA context. *See e.g. Wilner v. National Security Agency*, 592 F.3d 60, 75 (2nd Cir. 2010)(upholding, under Section 6, the denial of a FOIA request for the Terrorist Surveillance Program, even after its public acknowledgment, because the requested documents would reveal NSA activities); *Larson v. Department of State*, 565 F.3d 857, 868 (D.C. Cir. 2009) (holding that Section 6 "is a statutory privilege unique to the NSA" that provides "absolute protection" against FOIA disclosure and explaining that the NSA need not show harm to the NSA, but only that the withheld information relates to the activities of the NSA). *See also Lahr v. National Transportation Safety Board*, 569 F.3d 964, 985 (9th Cir. 2009)(stating that "[t]he agency need not make a `specific showing of potential harm to national security' because `Congress has already, in enacting the statute, decided that disclosure of NSA activities is potentially harmful.'")(quoting *Hayden v. Nat'l Sec. Agency/Cent. Sec. Serv.*, 608 F.2d 1381, 1390 (D.C. Cir. 1979)).

Courts also have upheld its invocation in the civil context. *Linder v. National Security Agency*, 94 F.3d 693, 698 (D.C. Cir. 1996)(quashing a civil subpoena for documents because Section 6 provided an absolute bar to disclosure of documents relating to the activities of NSA that the NSA need not show harm to the NSA, but only that the withheld information relates to

[1]The National Security Act, for example, served as the basis for the government's redaction of all of the last names from the government and defense exhibits considered during the recent Section 6(c) hearing.

the activities of the NSA).[2] It is precisely because this type of information that may not make sense to a district court or member of the public, but "would make all too much sense to a foreign counter-intelligence specialist who could learn much about this nation's intelligence-gathering capabilities from what these documents revealed about sources and methods," has caused the courts to hold such information deserving of protection under the statute. *See United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989).

In this case, the Court had to consider the admissibility of classified documents for which substitutions had been offered by the government. These classified documents presented one of those "thorny problems" for which the CIPA procedures vested "district courts with wide latitude" because the classified documents contained not just classified information, but also information protected under the National Security Act. Thus, while CIPA provided the Court with the procedures to handle the classified information, the fact that the classified documents contained classified information intertwined with the protected information required the court to consider the issue of the disclosure of the protected information. *See Rosen*, 557 F.3d at 195; *Smith*, 780 F.3d at 1107. Public disclosure of the unredacted protected information would have caused a similar type of harm deemed worthy of protection by the Fourth Circuit in *Smith*, 780 F.2d at 1109 (discussing the government's "'compelling interest in protecting both the secrecy of information to our national security and the appearance of confidentiality so essential to the

[2]Throughout the course of the CIPA hearing, the Court utilized the proper balancing test for substitutions relating to the classified information as well as the protected information appearing in the classified documents. *United States v. Moussaoui*, 382 F.3d 453, 476 (4th Cir. 2004)(stating that "it is clear that when an evidentiary privilege - even one that involves national security - is asserted by the Government in the context of its prosecution of a criminal offense," a district court must conduct a "balancing" test that determines if the information is material to the defense.).

effective operation of our foreign intelligence service.'")(quoting *CIA v. Sims*, 471 U.S. 159, 175 (1985)).

It is simply incorrect to argue that CIPA is a rigid set of procedures that precludes this Court from simultaneously considering the admissibility of classified information as well as other information, whether protected or unclassified. For example, in *United States v. Rezaq*, 134 F.3d 1121, 1142 (D.C. Cir. 1998), the government had sought and received permission from the district court to file an *ex parte, in camera* motion for a protective order relating to "a number of arguably discoverable classified materials." After the district court determined ceratin material discoverable, the government sought and received permission under § 4 of CIPA to prepare admissions of the relevant facts for the documents identified as discoverable by the district court. *Id*. On appeal, the defendant challenged the summaries, arguing that the summaries may have omitted important information. *Id*. The D.C. Circuit rejected that argument, finding that "[n]o information was omitted from the substitutions that might have been helpful to Rezaq's defense, and the discoverable documents had no unclassified features that might have been disclosed to Rezaq." *Id*. at 1143. If CIPA precluded a district court's simultaneous consideration of classified and unclassified information, the D.C. Circuit obviously could never have reached this result.

Moreover, the text of Section 6(c) further establishes the authority of the Court to approve substitutions that go beyond redactions limited only to classified information. Section 6(c)(1)(B), for example, uses the term "summary," which means an "abstract" or "abridgment," MERRIAM-WEBSTER DICTIONARY (2006). A summary necessarily will require the consideration of and potentially the inclusion of non-classified information. For example, in *Moussaoui*, 382

F.3d at 480-481, the Fourth Circuit recognized that the rule of completeness may require additions to a summary in order to achieve fairness and accuracy. Because it is a procedural statute, CIPA does not, and could not, set forth the myriad types of manners and forms a substitution could take or require. Moreover, given the unique nature of each criminal case and the unique nature in which classified information may appear, it could not set forth every permissible substitution, but rather CIPA provides the tools for district courts to fashion them.

Finally, this Court possessed the inherent authority outside of CIPA to resolve the legal and evidentiary issues relating to the protected information through the use of substitutions. In *Moussaoui*, 382 F.3d at 458-459, the district court ordered substitutions in lieu of the deposition testimony of three material witnesses. After finding the government's substitutions inadequate, and concluding that no satisfactory substitutions could be created, the government appealed. *Id*. at 459. In reversing the district court, the Fourth Circuit determined that adequate substitutions could be created and offered the district court considerable guidance in doing so. *Id*. at 478-480. Most importantly for purposes of this memorandum of law, both the district court's orders and the Fourth Circuit's opinion occurred outside the context of CIPA. *Id*. at 482 (holding that "CIPA does not apply here" and "[o]nce this process is complete, the matter is at an end - there are to be no additional or supplementary proceedings under CIPA regarding the substitutions."). Although the Fourth Circuit used CIPA as an analogous framework, it found that courts have power outside of CIPA to protect the information from disclosure at trial. Thus, although this Court considered the issue of the protected information within a CIPA hearing, the Court's authority to affirm or rejected substitutions for the protected information is separate and distinct from CIPA.

Finally, assuming arguendo that the Court could not consider the protected information within a CIPA hearing, the government could have raised the issue separately before trial. Such an approach made no sense, and would have required another closed hearing in which many of the same arguments and issues would have been re-hashed. The defendant suffered no prejudice from the Court's simultaneous consideration of both the classified information and protected information contained within the same classified document during the CIPA hearing.

Respectfully submitted this 9th day of May 2011.

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CERTIFICATE OF SERVICE

I hereby certify that I have caused an electronic copy of the foregoing motion to be served via ECF upon James Wyda and Deborah Boardman, counsel for defendant Drake.

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