

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

UNITED STATES OF AMERICA : CRIMINAL NO. 00-00-404  
v. : TITLE 18 U.S.C. SECTIONS 894, 1955,  
NICODEMO S. SCARFO : and 2

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**DEFENDANT SCARFO'S REPLY TO THE GOVERNMENT'S INVOCATION OF CIPA  
AND REQUEST TO MODIFY THE AUGUST 7, 2001 ORDER**

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Defendant, Scarfo, by his undersigned attorneys, herein replies to the Government's request to invoke the Classified Information Procedures Act, Title 18, U.S.C. Appendix III (hereinafter "CIPA") and have the Court modify its August 7, 2001 Order accordingly. Scarfo submits that the government may invoke CIPA only after it has made a showing that the information involved has been properly classified.

**PROCEDURAL HISTORY**

1. During the initial discovery proceedings the government took the position that the device it surreptitiously placed on Scarfo's computer and which it surreptitiously entered for purposes of retrieval (and perhaps reinstallation) was not relevant to Scarfo's motion to suppress and therefore not discoverable. There was no mention at all of its being classified.

2. The government later urged a law enforcement privilege, which attached to any discovery of this device, and presented an affidavit from Dr. Kerr to the effect that such discovery could threaten national security so that "U.S. Department of Justice regulations (Title

28, Code of Federal Regulations Section 16.26(b)(5) and FBI policy preclude disclosure." Dr. Kerr did state in his affidavit at item 3:

Moreover, the specific description and technical specifications of certain aspects of the underlying functionality of the technique were and have been classified prior to their deployment in this investigation. Owing to the sensitive/classified nature as to the underlying functionality of the system, details about it cannot be disclosed to the public.

3. Dr. Kerr related in his affidavit that the Government's attorney was precluded from learning about the details as to the underlying functionality until a security clearance was obtained.

4. On August 7, 2001 this Court ruled that it needed additional information to make an informed decision concerning the Fourth Amendment and Title III implications of the use of this device to obtain what the Government alleges are gambling and extortion records. The Government was ordered to make the details concerning the use and operation of the key logger device available to Mr. Scarfo and the defense. The Court also advised the Government to file information with the Court concerning the national security issue and the effect disclosure would have on the safety of FBI and police, and how it would jeopardize ongoing criminal investigations.

The Government responded by asking that the Court reconsider, invoked the procedures of CIPA, and sought to provide a "summary" of the workings of the device in question with additional material being forwarded to the Court so as to prevent disclosure of the "classified" information pertaining to the key logger device.<sup>1</sup>

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<sup>1</sup> This was said to be "a more complete description of the Key Logger System so that the Court could satisfy itself (before the summary statement is produced to the defense) that the Government's unclassified summary statement had not withheld from the defendant anything that might be helpful to the pending motion to suppress."

### **DEFENDANT SCARFO'S POSITION**

5. The fact that the government did not immediately inform the Court and defense that its program (in part) was classified is disturbing. At no point in time did the government say anything more than "certain aspects of the underlying functionality of the technique were and have been classified prior to their deployment in this investigation." This is vague in the extreme.

6. In order to invoke CIPA the government must show that the item or items were "properly" classified by Executive Order, statute, or regulation. CIPA Section 1. If classified in any other manner, CIPA is inapplicable. Simply because the Government says that the information is classified does not make it so.

If the item in question was classified in order to avoid discovery that would not be the proper classification envisioned by CIPA. To show that an item has been properly classified the government must establish that the proper procedure was followed pursuant to the relevant Executive Order, statute or regulation. In addition, Scarfo suggests that the date of the classification of any part of the device in question is most material. If classified after its use in this case and in close proximity to the discovery proceedings in this case, the government would have a very heavy burden to bear in showing that the device was properly classified. The inference of classification to avoid discovery would be well within reason and that would of course be an abuse of the discovery process.

Moreover, CIPA provides at Section 12 that the Attorney General must provide Congress with guidelines within 180 days of CIPA's enactment "specifying the factors to be used by the Department of Justice in rendering a decision whether to prosecute a violation of Federal law in which, in the judgment of the Attorney General, there is a possibility that classified information will be revealed." Section 12 goes on to provide that such guidelines "shall be transmitted to the appropriate committees of Congress."

Scarfo does not have these guidelines, but suggests that the government make them available to the Court along with the affidavits of government officials who consulted and found themselves to be in compliance with them prior to initiating this prosecution.

Scarfo further suggests that these guidelines would not include a gambling case.

Again, the consultation with these guidelines, or the lack thereof, may speak to the date the alleged "aspects" were classified - or the nature/level of their classification.

#### **THE DR. DONALD M. KERR AFFIDAVIT**

7. At this point in time, the Government has attempted to demonstrate that the information was classified by relying on the affidavit of Dr. Donald M. Kerr, which was attached to their August 3, 2001 response (Attached hereto as Exhibit 1). It is interesting to note that at that time, the Government was seeking to withhold disclosure on the basis of privilege, pursuant to Rule 16. Dr. Kerr's affidavit indicates that disclosure would jeopardize ongoing criminal investigations as well as the national security.

In paragraph 3 of his affidavit, Dr. Kerr states, "certain aspects of the underlying functionality of the technique were and have been classified prior to their use in this investigation. Owing to the sensitive/classified nature as to the underlying functionality of the system, details about it cannot be disclosed to the public."

In support of his concerns, he cites Title 28, Code of Federal Regulations, section 16.26(b)(5) (Attached hereto as Exhibit 2) which provides:

“Disclosure would reveal investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclosure investigative techniques and procedures the effectiveness of which would thereby be impaired...”

Scarfo notes that the section Dr. Kerr chose to cite does not address classified information.

Title 28, Code of Federal Regulations, section 16.26(b)(5) b)(3) does, and it provides:

Disclosure would reveal classified information, unless appropriately declassified by the originating agency...(Attached hereto as Exhibit 2)

This section is directly on point with the Government's present position and provides that the information should not be disclosed because it is classified. Dr. Kerr eschewed this section and chose to cite a provision that involved impairing the effectiveness of law enforcement techniques and procedures.

Scarfo suggests that Dr. Kerr's avoidance of the classified provision in favor of the impairment of law enforcement techniques provision speaks volumes. It is consistent with the government's conduct throughout this case in not disclosing that certain information was "classified" in whatever way Dr. Kerr meant to use that word.

The government approached the United States Magistrate Judge in this case with a description of a garden-variety technique, which gave not a hint that it may be out of the ordinary. It continued that approach during discovery negotiations and in the initial discovery proceedings. Dr. Kerr's affidavit said "classified" out of one side of his mouth, cited a provision that has nothing to do with classified information and he deliberately eschewed the provision that does.

Title 28 C.F.R., Part 17, codifies the requirements of Executive Order 12958 (April 1995) (Attached hereto as Exhibit 3). Part 17 outlines the classification procedure for the Department of Justice. The Government has failed to present any evidence that the key logger information was classified. Their reliance of Dr. Kerr's affidavit fails to meet the threshold showing that it was classified pursuant to law by statute, Executive Order or federal regulation.

In April of 1995, former President Clinton signed Executive Order 12958, which outlines procedures for classifying information (Attached hereto as Exhibit 4). Pursuant to Section 1.4 Classified Authority, the Order defines who may classify the information: Section 1.5 establishes classified categories and outlines information, which can be considered for classification. Section

1.6 defines the duration of Classification. Section 1.7 describes the information, which must appear on the face of each classified document, the identity and position of the official who made the classification, the agency, declassification instructions, and a concise reason for classification among other things. Finally, Section 1.8 outlines classification Prohibitions and Limitations.

The chameleon like position of the government has caused the official status of the key logger system to remain unclear to this day.

Scarfo opposes the attempt by the Government to invoke Section 4 of CIPA because it has failed to demonstrate to the Court or the defense that the information (which it has vigorously refused to reveal) is, in fact, properly classified in accordance with CIPA.

If the information is classified pursuant to Executive Order, the government should say so in an affidavit filed with this Court, which should include among other things, the official and the agency that authorized it to be classified, the elements which are classified, the level of classification and the date of classification.

Scarfo requests that this Honorable Court refuse to reconsider its Order unless and until the government meets its threshold burden of establishing that the key logger device was classified in accordance with law.

Respectfully submitted,

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