

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA : HON. NICHOLAS H. POLITAN, U.S.D.J.
V. : Crim. No. 00-404 (NHP)
NICODEMO S. SCARFO, ET AL. :

**GOVERNMENT'S REQUEST FOR MODIFICATION OF AUGUST 7, 2001 ORDER
PURSUANT TO § 4 OF THE CLASSIFIED INFORMATION PROCEDURES ACT
AND RULE 16(d) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE**

Pursuant to this Court's August 7, 2001 Opinion and Order in this case ("Order"), the Government respectfully requests that the Court "reconsider the procedure for disclosure as outlined in [the Order.]" See Order at 5. Because the disclosure, as outlined by the Court in the Order, would require divulging classified information, the procedures of the Classified Information Procedures Act, Title 18, United States Code, Appendix III, (hereinafter "CIPA"), should be followed. Accordingly, pursuant to that statute, as well as Rule 16(d)(1) of the Federal Rules of Criminal Procedure, it is requested that the Court modify its order in a manner that conforms to the procedures set forth in CIPA and that would permit the Government (1) to file under seal with the Court and subsequently serve on defense counsel (subject to an appropriate protective order) an additional unclassified summary statement that would be sufficient, together with the other materials in the existing record, to permit adjudication of the pending motion to suppress;

and (2) in advance of production of such statement to the defense, to provide the Court with an in camera, ex parte submission under CIPA § 4 that will allow the Court to confirm that the unclassified summary statement did not improperly withhold any information helpful to the defense.

Defendant Scarfo has requested discovery concerning the underlying functionality of the F.B.I.'s "Key Logger System." The Government has maintained in its prior two submissions, dated July 17, 2001 and August 3, 2001, that the defendants are not entitled to this information since the information is (1) beyond the purview of Fed. R. Crim. P. 16, and (2) privileged. In fact, as the Government has previously noted in its submissions, the information concerning the underlying functionality of the F.B.I.'s Key Logger System is classified. Because the Court's Order would require the Government to reveal this information to the Court and defense counsel on or before August 31, 2001, the United States now seeks to invoke CIPA.

Specifically, the Government respectfully submits that, pursuant to § 4 of CIPA, it should be permitted to provide, in lieu of the full disclosure required by the Court's Order, a condensed, unclassified summary statement that would supply (together with other materials in the record) a sufficient basis to permit the Court to rule on the pending motion to suppress. Moreover, also pursuant to § 4 of CIPA, the Government would be

willing to submit, ex parte and in camera, 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.

A. UNDER CIPA AND FED. R. CRIM. P. 16(d), THE COURT SHOULD PERMIT THE GOVERNMENT TO ENDEAVOR TO PRODUCE AN ADEQUATE UNCLASSIFIED SUMMARY STATEMENT IN LIEU OF PRODUCING CLASSIFIED INFORMATION

CIPA expressly authorizes the government, in lieu of producing classified information to the defendant, to instead produce a sufficient summary of the information, and to make an in camera, ex parte showing that the summary was adequate. The more general authority in Fed. R. Crim. P. 16(d) permits the same result.

Specifically, § 4 of CIPA provides in pertinent part as follows:

The court, upon a sufficient showing, may authorize the United States to delete specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure, to substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove. The court may permit the United States to make a request for such authority in the form of a written statement to be inspected by the court alone (emphasis added).

The plain language of the statute authorizes the Court to

delete classified information from materials to be made available to the defendant in discovery. In making its determination of the propriety of a particular discovery request, the Court may take into account national security interests. Indeed, the legislative history of CIPA explains the rationale underlying the Section 4 statutory provision and the interrelation of Section 4 with discovery Rule 16(d)(1):

When pertaining to discovery materials, this provision should be viewed, as clarifying the court's powers under Federal Rule of Criminal Procedure 16(d)(1). This clarification is necessary because some judges have been reluctant to use their authority under the rule although the advisory comments of the Advisory Committee on Rules state that "among the considerations taken into account by the court" in deciding on whether to permit discovery to be "denied, restricted or deferred" would be "the protection of information vital to the national security."

Senate Report No. 96-823, reprinted in 1980 U.S. Code Cong. & Ad. News 4294, 4299-4300.

This procedure has been upheld without exception as a proper practice. See United States v. Yunis, 867 F.2d 617, 621 (D.C. Cir. 1989) (CIPA makes explicit the application of the general law of discovery in the classified information area); United States v. Sarkissian, 841 F.2d 959, 965 (9th Cir. 1988) ("Congress intended § 4 to clarify the court's powers under Fed. R. Crim. P. 16(d)(1) to deny or restrict discovery in order to protect national security"); United States v. Pringle, 751 F.2d 419, 427 (1st Cir. 1984), rev'd on other grounds, 780 F.2d 143

(1st Cir. 1985) (the legislative history of CIPA establishes that protective orders limiting discovery were intended to apply in cases involving classified information).

Here, CIPA is properly invoked because the materials sought to be protected from disclosure are "classified." See Kerr Affidavit, ¶ 3. CIPA defines "classified information" to include material that has been identified pursuant to statute, regulation, or executive order to require protection against unauthorized disclosure for reasons of "national security." CIPA § 1(a), 18 U.S.C. App. III, § 1(a). "National security" is further defined within the statute to mean "the national defense and foreign relations of the United States." CIPA § 1(b), 18 U.S.C. App. III, § 1(b).¹

Rule 16(d)(1) provides, in pertinent part:

(d) Regulation of Discovery.

(1) Protective and Modifying Orders.

Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone.

¹The fact that the Court's Order calls for the disclosure of "classified" information is alone sufficient to trigger CIPA. The Government also anticipates that, if the Court agrees to modify the Order as requested, the Government will apply for a separate additional protective order precluding the defense from further disclosing the unclassified summary statement.

See, United States v. Innamorati, 996 F. 2d 456, 487 (1st Cir. 1993) ("Fed. R. Crim. P. 16(d)(1) expressly authorizes the court to deny discovery of information sought by a defendant based on an ex parte showing by the government of the need for confidentiality").

If the materials sought to be protected were only law enforcement sensitive information, Fed. R. Crim. P. 16(d)(1) would be the sole source of protection. United States v. Panas, 738 F.2d 278, 285-86 (8th Cir. 1984) (finding that because the transmitting technology at issue was law enforcement sensitive but not classified, the protective order was reviewable under Rule 16(d)(1), but not under CIPA). But because the materials sought to be protected in the instant case are both law enforcement sensitive and classified, i.e., bearing on national security concerns, Rule 16(d)(1) and CIPA § 4 are properly pursued in tandem.²

Accordingly, under § 4 of CIPA, the Court should modify its Order to permit the Government, in lieu of the classified

² As a point of clarification, CIPA § 4, and not CIPA §§ 5 or 6, is implicated under the circumstances presented. Section 4 relates to the discovery of classified information that the defendant does not possess. In contrast, §§ 5 and 6, providing for notice and a hearing, set the course for proceeding in instances when the classified material is in the defendant's possession, either because it will be offered as part of the proof of the charges or will be proffered in defense. Pringle, 751 F.2d at 426-27; United States v. La Rouche Campaign, 695 F. Supp. 1282, 1284-85 (D. Mass. 1988).

disclosure that would be required by the Order, to instead endeavor to submit a summary statement that is adequate to permit the disposition of the pending motion to suppress.

B. CIPA AND RULE 16 PERMIT THE COURT TO EVALUATE THE ADEQUACY OF THE GOVERNMENT'S SUMMARY STATEMENT EX PARTE AND IN CAMERA

By their terms, both CIPA § 4 and Rule 16(d)(1) explicitly permit the Court to review, in camera and ex parte, whether the classified information withheld from the Government's substituted summary statement is properly discoverable. As explained above, the Government expects that its unclassified summary statement will be sufficient (together with information already in the record) to establish that the pending motion to suppress is not well taken and should be denied. In addition, in order to ensure that the Government has complied with its discovery obligations (which are the subject of a separate motion), the Government is willing to submit under CIPA § 4, in camera and ex parte, a more complete description of the classified information withheld from the summary statement.³

³ The Government only seeks to submit the more complete classified statement ex parte and in camera for the limited purpose set forth in CIPA § 4, namely, to permit the Court to evaluate the adequacy of the Government's unclassified summary statement. The Government does not seek to use any of the classified information as part of the record on which the motion to suppress may be decided; on the contrary, the Government seeks affirmatively to exclude the use of any classified information for that purpose by either the Government or the defense.

The standards for evaluating whether the classified information withheld from the summary statement is discoverable are well settled. CIPA itself creates no new discovery rights or obligations. See, United States v. Varca, 896 F.2d 900, 905 (5th Cir.), cert. denied, 498 U.S. 878 (1990). "Rather it contemplates an application of the general law of discovery in criminal cases to the classified information area with limitations imposed based on the sensitive nature of the classified information," Yunia, 867 F.2d at 621.

As the D.C. Circuit explained in Yunia, id. at 623, "the procedures [CIPA] mandates protect a government privilege in classified information similar to the informant's privilege identified in Roviaro," 353 U.S. 53 (1957). Accordingly, that Court held:

[C]lassified information is not discoverable on a mere showing of theoretical relevance in the face of the government classified information privilege, but that the threshold for discovery in this context further requires that a defendant seeking classified information, like a defendant seeking the informant's identity in Roviaro, is entitled only to information that is at least 'helpful to the defense of [the] accused.'

Roviaro, 353 U.S. at 60-61.

Even if a defendant is able to meet his threshold burden of showing that the classified information would be helpful to the defense, overriding national security concerns may trump the defendant's need for the information.

United States v. Pringle, supra, 751 F.2d 419, illustrates the authority of the courts under Rule 16(d)(1) and CIPA § 4 to weigh national security concerns during an ex parte, in camera inspection of documents pursuant to a defendant's discovery request. In Pringle, the defendants sought discovery of classified materials relating to the surveillance, boarding, and seizure of the ship they used to smuggle narcotics. The district court, employing the principles enunciated by the Supreme Court in Roviaro v. United States, supra, and determining that the information sought was not discoverable under Rule 16 or Brady v. Maryland, 373 U.S. 83 (1963), held that the defendant's interest in gaining the information was outweighed by the concomitant prejudice to the national security. In affirming the district court's decision, the First Circuit relied on Roviaro.

Roviaro requires the lower courts to "balanc[e] the public interest in protecting the flow of information against the individual's right to prepare his defense." 353 U.S. at 62. Section 4 provides the machinery for a court to perform that same task where classified sources are involved. This certainly is sensible since national security sources are entitled to no less protection than law enforcement informants. See, United States v. Smith, 780 F.2d 1102, 1109 (4th Cir. 1985) (en banc) ("To give the domestic informer of the police more protection than the foreign informer of the CIA seems to us to place the security of

the nation from foreign danger on a lower plane than the security of the nation from the danger from domestic criminals. In our opinion the national interest is as well served by cooperation with the CIA as with the domestic police"). Accordingly, "on issues of discovery [under CIPA], the court can engage in balancing" national security concerns against the defendant's need for classified information, Sarkissian, supra, 841 F.2d at 965. See also, United States v. Smith, supra, 780 F.2d at 1110 (applying the same balancing test in the context of CIPA, Section 6 proceedings).⁴

C. CONCLUSION

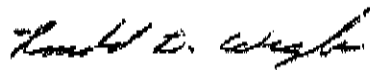
For the above reasons, the United States should be permitted (1) to file under seal with the Court and subsequently serve on defense counsel (subject to an appropriate protective order) an additional unclassified summary statement that would be sufficient, together with the other materials in the existing record, to permit adjudication of the pending motion to suppress; and (2) in advance of production of such statement to the defense, to provide the Court with an in camera, ex parte

⁴We note that although the Court of Appeals in Yunis endorsed the Roviano standard for CIPA §4 discovery determinations, it neither adopted nor rejected the balancing test, noting that it did not have to reach that issue since defendant failed to meet his threshold burden of showing that the classified information sought was "genuinely helpful to his defense," 867 F.2d at 625.

submission under CIPA § 4 that will allow the Court to confirm that the unclassified summary statement did not improperly withhold any information helpful to the defense.

Respectfully submitted,

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Dated: August 23, 2001

RDW:2000R00789

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

UNITED STATES OF AMERICA : Hon. Nicholas H. Politan
v. : Criminal No. 00-404 (NHP)
NICODEMO S. SCARFO, ET AL. : ORDER

This matter having come before the Court on the motion of the United States, by Robert J. Cleary, United States Attorney (Ronald D. Wigler, Assistant U.S. Attorney, appearing), for an Order requesting the Court to reconsider the procedure for disclosure of information as set forth in its August 7, 2001 Opinion and Order. Since the information ordered disclosed by the Court is classified, the United States is seeking permission, pursuant to Section 4 of the Classified Information Procedures Act, Title 18, United States Code, Appendix III, and Rule 16(d)(1) of the Federal Rules of Criminal Procedure, (1) to file with the Court and subsequently provide to the defense (subject to an appropriate protective order) an unclassified summary statement in lieu of the disclosure set forth in the Court's Order; and (2) to provide the Court with an in camera, ex parte submission under CIPA § 4 that will allow the Court to confirm that the proposed unclassified summary statement did not improperly withhold any information helpful to the defense.

The Court having read the arguments of counsel; and good cause appearing,
IT IS, on this ____ day of August, 2001,
ORDERED that, pursuant to § 4 of the Classified Information Procedures Act,

Title 18, United States Code, Appendix III, and Rule 16(d)(1) of the Federal Rules of Criminal Procedure, the United States shall file, on or before September 14, 2001, in camera and ex parte, a proposed unclassified summary statement describing the Key Logger System, together with the classified description contemplated by the Court's Order;

IT IS FURTHER ORDERED that, after the Court has reviewed the proposed summary statement and ordered modifications (if any) thereto, the United States shall, in lieu of the disclosure set forth in the Court's Order, file under seal with the Court, and serve on defense counsel (although not until the Court has ruled on any then-pending application for a protective order limiting defense disclosure), the unclassified summary statement approved by the Court under CIPA § 4.

HON. NICHOLAS H. POLITAN
UNITED STATES DISTRICT JUDGE