IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	*	
v.	*	**Criminal No. 1:10-cr-0181-RDB**
THOMAS ANDREWS DRAKE	*	

DEFENDANT'S RESPONSE TO GOVERNMENT'S MEMORANDUM OF LAW REGARDING APPLICATION OF LEGAL PRINCIPLES UNDER CIPA

One month from trial, and one year after the Indictment issued in this case, the government has asserted, for the first time, an evidentiary privilege under the National Security Agency Act of 1959 that it claims authorizes the Court to redact, or insert substitutions for, relevant, unclassified evidence that will be introduced during the upcoming criminal trial. There is no authority for this unprecedented assertion in the context of a criminal case. The National Security Agency Act of 1959 is a civil statute that does not address criminal prosecutions or the rights of a criminal defendant. The applicable statute is the Classified Information Procedures Act (CIPA). CIPA is the only statute that confers upon courts the authority to admit substitutions for relevant evidence in criminal cases. CIPA authorizes substitutions only for "classified information," not unclassified information. *See* 18 U.S.C. App. 3, § 6(c) (emphasis added). The government may not erode Mr. Drake's Sixth Amendment right to a fair trial because the National Security Agency fears disclosure of relevant, unclassified information during a public trial.

I. Procedural Background

On April 14, 2010, the United States filed an Indictment against Mr. Drake. In the year since the Indictment issued, the government has produced a significant amount of unclassified

and classified evidence. In February and March of this year, the government and the defense filed and briefed numerous pretrial motions, challenging the admissibility of certain, unclassified evidence and the constitutionality of the Espionage Act and CIPA. On March 31, 2011, the Court heard oral argument on the motions, ruling from the bench on some and promptly issuing written rulings on others. Having resolved the pretrial motions, the Court scheduled CIPA hearings to begin on April 26, 2011. Trial is scheduled for June 13, 2011.

In anticipation of the CIPA hearings, the parties filed a number of lengthy submissions under seal. On April 8, 2011, the defense filed a notice under Section 5 of CIPA, providing the government with notice of the classified information that it might introduce or cause the introduction of at trial. On April 15, 2011, the government filed a response to the Section 5 notice, citing its objections to the use, relevance, and admissibility of the classified evidence. *See* Docket No. 100. On April 21, 2011, the defense filed a memorandum regarding the use, relevance, and admissibility of the classified information in its Section 5 notice. *See* Docket No. 101. On April 25, 2011, the government provided the defense with a binder of classified exhibits that it intends to introduce at trial. The exhibits in the binder contained both classified and unclassified information. Significantly, the government's exhibits also contained numerous handwritten annotations by its classification expert, Ms. Catherine Murray, that reflect Ms. Murray's opinion about which portions of the documents she deems classified and which portions of the documents she deems unclassified.

On April 26, 2011, the Court held a hearing pursuant to CIPA § 6(a) to determine the use, relevance, and admissibility of the classified information in the defendant's Section 5 notice and in the government's exhibit binder. The defense did not object to the admission of the

government's exhibit binder, and the Court ruled it admissible. The Court also issued rulings on the use, relevance, and admissibility of the classified information in the Section 5 notice.

After the April 26 CIPA hearing on relevance, the government produced proposed substitutions for the classified information deemed relevant and admissible by the Court. On May 3, 2011, the defense filed its response and objections to the proposed substitutions. *See* Docket No. 107. Among the objections noted by the defense was the fact that the government had proposed a significant number of substitutions or redactions for unclassified information, a measure that CIPA does not permit or contemplate. This included information in the government's own exhibit binder that its classification expert has deemed unclassified. The defense estimated that approximately 25% of the proposed substitutions were for unclassified information.

On May 4, 2011, the Court began the second phase of the CIPA hearings, the "substitutions" phase under § 6(c). The hearing lasted four days, concluding on May 9. At the outset of the hearing, the defense objected to the government's proposed substitutions and redactions for unclassified information. The proposals included substitutions/redactions for unclassified information in the five allegedly classified documents charged in the willful retention counts. For the first time in the case, the government asserted that some of the unclassified information was deemed "protected material" by the National Security Agency. For this "protected material," the government claimed that the Court should allow redactions or substitutions in the interest of national security. The government conceded that the "protected material" was unclassified. The government also conceded that it had not previously identified for the defendant or the Court the portions of the unclassified evidence that it deemed "protected

material." The government argued that its request to redact relevant, unclassified information that NSA considers "protected information" was supported by case law. In reliance on the government's representation about the case law and its oral proffers regarding why the unclassified information is considered "protected material," the Court allowed certain substitutions for, or redactions of, unclassified information. However, the Court noted its concern that the government had never briefed or raised this issue before the morning of the substitution hearing, and it ordered the government to submit a memorandum of law identifying the legal authority for its position.

In the government's memorandum of law filed yesterday, the prosecution asserts for the first time an evidentiary privilege under the National Security Agency Act of 1959, 50 U.S.C. § 402, Section 6 (National Security Agency Act).[1] In its memorandum, the government claims that the Court may redact certain unclassified but "protected" information because "NSA possesses a statutory privilege that protects against the disclosure of information relating to its activities." *See* Government's Memorandum of Law Regarding Application of Legal Principles Under CIPA, Docket No. 110, at 3. In making this assertion, the government cites a statute that appears to be invoked exclusively in the civil context. The statute provides that "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, of any information with respect to the activities thereof, or of the names, titles, salaries, or number of persons employed by such agency." *See* 50 U.S.C. § 402, Sec. 6(a). For a number of reasons, the government's asserted privilege should be rejected in this

[1] During the four-day substitution hearing, the defense does not recall ever hearing the government cite the National Security Agency Act as a basis for its asserted privilege.

criminal case, and any substitutions for, or redactions of, relevant, unclassified information should be rejected.

II. The National Security Agency Act Does Not Authorize the Redaction or Substitution of Relevant, Unclassified Evidence in a Criminal Prosecution.

The defense is aware of no criminal prosecution involving classified information in which the Court has redacted or allowed substitutions for unclassified information based on the National Security Agency Act of 1959. None of the cases cited by the government are criminal cases, and none involve CIPA. Every case cited by the government is a civil case in which a civil litigant has sought disclosure of NSA information pursuant to the Freedom of Information Act (FOIA) and NSA has fought disclosure, citing the National Security Agency Act. The Act is almost exclusively relied upon in response to FOIA requests that seek disclosure of NSA activities. The Act says nothing about the admissibility of NSA documents that have been produced to a defendant in a criminal case instigated by NSA. Indeed, there is no case in which a privilege under the National Security Agency Act has ever been read to trump or potentially impede a criminal defendant's fundamental right "to develop all relevant facts" at trial under the Sixth Amendment. *Taylor v. Illinois*, 484 U.S. 400, 408-09 (1988). Even under CIPA, the disclosure of classified information is protected only to the extent that it "does not impair the defendant's right to a fair trial." *United States v. Abu-Jihaad*, 630 F.3d 102, 140 (2nd Cir. 2010) (quotation omitted). This is even more so the case when the information the government seeks to protect is unclassified. Whatever the significance of the National Security Agency Act in the civil context, it should have no impact on the defendant's right to present his defense unless the government can show that the information is classified.

Even if the Court were to entertain the government's invocation of a privilege under the National Security Agency Act in this criminal case, the government has not even attempted to satisfy the terms and requirements of the statute. Its mere assertion that the privilege applies is insufficient. The government is required to submit to the Court a detailed, nonconclusory affidavit explaining why a privilege under the National Security Agency Act applies to the allegedly "protected material." The civil cases that the government cites are instructive on this point. For example, in *Hayden v. National Security Agency*, 608 F.2d 1381 (D.C. Cir. 1979), several plaintiffs sought disclosure under FOIA of all records pertaining to them in the possession of the National Security Agency. The court found that such documents were exempt from disclosure under the National Security Agency Act. *See id*. at 1389 & n.44. In doing so, the court emphasized that the government had submitted a detailed affidavit explaining why the materials at issue fell within the exemption:

> In its affidavits, the [National Security] Agency must show specifically and clearly that the requested materials fall into the category of the exemption. Here the Agency stated in its affidavits that all requested documents concerned a specific NSA activity, to wit, intelligence reporting based on electromagnetic signals. These affidavits further explained how disclosure even of descriptions and dates of the material would reveal information integrally related to this NSA activity. . .

Id. at 1390. Other courts have similarly required detailed affidavits specifying why the information is exempt from public disclosure under FOIA. *See Wilner v. National Security Agency*, 592 F.3d 60, 72(2nd Cir. 2009) (upholding nondisclosure of information relating to NSA because government's "affidavits provide the requisite detailed explanations for withholding the documents requested") (quotation omitted) (emphasis added); *Larson v. Department of State*, 565 F.3d 857, 864, 868 (D.C. Cir. 2009) (government properly

demonstrated that § 402 protected withheld material from disclosure under FOIA by submitting detailed affidavit showing that disclosure of material would reveal "information with respect to the activities" of NSA; emphasizing, however, that "conclusory affidavits that merely recite statutory standards, or are overly vague or sweeping will not, standing alone, carry the government's burden"); *Lahr v. National Transportation Safety Board*, 569 F.3d 964, 985 (9th Cir. 2009) (government allowed to invoke exemption to disclosure where NSA provided detailed affidavit sufficiently supporting its position). *Compare Founding Church of Scientology v. NSA*, 610 F.2d 824, 827 n.23, 830-33 (D.C. Cir. 1979) (NSA affidavit in support of its position that its records were exempt from disclosure was too conclusory and therefore insufficient, where government furnished little that would enable determination as to whether materials withheld actually bore on Agency's organization, functions or faculty for intelligence operations and, instead, merely stated that compliance would reveal certain functions and activities and would jeopardize national security).

Here, the government has not submitted any affidavit providing the requisite information establishing that the criteria of the statutory privilege have been satisfied. All that has been offered are the vague, conclusory oral proffers of government counsel. Accordingly, the government has not come close to meeting its burden of showing why the unclassified information is protected from disclosure under the National Security Agency Act.

III. CIPA is the Only Statutory Mechanism That Permits the Court to Allow Substitutions in a Criminal Case Involving Classified Information.

CIPA is the only statute that authorizes a court to admit substitutions for relevant, admissible evidence in a criminal case, and by its terms, CIPA applies only to "classified

information." It does not apply to unclassified information. This is not a mere technicality. Classified information is information the disclosure of which may cause varying degrees of harm to the United States. The danger of disclosing classified information is the only justification for imposing CIPA's substitution procedure on the defendant. That danger is not present in the case of unclassified information. For that reason, the Court should not have allowed substitutions for any of the unclassified evidence. The defense has been substantially impaired by each substitution for unclassified evidence and by the cumulative effect of the substitutions.[2]

In the alternative, if the Court determines that the government may invoke a privilege under the National Security Agency Act, the substitution process remains irreparably flawed. The prosecution has not complied with the requirements of the Act. Without the requisite affidavits, the Court has erred in allowing substitutions for unclassified information solely on the basis of vague, non-detailed proffers from the prosecuting attorneys. The defense and the Court had no basis to evaluate the proffers. Under the circumstances, the Court should deny every substitution for unclassified material to which the defense objected.

If the Court allows the government to submit affidavits, the Court should re-open the substitution hearing for the limited purpose of determining whether the affidavits support the substitution request and whether the proposed substitutions are appropriate. If, after review of the affidavits, the Court determines that substitutions or redactions for unclassified information

---

[2] During the four-day substitution hearing, the defense continually noted its objection to the substitution of unclassified information considered "protected material" by the government. When asked by the Court to respond to the proposed substitutions, the defense was required to reveal its strategy, particularly as it relates to the cross-examination of the government's expert, Ms. Murray. This, too, significantly prejudiced Mr. Drake and gave the government undeserved insight into defense strategy, which will not be reciprocated.

are permissible, the standard for substitutions under CIPA must govern. The substitutions must afford the defendant "substantially the same ability to make his defense as would disclosure of the specific classified information." 18 U.S.C. App. 3, § 6(c). *See United States v. Moussaoui*, 382 F.3d 453, 477 (4th Cir. 2004) ("We believe that the standard set forth in CIPA adequately conveys the fundamental purpose of a substitution; to place the defendant, as nearly as possible, in the position he would be in if the classified information . . . were available to him."); *United States v. Fernandez*, 913 F.2d 148, 158 (4th Cir. 1990) (district court properly rejected government's proposed substitutions that "fell far short of informing the jury" about information that was essential to the defense).

Conclusion

In conclusion, only CIPA authorizes substitutions in a criminal case involving classified information, and CIPA, by its terms, applies only to "classified information." The National Security Agency Act does not address the admissibility of NSA documents produced in a criminal investigation instigated by NSA, and it does not authorize substitutions in a criminal case. Neither CIPA nor the National Security Agency Act confers courts with the authority to require substitutions for unclassified, relevant evidence in a criminal case. Accordingly, the Court should not allow any such substitutions. If the Court permits this unprecedented measure, the Court should order the government to provide a detailed affidavit identifying with specificity the reasons why disclosure of each item of "protected material" would harm national security. Upon receipt of the affidavit, the Court must re-open the substitutions hearing for the limited purpose of considering whether the unclassified information deserves protection and whether the proposed substitutions afford Mr. Drake substantially the same ability to defend himself as he

would have without the substitution.

Respectfully submitted,

/S/

JAMES WYDA, #025298
Federal Public Defender
DEBORAH L. BOARDMAN, #28655
Assistant Federal Public Defender
Office of the Federal Public Defender
100 South Charles Street, Tower II, 9th Floor
Baltimore, Maryland 21201
Phone: 410-962-3962
Fax: 410-962-0872
Email: jim_wyda@fd.org
deborah_boardman@fd.org