

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA)
)
 v.) No. 1:10cr485 (LMB)
)
JEFFREY ALEXANDER STERLING)

**RESPONSE OF THE UNITED STATES
TO DEFENDANT'S CIPA SECTION 5 NOTICES
[UNCLASSIFIED]**

The United States, through the undersigned counsel, hereby responds to the defendant's two notices filed pursuant to Section 5 of the Classified Information Procedures Act (CIPA), 18 U.S.C. App. III § 5.

I. The Defendant's CIPA Section 5 Notices

On April 1, 2011, the defendant filed his first notice under CIPA Section 5 (Docket 82); and on April 7, 2011, he filed his second (Docket 83). In these two filings, the defendant gives notice of

his intention to disclose the following classified information in connection with the trial or pretrial proceedings in this case. The defendant submits he reasonably expects to disclose this information as part of his investigation of the case, and as part of the trial of this case.

He then attaches to the two notices documents provided on discovery consisting of FBI 302 reports and CIA cables. The defendant does not designate or delineate in any way the specific information contained in these documents which he believes must be disclosed.

II. CIPA Section 5

CIPA contains a set of procedures by which federal district courts rule on pretrial matters concerning the discovery, admissibility and use of classified information in criminal cases. *See United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1363 (11th Cir. 1994). CIPA's fundamental purpose is to "harmonize a defendant's right to obtain and present exculpatory material [at] trial and the government's right to protect classified material in the national interest." *United States v. Pappas*, 94 F.3d 795, 799 (2d Cir. 1996). It "evidence[s] Congress's intent to protect classified information from unnecessary disclosure at any stage of a criminal trial." *United States v. Apperson*, 441 F.3d 1162, 1193 n.8 (10th Cir. 2006).

Section 5 of CIPA applies when a criminal defendant who already possesses classified information seeks to disclose such information during the course of a trial or proceeding. *See, e.g., Baptista-Rodriguez*, 17 F.3d at 1363; *United States v. Sarkissian*, 841 F.2d 959, 965-66 (9th Cir. 1988); *United States v. Collins*, 720 F.2d 1195, 1199-1200 (11th Cir. 1983). Section 5 requires the defendant to provide timely written notice to the court and the government describing any classified information that he reasonably expects to disclose. *See* 18 U.S.C. App. III § 5(a). Notification must take place "within the time specified by the court, or where no time is specified, within thirty days prior to trial." *Id.* Although the description of the classified information may be brief, it must be particularized and set forth the specific classified information that the defendant reasonably believes to be necessary to his defense. *Id.* The particularization requirement applies both to documentary exhibits and to oral testimony, whether it is anticipated to be brought out on direct or cross-examination. *See generally United States v. Wilson*, 750 F.2d 7, 9 (2d Cir. 1984).

The Section 5(a) notice must be specific because it is the central document in the procedures envisioned under CIPA. The requirement in Section 5(a) that “such notice shall include a brief description of the classified information” does not mean “a vague description.” *Id.* Nor does it matter that “the government can locate specific data about defendant’s knowledge of sensitive information in its own records.” *Id.* Instead, the “Section 5(a) notice requires that the defendant state, with particularity, which items of classified information entrusted to him he reasonably expects will be revealed by his defense in this particular case.” *Id.* “The court, the government and the defendant should be able to repair to the Section 5(a) notice and determine, reliably, whether the evidence consisting of classified information was contained in it.” *Id.* For a court to “countenance a Section 5(a) notice which allows a defendant to cloak his intentions and leave the government subject to surprise” would simply “require the defendant to reduce ‘greymail’ to writing.” *Id.*

When evaluated in light of these standards, it is clear the defendant’s two CIPA Section 5 notices are woefully deficient. Filing with the Court a stack of documents provided to the defendant on discovery simply is not a substitute for a sufficiently particularized notice under Section 5(a). It is not the Court’s nor the government’s obligation to sift through these documents to discern precisely what information the defendant intends to use at trial. That is the defendant’s responsibility.¹ As a result, the Court should reject the two notices as deficient, and, pursuant to Section 5(b), preclude the disclosure of any of the classified information referenced in those notices. *See United States v. Badia*, 827 F.2d 1458, 1465 (11th Cir. 1987).

¹ The amount of classified discovery is not an excuse for a deficient CIPA notice. Here, the number of classified documents produced on discovery (roughly 2,700 pages) is not especially voluminous.

The defendant states in his two notices that he needs to disclose the information contained in the attached documents during his pre-trial investigation. Defense counsel also alluded to this at the most recent hearing on April 8, 2011 (*see* Docket 85). The need to protect classified information and the procedures we must follow to accomplish this are at times burdensome and inconvenient. But the inconvenience of working with classified evidence is not grounds for ordering disclosure. As we informed the Court at the hearing, the United States plans to un-classify whatever information is necessary to try this case publicly, and we will do so in a timely manner. In the meantime, the United States has agreed to assist defense counsel in its investigation of the case by facilitating access to potential witnesses the defense would like to interview. For covert individuals, we have agreed to communicate to them defense counsel's request to meet and interview them. For all others, we have agreed to provide defense counsel with their contact information so that defense counsel may contact them directly. To the extent that any of these persons agrees to meet with defense counsel, we have agreed to determine whether the person to be interviewed possesses the requisite clearances to be questioned about this case, and, if not, to take reasonable steps to resolve any clearance issues. In this fashion, we believe defense counsel can adequately and thoroughly prepare for trial even though much of the subject matter of the pre-trial investigation will remain classified.

III. CIPA Section 6 Notice and Request for Hearing

As noted above, we ask that the Court find that the two CIPA Section 5 notices filed by the defendant are inadequate and do not warrant a hearing pursuant to CIPA Section 6. Under that section, after the defendant files a Section 5 notice, the government may request a hearing at which the court will make “all determinations concerning the use, relevance or admissibility” of

the proposed defense evidence, and upon such a request, the court shall conduct a hearing. 18 U.S.C. App. III § 6(a). Accordingly, if the Court disagrees with the government as to the adequacy of the defendant's notices, the United States requests that a hearing be conducted pursuant to CIPA Section 6(a). The government requests that the hearing be held *in camera*.² In addition, CIPA Section 6(b)(1) requires the government to provide the defendant with prior notice of the classified information that will be at issue at this hearing. Given that the defendant has not identified with any particularity the specific classified information that he wishes to disclose, the government cannot give the defendant notice other than to state that all of the classified information contained in the documents identified by the defendant in the notices filed April 1 and April 7, 2011, is at issue.

² If the Court does not reject the two notices and convenes a hearing under CIPA Section 6, the United States will file a certification to this effect as required by CIPA Section 6(a).

CONCLUSION

For these reasons, the United States requests that the Court find that the defendant has failed to comply with the requirements of CIPA Section 5(a). Alternatively, the United States requests that the Court hold a hearing pursuant to CIPA Section 6(a) to determine the use, relevance and admissibility of the classified information contained within the documents submitted by the defendant in the CIPA Section 5 notices filed April 1, 2011, and April 7, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have caused an electronic copy of the foregoing *Response of the United States to Defendant's CIPA Section 5 Notices [Unclassified]* to be served via ECF upon Edward B. MacMahon, Jr., and Barry J. Pollack, counsel for the defendant.

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