

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Criminal Case No. 05-cr-00545-EWN

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. JOSEPH P. NACCHIO,

Defendant.

**MEMORANDUM BRIEF REGARDING CIPA
(FILED UNDER SEAL)**

The Government respectfully submits this memorandum brief regarding the Classified Information Procedure Act (CIPA) under seal in response to the Court's instructions on December 20, 2005.

I. Introduction

This memorandum addresses three issues: (1) the factual context in which CIPA issues may arise; (2) a summary of CIPA; and (3) a request for protective orders to govern the process during which the Court evaluates the need, if any, to employ CIPA procedures.

As a threshold matter, the Court will need to determine whether it will be necessary to employ the full scope of the extensive procedures specified in CIPA to the issues in this case. The Government believes strongly that the Court should ultimately conclude that classified information is wholly irrelevant to the issues framed by the Indictment and that full-blown CIPA procedures are unnecessary. However, that determination can only be made by the Court after certain preliminary steps are taken. Those preliminary steps generally include appointment of a

Court Security Officer (CSO) from the Department of Justice to advise the Court about CIPA procedures, obtaining security clearances for necessary Court and defense counsel personnel, and then reviewing defense counsel's position as to whether, in the end, they continue to believe that any presentation of classified information is necessary. Even the step of clearing defense counsel to debrief their client will involve an elaborate process.

The defense counsel will need to complete a security questionnaire, 2 fingerprint cards, an IRS tax check waiver, and a credit check form. The Federal Bureau of Investigation will conduct background investigations covering the past ten years. Once the background investigations are adjudicated favorably, the defense counsel will receive a security briefing. The defense counsel will need to be provided with work space within a secure facility in Denver, Colorado.

At the security level relevant to this step, counsel cannot discuss the matter with their client outside a secure facility. They cannot discuss it with each other or the Government on a standard phone line. They must store their notes and conduct any such meetings to discuss the specific information that they obtain from their client and whether it has relevance to the case within the secure facility.

If pleadings are to be filed using information classified at the appropriate level they must be prepared on accredited computers, printed on accredited printers, and stored in the secure facility designated for use by defense counsel. The Court will need to have special facilities and clearances for its staff to discuss the information and if necessary, store the pleadings.

The appointment of a CSO is required to provide security guidance to the Court regarding the care, custody, and control of classified information. The CSO is appointed pursuant to the Classified Information Procedures Act.

For the reasons set forth below, the Government requests that the Court proceed cautiously through the process of evaluating whether these procedures will be necessary to avoid incurring unnecessary expense or delay, and also to create milestones to review whether continued utilization of any special procedures are really necessary.

II. Factual Context

The Defendant suggests that it “may” be necessary to refer to classified information in order to present his defense. The Government does not believe that it will ever be necessary to refer to classified information during the course of this case. The process by which the Defendant and the Court assess this possibility is the subject of this memorandum. In order to evaluate the need to employ CIPA procedures, a general understanding of Qwest’s business, how Qwest management handled classified information, and what type of information is classified is essential.

A. A Small Part of Qwest’s Actual and Prospective Business in 2001 was Derived from Classified Contracts

In September 2000, Qwest issued its 2001 financial targets to Wall Street. Those targets called for Qwest to earn approximately \$21.3 to \$21.7 billion in revenue in 2001. *See* Exhibit 1. That target was repeatedly reaffirmed by the Defendant in conferences, press releases and SEC filings until September 10, 2001. On September 10, 2001, Qwest announced for the first time to the investing public that it expected to generate approximately \$20.5 billion in revenue in 2001,

or approximately \$1 billion worse than previously announced. *See* Exhibit 2. In April 2002 Qwest reported actual revenue for 2001 of \$19.6 billion, almost a billion less than announced on September 10, 2001. Ultimately, Qwest was forced to restate even that reported revenue. Qwest restated approximately \$2.5 billion in revenue for 2000 and 2001. Only a small part, \$200 million in 2000 and \$322 million in 2001 (approximately 1.5%), of Qwest's total revenue, whether reported or actual, was attributable to federal contracts. Classified contracts accounted for only a small subset of all federal contracts.¹

Qwest's business was divided into business units such as Wireless, Yellow Pages (DEX), local telephone service (National Mass Markets), Government Services, etc. One of these business units was Government Systems. The Government Systems Unit ("GSU") accounted for all revenue received by Qwest from all federal contracts, classified and unclassified, and reported it into Qwest's management reports. In addition, the GSU projected the amount of revenue it could reasonably expect to achieve from prospective federal contracts, classified and unclassified, every year. These projections were included in Qwest's overall corporate projections and financial targets. In short, all information concerning federal contracts and prospective federal business, classified or unclassified, that would or might produce revenue was included in Qwest's forecasts and reports, both internally and externally. The Defendant has never contested this fact, either directly or through his previous or present counsel.

¹ Qwest's classified revenue was less than one-half of total Federal revenue in 2001, comprising a fraction of one percent of total revenue. Moreover, there was no increase in Federal or classified work right around the corner. Qwest's Federal revenue and its classified revenue actually declined in 2002.

In 2000, Qwest's GSU, including both classified and unclassified sources, accounted for about \$200 million in revenue. During 2001, while Defendant was selling his stock, the GSU forecasted revenue of \$328 million. While the Defendant was selling his stock in 2001, the GSU forecast remained at \$328 million and internal reports reflected that this business unit, like almost every other Qwest business unit, was performing worse than expected, falling short of its plan by as much \$18 million for 2001. *See* Exhibit 3. By year end, even after the events of September 11, 2001, the GSU fell short of its 2001 plan by \$22 million.

B. *The Information About These Contracts and Prospective Contracts That is Relevant to the Indictment is Not Classified.*

The only information about federal contracts that is relevant to this Indictment is the financial information, i.e. how much revenue Qwest expected and when. Qwest management routinely reviewed financial information concerning federal contracts without ever needing to know the classified details of the projects. Whenever Qwest received or might receive a federal contract, the project received a code name such as a number or a fictitious word like "Ferrari." All financial information about these actual or prospective contracts would then be included on various schedules and forecasts, using the coded information. No reference was ever made to the name of any federal agency with which the business was done, or to the nature of the business. There was no need for Qwest management to refer to any classified information about the projects for financial reporting purposes because the name of the applicable agency and the nature of the work were not relevant. The only financial information that was relevant for management and reporting purposes was the estimated revenue and expense associated with the

GSU. This information allowed Qwest to set targets, make budgets, plan headcount, hire, purchase materials, and fulfill its disclosure obligations.

Included in the discovery being provided to the Defendant is unclassified information obtained by the Government that sets forth in detail, using coded information, the number of contracts, the revenue and expense associated with them, and Qwest's *classified and unclassified* business forecasts. Generally, that information establishes that Qwest's 2001 forecast for all federal business including all classified business was \$322 - \$328 million dollars during 2001, and that Qwest's GSU fell \$22 million short of its forecasts during the relevant time period.

The unclassified discovery allows the Defendant to fully and completely present information, if any, that he believes is relevant to his defense. To the extent he wants to contend that there were prospects for future classified business that might have benefitted Qwest's 2001 financial results, those forecasts have been provided and can be introduced without mentioning or even conducting discovery of the classified details. To the extent he wants to claim that existing contracts generated significant revenue, all of that revenue information has been provided to him without disclosing any classified information.

C. *Some Detailed Information About Qwest's Classified Business is Highly Classified, But is Completely Irrelevant to the Indictment.*

Although Qwest's entire federal contract business is small, and its classified business is a subset of that, the nature of this work is highly classified. Qwest is a Regional Bell Operating Company with international telecommunications facilities. Its network is, inherently, part of an international communications infrastructure and constitutes part of our nation's critical

infrastructure. The identity of the agencies with which Qwest does business, the nature of the work done, and obviously, the nature of the work done by those agencies is extremely sensitive national security information. That information should not be injected into this case lightly or without substantial justification.

Here, where all the revenue and all the forecast revenue from all Qwest's classified business can be accounted for without ever making any reference to the identity or nature of the work, there will be no need to present any classified information at trial.

D. *The Adoption of Rule 10b5-1 and the Principles of Insider Trading Applicable to the Indictment Make It Even Less Probable That Any Reference to Classified Material Will Be Necessary.*

The Indictment alleges that the Defendant sold Qwest stock while in possession of material inside information. After adoption of S.E.C. Rule 10b5-1, it is unnecessary to prove that a defendant was motivated by the inside information, or that the sales were caused by the inside information. 17 C.F.R. § 240.10b5-1. The Securities Exchange Commission explicitly defined sales "on the basis of" inside information to be sales made while the Defendant "was aware of" material inside information and rejected the need to show that the Defendant was motivated by that information. *See SEC Final Rule Discussion*, 65 F.R. 51716 (August 24, 2000). Therefore, "awareness" of material inside information imposes on the defendant a duty to refrain from trading while the information remains undisclosed. *United States v. O'Hagan*, 521 U.S. 642, 651-652 (1997). Rule 10b5-1 creates an exclusive defense to the offense of insider trading only where an insider meets its strict requirements. For example, an insider can properly adopt a written plan to sell a specific amount of securities on a specific date, and follow the plan without deviation. The plan must be adopted at a time when the defendant is not aware of material inside

information and cannot be adopted for the purpose of avoiding the prohibition on insider trades. Finally, the SEC, through interpretive guidance, has specified that stopping sales under one plan and then starting sales under a second plan calls into question the bona fides of both plans since it raises an inference that the defendant is simply timing his sales.

The Indictment alleges that, in this case, the Defendant was aware of specific, material, undisclosed information concerning the risks facing Qwest's commercial business in 2001, the historic facts concerning Qwest's performance that formed the basis for Qwest's 2001 targets, and the performance of Qwest's commercial business as 2001 unfolded. For example, the Defendant was warned in writing by Qwest's President and others that "if recurring revenues don't take off" in early 2001, there won't be enough "one-timers" in the third and fourth quarters to close the revenue gap and the company will have "big problems." These warnings were explicitly based on Qwest's poor historic performance in growing recurring revenue at a rate sufficient to hit its targets and on the fact that Qwest's publicly announced targets were, in the words of Qwest's President, "a huge stretch" to begin with. *See* Exhibits 4 and 5. These warnings and risks, and this information about Qwest's historic and actual performance, were material to investors and were never disclosed to the public. In fact, these undisclosed risks were the opposite of the assurances given to the investing public by the Defendant. As 2001 unfolded, recurring revenues did not take off and there were not enough "one-timers" to fill the gap. Therefore, on September 10, 2001, Qwest announced to the public that it was reducing its 2001 targets by approximately \$1 billion. None of these allegations is premised upon, or will require evidence about, Qwest's federal contracts or any classified information.

Even if Qwest had material federal classified contract prospects that might offset the pervasive weakness in its commercial business, the Defendant would still be under a duty to disclose or abstain and would be guilty of the crime of insider trading. It is no defense to an insider trading allegation that the Defendant was aware of material undisclosed negative information to say that the Defendant was also aware of other material undisclosed positive information. To hold otherwise would allow an insider to buy and sell securities after his or her company had undergone a material transformation from one type of business with one risk profile to a completely different business with a different risk profile, without ever making disclosure to the public. In this case, Qwest consistently presented itself as a cutting-edge commercial telecommunications provider and not a company that was dependent in any material way on the vagaries and uncertainties of the Government contracting world. If, in fact, Qwest had become a company that could only make its numbers through a dependence on government contracts, that fact, in and of itself, would have imposed a duty to abstain from trading on the part of the Defendant. The truth is that federal contracts comprised only a small part of Qwest's business and were never viewed as substantial enough to solve Qwest's problem in the short time frame at issue in the Indictment.

In short, the possibility that any classified information is or could be germane to this Indictment is remote. In order to expedite the process by which Defense counsel can test this proposition, the Government has proceeded to initiate the process of obtaining a limited number of security clearances for defense counsel to debrief their client. The Government will continue to produce on an expedited basis all non-classified discovery during the period necessary to

obtain clearances. After defense counsel has debriefed their client, the parties can revisit with the Court the need, if any, for further CIPA or CIPA-like procedures.

II. Introduction to CIPA

Two of the most important duties of the Executive Branch are prosecuting violations of Federal criminal laws and protecting the nation's security secrets. The Supreme Court duly noted that "[i]t is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981).

CIPA was enacted in 1980 to address the problem of graymail, that is, threats by a defendant to disclose classified information in the course of criminal litigation. The statute was designed to reconcile a defendant's right to obtain and introduce exculpatory material with the government's duty to protect from disclosure sensitive information that could compromise national security. *See United States v. Rezaq*, 134 F.3d 1121, 1142 (D.C. Cir. 1998). Prior to the enactment of CIPA, the Government was forced to anticipate whether the defendant would seek to disclose classified information in connection with the litigation of a case and guess whether such information would be admissible. *See United States v. Collins*, 720 F.2d 1195, 1196-97 (11th Cir. 1983).

CIPA establishes pretrial, trial, and appellate procedures for federal criminal cases in which there is a possibility that classified information will be publically disclosed. Under these procedures, issues concerning the discoverability of classified information by the defendant and/or his counsel are resolved, usually *ex parte* and *in camera*, and the government is made aware prior to trial, through *in camera* hearings, whether classified information will have to be

disclosed in open criminal proceedings. The Government can then make an informed decision concerning the costs of going forward with the prosecution. *See generally, id.*

A key to the CIPA process is the requirement that the defendant provide pretrial written notice of the classified information he reasonably expects to disclose. The government may then seek a ruling as to whether the proffered classified information is relevant and admissible. If any of the information is ruled admissible, the government may move that a summary be substituted for it or alternatively it may substitute a statement admitting facts that the classified information would tend to prove, thereby obviating the need for disclosure of the specific sensitive information. If the Court finds such substitution inadequate to preserve the defendant's right to a fair trial and the government continues to object to the use of the information, the Court must order the defendant not to disclose the classified information. At the government's request, part or all of these proceedings are held *in camera*. *See United States v. Pappas*, 94 F.3d 795 (2d Cir. 1996).

The government may request an *in camera* hearing, as well, to take up issues concerning the use and relevance of any classified information which it seeks to introduce at trial, and may move that it be permitted to offer substitutions, to include summaries or statements admitting relevant facts, for specific items of classified information.

CIPA also provides *ex parte, in camera* procedures for the protection of classified information subject to discovery under Fed. R. Crim. P. 16, *Brady v. Maryland*, 373 U.S. 83 (1963) and Rule 26.2 (formerly the *Jencks* Act, 18 U.S.C. §3500 (1976)). It permits the government to move for and the Court to authorize the deletion of classified information from documents to be made available to the defendant or counsel in discovery, or the substitution of

summaries or statements admitting relevant facts for such documents. *See United States v. Yunis*, 867 F.2d 617, 621-622 (D.C. Cir. 1989).

CIPA permits the government to take an interlocutory appeal from any order by the court authorizing the disclosure of classified information.

III. Definitions, Pretrial Conference, Protective Orders and Discovery

A. Definition of Terms

Subsection 1(a) of CIPA defines classified information, as follows:

[A]ny information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security . . .

Subsection (b) defines "national security" to mean the "national defense and foreign relations of the United States."

B. Pretrial Conference

Section 2 provides that "[a]t any time after the filing of the indictment or information, any party may move for a pretrial conference to consider matters relating to classified information that may arise in connection with the prosecution." Following such a motion, the district court, "shall promptly hold a pretrial conference to establish the timing of requests for discovery, the provision of notice required by section 5 of this Act, and the initiation of the procedures established by section 6 [to determine the use, relevance, or admissibility of classified information] of this Act."

Section 2 also provides that, "the court may consider any matters which relate to classified information or which may promote a fair and expeditious trial." Consequently, the

court may take up matters concerning security procedures, clearances and the like. The legislative history of CIPA emphasizes that while this provision gives the district court the same latitude as under Rule 17.1, no substantive issues concerning the discovery or use of classified information are to be decided in a pretrial conference under Section 2. *See* S. Rep. No. 823, 96th Cong., at 5-6, *reprinted in* 1980 U.S. Code Cong. & Ad. News at 4298-4299. Instead, CIPA requires such issues to be decided under Sections 4 and 6.

C. Protective Orders

Section 3 requires the court, upon the request of the Government, to issue and order, "to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case . . ." The protective order applies to all materials furnished to the defense under the government's discovery obligations, and may be used to prevent the defendant from disclosing classified information already in his possession. A protective order has been requested in this case.

IV. Discovery of Classified Information by the Defendant

Section 4 of CIPA, while creating no new rights of or limits on discovery, does require courts to consider secrecy concerns when applying general discovery rules. *See United States v. Yunis*, 924 F.2d 1086, 1089 (D.C. Cir. 1991).

The Court of Appeals for the District of Columbia Circuit has established a three pronged test for the discovery of classified information which, except for the fact that it is classified, normally would be turned over to the defendant under Rule 16. To be entitled to discovery under CIPA, a defendant must make a threshold showing that the requested material is relevant to his case. If such a showing can be made, the court must determine whether or not the government

has asserted a colorable claim of privilege, that is, that there is a basis for the classification of the document or information at issue. If the government has asserted such a claim, the defendant must show that the information would be helpful to his defense. *See id.*

The Ninth Circuit has held that even when a defendant can make these showings, the court can balance the defendant's interests in obtaining the information against the government's obligation to protect the national security. *See United States v. Sarkissian*, 841 F.2d 959, 965 (9th Cir. 1988).² Indeed, the legislative history of Section 4 makes it clear that the court may take the national security interests into account when considering the government's requests to preclude discovery of classified information:

[W]hen pertaining to discovery materials, [Section 4] should be viewed as clarifying the court's power 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 states 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.

S. Rep. No. 823, 96th Cong., at 6, *reprinted in* 1980 U.S. Code Cong. & Ad. News at 4299-4300.

Even if classified information is determined to be discoverable, Section 4 provides that:

[t]he 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 the relevant facts that classified information would tend to prove.

Thus, upon the request of the government, alternatives to disclosure of classified information may be permitted. Section 4 further provides that the government may demonstrate

² The District of Columbia declined to address this balancing test in *United States v. Rezaq*, 134 F.2D at 1142 n 15.

that the use of such alternatives is warranted in an *in camera, ex parte* submission to the court alone. *See Yunis*, 867 F.2d at 619

V. Sections 5 and 6: Pretrial Evidentiary Rulings

There are three critical pretrial steps in the handling of classified information under Sections 5 and 6 of CIPA. First, the defendant must specify in detail the precise classified information he reasonably expects to disclose. Second, the Court, upon a motion of the government, shall hold a hearing pursuant to Section 6(a) to determine the use, relevance and admissibility of the proposed evidence. Third, following the 6(a) hearing and formal findings of admissibility by the Court, the government may move to substitute an admission of relevant facts or summaries for classified information the Court rules is admissible.

A. The Section 5(a) Notice Requirement

Section 5(a) of CIPA requires a defendant who reasonably expects to disclose or to cause the disclosure of classified information at any trial or pretrial proceeding, to provide timely pretrial written notice to the attorney for the government and the Court. Section 5 specifically provides that notification shall take place, "within the time specified by the court or, where no time is specified, within thirty days prior to trial . . ."

Particularization is required in providing notice under Section 5(a). The notice must be specific because it is the central document in the procedures envisioned under the Act. As the Eleventh Circuit explained in *United States v. Collins*, 720 F.2d 1195, 1190-1200 (11th Cir. 1983):

Appellee argues that a mere general statement of the areas about which evidence may be introduced is all that is contemplated by Section 5(a)'s requirement that "such notice shall include a brief description of the classified information." It is

contented that "a brief description" does not demand specificity, thus permitting notice of nothing more than the general areas of activity to be revealed in defense. However, this overlooks that the "brief description" is not to be translated as "vague description"; of the "classified information" may not be interpreted as "of the areas of activity concerning which classified information may be revealed."

It is of no importance that the government can locate specific data about defendant's knowledge of sensitive information in its own records 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.

The Section 5(a) notice is the central document in CIPA. After the CIPA procedures have been followed, the government should not be surprised at any criminal trial when the defense discloses, or causes to be disclosed, any item of classified information. The court, the government and the defendant should be able to refer to the Section 5(a) notice and determine, reliably, whether the evidence consisting of classified information was contained in it. The court must not countenance a Section 5(a) notice which allows a defendant to cloak his intentions and leave the government subject to surprise and what may be revealed in the defense. To do so would merely require the defendant to reduce "graymail" to writing.

Having found the defendant's notice insufficient under Section 5, the court vacated the order issued by the district court upon it and remanded the case.

The particularization requirement applies to both documentary exhibits and to oral testimony, whether it is anticipated to be brought out on direct or cross-examination. *See Collins, id.*; *United States v. Wilson*, 750 F.2d 7 (2d Cir. 1984). The Section 5 notice, however, does not require a defendant to provide argument in support of the relevance of particular noticed documents in the notice itself. Section 5(b) permits the court to preclude the disclosure of classified information if the defendant fails to provide a sufficiently detailed notice far enough in advance of trial to permit implementation of CIPA procedures. *See United States v. Badia*, 827 F.2d 1458, 1465 (11th Cir. 1987). In *Badia*, the court rejected the defendant's claim that he was

not obliged to file a Section 5 notice because the government already knew that he would assert a defense involving the Central Intelligence Agency. The Court observed:

The government's belief that a defendant may assert a defense involving classified material cannot substitute for the formal notice mandated by §5(a). The Thirty-day time frame is intended to give the government the opportunity to ascertain the potential harm to national security, and to consider various means of minimizing the cost of disclosure. Any form of notice provided less than thirty days prior to trial clearly does not permit the government to accomplish this objective.

Badia, 827 F.2d at 1465.

The Eleventh Circuit thus far affirmed the lower court's ruling precluding the defendant from raising matters at trial that should have been noticed pursuant to Section 5 of CIPA. Similarly, if the defendant attempts to disclose at trial classified information which is not described in his Section 5(a) notice, preclusion is the appropriate remedy prescribed by Section 5(b) of the statute. See *United States v. Smith*, 780 F.2d 1102, 1105 (4th Cir. 1985).

B. The Section 6(a) Hearing

Once the defendant files a notice of intent to disclose classified information under Section 5, the government may then petition the court for a hearing under Section 6(a). The purpose of the hearing under Section 6(a) of CIPA is "to make all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceedings." Section 6(a) further provides for the hearing to be held *in camera* with both parties present if the Attorney General certifies that a public proceeding may result in the disclosure of classified information.

At the Section 6(a) hearing, the court is to hear the defense's proffer and the arguments of counsel, and then rule whether the classified information identified by the defense is relevant

under the standards of Fed. R. Evid. 401. The defendant has the burden of establishing that the evidence is relevant and material. *See United States v. Miller*, 874 F.2d 1255, 1276-77 (9th Cir. 1989). As noted previously with respect to discovery, CIPA does not create new rules of evidence; it is designed simply to protect the government's privilege regarding classified information. *See Yunis*, 924 F.2d at 1095; *see also United States v. Wilson*, 750 F.2d 7, 9 (2d Cir. 1984).

The Court's inquiry does not end there, for under Fed. R. Evid. 402, not all relevant evidence is admissible at trial. The Court therefore must also determine whether the evidence is excludable under Rule 403. *United States v. Wilson*, 750 F.2d at 9. *See also United States v. Cardoen*, 898 F.Supp. 1563, 1571 (S.D. Fla. 1995).

The Fourth Circuit requires that the district court take cognizance of the government's interest in protecting national security and the defendant's interest in receiving a fair trial in ruling regarding the admissibility of classified information, and allows the admission of such evidence only when it is helpful to the defense or essential to a fair administration of justice. *See United States v. Fernandez*, 913 F.2d 148, 154 (4th Cir. 1990); *United States v. Smith*, 780 F.2d 1102, 1107 (4th Cir. 1985). *But see United States v. Cardoen*, 898 F.Supp. At 1571; *United States v. Lopez-Lima*, 738 F.Supp.1404, 1411 (S.D. Fla. 1990) (declining to adopt such a rule).

At the conclusion of the Section 6(a) hearing, CIPA requires the court to state in writing the reasons for its determinations as to each item of classified information.

C. Substitution Pursuant to Section 6(c)

In the event that the Court rules that one or more items of classified information are admissible, the government has the option of offering substitutions pursuant to Section 6(c) of

CIPA. Under Section 6(a) the government may move to substitute either (1) a statement admitting relevant facts that the classified information would tend to prove, or (2) a summary of the classified information instead of the classified information itself. *See United States v. Rezaq*, 134 F.3d 1121 (D.C. Cir. 1998). A motion for substitution shall be granted if the "statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information."

The Court may approve the substitutions provided by the government after conducting a detailed *in camera* comparison with the originals to determine whether the substitutions protect the defendant's right to a fair trial. *See United States v. Rezaq*, 134 F.3d at 1142-1143.

D. Sealing of records of in camera hearings under Section 6(d)

If the Court rules that classified information may not be used, Section 6(d) requires the court to seal, and preserve for use in the event of an appeal, the records of any *in camera* hearing held under the Act to decide such questions of admissibility. The defendant may seek reconsideration of the Court's determination prior to or during trial.

E. Section 6(e): Prohibition on disclosure of classified information by defendant; relief for defendant when United States opposes

When the Court determines that specific items of classified information are relevant and admissible and then denies the government's motion for substitution under Section 6(c), Section 6(e)(1) permits the government, by affidavit from the Attorney General, to object to the disclosure of the classified information at issue. In such cases, the Court, "shall order that the defendant not disclose or cause the disclosure of such information." Section 6(e)(1).

Section 6(e) lists the sliding scale of sanctions which the court may impose against the government as a means of compensating for the defendant's inability to present proof regarding specific items of classified information.

VI. Other Relevant CIPA Procedures

A. Interlocutory Appeal

Section 7(a) of the Act provides for an interlocutory appeal by the government from any decision or order of the trial judge "authorizing the disclosure of classified information, or for refusing a protective order sought by the United States to prevent the disclosure of classified information." The term "disclosure" within the meaning of Section 7 includes both information which the court orders the government to divulge as well as information already possessed by the defendant which he intends to make public. *See United States v. Pappas*, 94 F.3d at 799-800. Section 7(b) instructs the court of appeals to give expedited treatment to any interlocutory appeal filed under subsection (a).

B. Introduction of Classified Information

Section 8(a) provides that "[w]ritings, recordings, and photographs containing classified information may be admitted into evidence without change in their classification status." This provision simply recognizes that classification is an executive, not a judicial function. Thus, Section 8(a) implicitly allows the classifying agency, upon completion of the trial, to decide whether the information has been so compromised during trial that it could no longer be regarded as classified.

In order to prevent unnecessary disclosure of classified information, Section 8(b) permits the court to order admission into evidence of only a part of a writing, recording, or photograph.

Alternately, the court may order into evidence the entire writing, recording, or photograph with redaction of all or part of the classified information contained therein. However, Section 8(b) does not provide grounds for excluding or excising part of a writing or recorded statement which ought in fairness, be considered contemporaneously with it. Thus, the court may admit into evidence part of a writing, recording, or photograph only when fairness does not require the whole document to be considered.

Section 8(c) provides a procedure to address the problem presented during a pretrial or trial proceeding when the defendant's counsel asks a question or embarks on a line of inquiry that would require the witness to disclose classified information not previously found by the court to be admissible. If the defendant knew that a question or line of inquiry would result in disclosure of classified information, he presumably would have given the government notice under Section 5 and the provisions of Section 6(a) would have been implemented. Section 8(c) serves, in effect, as a supplement to the hearing provisions of Section 6(a) to cope with situations which cannot be handled effectively under Section 6, where the defendant does not realize that the answer to a given question will reveal classified information. Upon the government's objection to such a question, the Court is required to take suitable action to avoid the improper disclosure of classified information.

VII. Protective Order Governing Preliminary CIPA Filings

Although the Government has not included any reference to classified information in this Memorandum Brief, and believes that it will not be necessary to refer to classified information during these proceedings, certain information relating to the issue of whether CIPA applies is confidential, even though not classified. For example, a person's security clearance level is not

classified information. However, persons receiving high-level security clearances are advised not to publicly reveal those clearances without significant justification because public knowledge of their clearance level can pose personal security risks to the holder. Similarly, although the amount and existence of classified work done by Qwest may not, in itself, be classified, general publication of that information could disadvantage Qwest commercially and might allow potential foreign agents to make guesses or inferences that could be harmful to Qwest or its employees, or the United States, even if those inferences are inaccurate or unwarranted.

Accordingly, the best practice is to require filings that touch on the subject of classified contracts to be filed under seal and dealt with *in camera*. That concern for safety and any inadvertent disclosure prompted counsel for the Government at the initial pre-trial conference to deflect the Court's question about other issues that might come up until a proper sealed filing could be made. The parties have agreed to and the Government has filed an unopposed motion to require CIPA filings to be under seal and respectfully asks the Court to enter an Order granting that motion. Section 3 at Title 18, United States Code, Appendix 3, pertaining to protective orders is not limited to an order preventing direct disclosure of classified information, but can fairly be read to permit orders that will have a prophylactic effect and ensure that any disclosure is the result of careful consideration and not inadvertent.

WHEREFORE, the United States of America requests that the Court issue the requested protective order and conduct any further proceedings dealing with CIPA related issues *in camera*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of January, 2006, I electronically filed the foregoing **MEMORANDUM OF LAW REGARDING C.I.P.A. (FILED UNDER SEAL)** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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