

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

Judge Edward W. Nottingham

Criminal Action No. 1:05-cr-00545-EWN-ALL

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSEPH P. NACCHIO,

Defendant.

**REQUEST OF *THE DENVER POST* FOR RELEASE
OF REDACTED TRANSCRIPTS OF CLOSED CIPA HEARINGS**

The Denver Post Corporation, publisher of *The Denver Post*, by and through its undersigned counsel, respectfully requests that the Court enter an Order directing the Case Security Officer to file in the court record maintained by the Clerk of the Court, by a date certain, publicly available transcripts of the closed CIPA hearings that were conducted herein, with all classified information redacted. As grounds for this Request, the Denver Post states:

1. During the course of the proceedings before this Court, and pursuant to this Court's orders under the Classified Information Procedures Act ("CIPA"), closed hearings were convened on seven occasions (8/25/06 Dkt. No. 152; 10/12/06 Dkt. No. 171; 12/08/06

Dkt. No. 198; 1/12/07 Dkt. No. 208; 2/23/07 Dkt. Nos. 256 & 257; 3/1/07 Dkt. No. 265; and 3/9/07 Dkt. No. 269).

2. Prior to the first such closed hearing, on August 23, 2006, the Denver Post filed a Response in Opposition to the Government's Motion to Close Hearing Pursuant to Section 6(a) of CIPA [Dkt. No. 142] which this Court overruled in part after a hearing in open court on August 25, 2006. [Dkt. No. 149].

3. At the end of the above referenced hearing on the Denver Post's Response in Opposition, the Court stated that it would "consider the possibility of a transcript [of the closed CIPA hearing] which would be reviewed for purposes of seeing whether there is classified information." Tr. of Aug. 25, 2005 (Pretrial Conf.) at 16:21-23. Although the Court made clear that it "should not be understood as guaranteeing anything other than the fact that the schedule [for further CIPA briefing] would be publicized," *id.* at 17:1-2, it stated that consistent with the holding *United States v. Marzook*, 412 F. Supp. 2d 913 (N.D. Ill. 2006), it "would consider a post-hearing effort to open or to unseal, in effect, a portion of what the Court discusses" in CIPA proceedings closed to the public. *Id.* at 16:13-15.

4. On October 13, 2006, the Court entered a Minute Order directing that "The transcript of the 8/25/06 motions hearing shall be reviewed and redacted by the appropriate agencies and made available for public filing no later than 11/2/06." [Dkt. No. 171]

5. The Denver Post has obtained a transcript of the motions hearing conducted on August 25, 2006 [Dkt. No.187], but it does not contain any of the hearing conducted in closed session under CIPA (*see* Tr. of 8/25/06 at 67:16-17) and the Denver Post's counsel

has been informed by the Court's Official Reporter that no redacted transcript of the August 25, 2006 closed CIPA hearing has been received or filed in the Clerk's Office, despite the Court's Order of October 13, 2006.

6. In addition, no redacted transcripts are on file in the Clerk's Office of the closed CIPA hearings that were conducted on October 12 and December 8, 2006 and on January 12, February 23, March 1 and March 9, 2007.

7. Even though the Defendant has filed a Notice of Appeal, this Court retains jurisdiction to decide matters related to the records of this Court. *See Venen v. Sweet*, 758 F.2d 117, 120 n.2 (3d Cir. 1985) (district court retains jurisdiction after appeal is filed to issue certain orders, including "with respect to the record on appeal"); *Cf. United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) (holding that District Court retains jurisdiction to modify protective order even after case has been dismissed); *McClatchy Newspapers v. Central Valley Typo. Union No. 46*, 686 F.2d 731, 735 (9th Cir. 1982) (district court retains jurisdiction after appeal is filed "where the court supervises a continuing course of conduct and where as new facts develop supervisory action by the court is requested").

8. The public's right of access to transcripts of judicial hearings conducted in connection with criminal proceedings is guaranteed by the First Amendment to the Constitution of the United States. *See Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 512 (1984) ("When limited closure is ordered, the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript of the

closed proceedings available *within a reasonable time*, if the judge determines that disclosure can be accomplished while safeguarding the [compelling governmental] interest[]. Even then a [compelling governmental interest] may rise to a level that *part of* the transcript should be sealed . . .”) (emphasis added). Among the means that must be utilized to protect the public’s right of access to judicial proceedings is the timely release of transcripts of closed proceedings with only the sensitive (classified) information redacted. *See Id.* at 513 (holding that the trial judge’s “failure to consider alternatives . . . to total suppression of the transcript” was a constitutional violation); *Cf. Matter of Search Warrants Issued on June 11, 1988*, 710 F. Supp. 701, 705 (D. Minn. 1989) (ordering release of redacted versions of sealed search warrant papers and noting that “[w]here redaction is required . . . it must be narrowly tailored to allow for as much disclosure as is feasible.”).

9. When the First Amendment right of access attaches to a judicial document or proceeding it affords a right of *contemporaneous* access, “where each passing day may constitute a separate and cognizable infringement of the First Amendment.” *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 126-27 (2d Cir. 2006) (citations omitted); *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (“The loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury.”); *see also Lugosch*, 435 F.3d at 127 (“We take this opportunity to emphasize that the district court must make its findings quickly. Our public access cases and those in other circuits emphasize the importance of *immediate* access when a right of access is found.”) (emphasis added) (citations omitted); *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994)

(access to court records “should be immediate and contemporaneous”); *Republic of the Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 664 (3d Cir. 1991) (“the public interest encompasses the public’s ability to make a *contemporaneous* review of the basis of an important decision of the district court”) (emphasis added).

10. Notably, in the two CIPA cases this Court cited from the bench on August 25, 2006 (Tr. of Aug. 25, 2006 at 16:9-15), the district courts that ordered CIPA proceedings closed to the public also ordered that redacted transcripts be made available within weeks of the closed proceeding. See *United States v. Marzook*, 412 F. Supp. 2d 913, 924 (N.D. Ill. 2006) (ordering United States to conduct post-hearing review of testimony “within seven days from the issuance of the final transcript” and “the Court will promptly make it part of the public filing. This expedited review of the testimony will ensure that any information that is not classified will be made available to the public in a timely manner.”); *United States v. Poindexter*, 732 F. Supp. 165, 168-69 & n.18 (D.D.C. 1990) (ordering public release of edited videotape of closed deposition testimony, and Court expects, absent “extraordinary disputes” regarding classified materials, “this process will not consume more than two or three working days”).

WHEREFORE, The Denver Post respectfully asks that the Court enter an Order directing that transcripts of all seven closed CIPA hearings conducted herein be filed with the Clerk of the Court by a date certain in the near future, and be made available for public inspection, with only the actual classified information contained therein redacted.

Respectfully submitted this 17th day of August, 2007.

LEVINE SULLIVAN KOCH & SCHULZ, L.L.P.

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of August, 2007, I electronically filed the foregoing **REQUEST OF THE DENVER POST FOR RELEASE OF REDACTED TRANSCRIPTS OF CLOSED CIPA HEARINGS** with the Clerk of the Court using the CM/ECF electronic filing system, which will send an electronic copy of this filing to the following counsel of record:

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