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Federal Law Enforcement Training Centers
U.S. Department of Homeland Security
1131 Chapel Crossing Road
Glynco, Georgia 31524

Homeland Security

December 9, 2020

404-142 (CIO/IBM)

Email

Re: **FOIA 21-008**

This is the final response to your Freedom of Information Act (FOIA) request to the Federal Law Enforcement Training Centers (FLETC) dated October 14, 2020.

During a search for records within the FLETC Legal Division, we located one document containing 11 pages that are responsive to your request. These records are partially withheld pursuant to Exemptions (b)(6), Title 5 U.S.C. § 552, FOIA Exemptions 6.

> **FOIA Exemption 6** exempts from disclosure personnel or medical files and similar files the release of which would cause a clearly unwarranted invasion of personal privacy. This requires a balancing of the public's right to disclosure against the individual's right privacy. The privacy interests of the individuals in the records you have requested outweigh any minimal public interest in disclosure of the information. Any private interest you may have in that information does not factor into the aforementioned balancing test.

You have a right to appeal the above withholding determination. Should you wish to do so, you must email your appeal and a copy of this letter, within 90 days of the date of this letter, to: FLETC-FOIA@fletc.dhs.gov following the procedures outlined in the DHS FOIA regulations at 6 C.F.R. Part 5 § 5.8. The subject line of your email should be marked "FOIA Appeal." Copies of the FOIA and DHS FOIA regulations are available at www.dhs.gov/foia. Please note, emailing your appeal is to accommodate the COVID-19 pandemic and our inability to receive packages as usual.

Additionally, you have a right to seek dispute resolution services from the Office of Government Information Services (OGIS) which mediates disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. If you are requesting access to your own records (which is considered a Privacy Act request), you should know that OGIS does not have the authority to handle requests made under the Privacy Act of 1974. You may contact OGIS as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at ogis@nara.gov; telephone at 202-741-5770; toll free at 1-877-684-6448; or facsimile at 202-741-5769.

Provisions of FOIA allow us to charge for processing fees, unless you seek a waiver of fees. In this instance, because the cost is below the $25 minimum, there is no charge.

If you need any further assistance or would like to discuss any aspect of your request, I can be reached at (912) 267-3103 or via email at Alicia.Mikuta@fletc.dhs.gov.

Sincerely,

ALICIA D MIKUTA
Digitally signed by ALICIA D MIKUTA
Date: 2020.12.09 14:40:22 -05'00'

Alicia D. Mikuta
Information Management Officer
FOIA/Privacy

Enclosure(s):
1. Emailed Version of Article

From: (b)(6) [redacted]
To:
Cc:
Subject: RE: FOIA_21-008
Date: Friday, December 4, 2020 10:14:29 AM

Good morning (b)(6) [redacted]

Here's the full text of the requested article.

An Introduction and Practical Guide for Criminal Investigators

(b)(6) [redacted]

Federal Law Enforcement Training Center

I. INTRODUCTION

A. The Scenario

It's Monday morning. You are the Group Supervisor in a small office of the Customs and Border Protection. You've just poured your second cup of coffee and are starting to review your case file in preparation for an upcoming trial when you are interrupted by the phone ringing. It's your administrative assistant advising that two Customs and Border Protection officers (CBPO) are here to see you. The CBPOs say they've been up all night working on a case that started as a routine border matter but which now apparently involves extremely sensitive and classified information. So much for preparing for trial. You lean back in your office chair and listen to the CBPOs as they begin their case presentation.

Just before midnight, Marcos Sandaval, a Venezuelan businessman, arrived at the Jacksonville Airport aboard a charter flight from Caracas. He presented his Venezuelan passport to Immigration and was then allowed to proceed for inspection by U.S. Customs. In his Customs Declaration, Sandaval had indicated that he was not carrying in excess of $10,000 in U.S. currency. The Customs Inspector, acting on a hunch after questioning Sandaval, directed him to a secondary inspection. During secondary, the Inspector found $500,000 in U.S. Currency concealed in the lining of Sandaval's briefcase along with a second passport, this one from Eritrea, in Sandaval's name. The Customs Inspector thereafter placed Sandaval under arrest and called his supervisor. The supervisor and his immediate assistant, both of whom are now sitting before you making the case presentation, responded to the airport. Sandaval, after being advised of his *Miranda* rights, invoked his rights of silence and to have his attorney present before any questioning.

So, you ask yourself, what's the big deal? Why have these two CBPOs lost sleep over this case? You quickly learn that they ran Sandaval's name through a Joint Terrorism Task Force index from which there was a "hit." Unfortunately, there was no further information in the JTTF index other than an advisory to contact the CIA. When these CBPOs did so, they were advised that no information could be released to them until their clearances were verified and passed by FBI's security office to CIA's security office. Once that matter was accomplished, the CBPOs learned what they had begun to suspect: Sandaval is a documented CIA source.

You have the requisite clearances, so you call a contact of yours at Langley, using your Secure Telephone Unit (STU III), a telephone approved for conversations involving classified information. You learn that Sandaval is a documented source under the control of a CIA operative who was operating in an undeclared status out of Ethiopia; that is, the government of Ethiopia was unaware of his agency affiliation. One of the defendant's businesses involves the export and sale of dual use technology, including devices that can be used to trigger explosives attached to missiles, and the CIA has advised Customs that its operations agent was responsible, in part, for providing funds to Sudanese rebels based in Ethiopia. Your CIA source advises you that Sandaval may defend by, among other things, claiming that the $500K was intended to fund the Sudanese rebels on behalf of the CIA.

B. What now?

If you were that Group Supervisor, what concerns do you think should be triggered in your mind by the foregoing events? First, this case will clearly involve classified information, maybe not to prove Sandaval's omission in his Customs Declaration, but certainly to counter what will likely be his defense, that is, that he was lawfully acting on behalf of a United States agency, the CIA. There can be little doubt that classified information exists that is either relevant to Sandaval's defense, to the government's rebuttal to that defense, or both. You have your clearances, but Sandaval certainly doesn't. How then may the government, prosecutors and agents, meet their discovery obligations and prosecutorial objectives without compromising classified information?

The answer lies in the Classified Information Procedures Act (CIPA) found at Title 18, United States Code, Appendix III. This article will introduce the reader to CIPA and to how its provisions play out in the development of a criminal case, from the investigation to trial preparation and during the trial itself. Armed with such information, you, if you were the Group Supervisor in the foregoing scenario, and any other criminal investigator who encounters similar circumstances, will be better able to gauge the unfolding investigation in order to avoid compromising classified information through unauthorized disclosure while at the same time providing support to the Assistant United States Attorney (AUSA) in meeting his or her discovery obligations to the defendant and, ultimately, in successfully prosecuting the case.

C. Caveats

Criminal investigators and prosecutors should remember one thing about CIPA, arguably above all else. It is ONLY a procedural statute; it neither adds to nor detracts from the substantive and procedural rights of the defendant or the discovery obligations of the government. That being said, however, the objectives of CIPA are as important as any within the procedural laws of the United States:

FIRST: to provide the government with advance notice when a defendant intends to disclose classified information during litigation of pretrial issues or at a criminal trial;

SECOND: to permit the government to avoid unnecessary harm to the national security where the disclosure of such information is not legally required; and

THIRD: to permit the government to gauge the harm to national security, and thereby determine how and whether to proceed, where the disclosure of such information **is** necessary to the fair resolution of the case.

It must be remembered that CIPA is NOT a sword by which the government may excise otherwise discoverable information. Rather it is a shield against unnecessary or inadvertent disclosures of classified information in a criminal case; and, where there is discoverable classified information in a case, it gives the government advance notice of the national security "cost" of going forward.

II. THE ACT

A. Preliminary Discussion

Section 1 of CIPA defines "classified information" and "national security" both of which are terms used throughout the statute. Subsection (a), in pertinent part, defines "classified information" as [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."

Terrific, you say, but just what the heck does that mean? My answer is “don’t worry about it.” You don't need to know what it means because you do not have, and likely never will have, original classification authority.

Original classification authority is held only by certain persons in the intelligence community who have been designated by the President. The only time you may need to classify a document will be derivatively, for example, based upon your use in a report, or your prosecutor’s use in a motion, of information classified by a proper government official. In that event, you must note on that report or pleading such derivative classification.

What you **do** need to worry about, if classified information is part of your case, is as follows:

FIRST: determining the level of classification involved. If a document bears the classification of “Confidential,” or “Secret,” or “Top Secret,” it is so labeled due to national security concerns. Top Secret is also further divided into code word classifications, usually so designated by a letter or letters. (Those letter sub-classifications themselves are also often classified.) On the other hand, the label “For Official Use Only” or "Sensitive Law Enforcement Information" and other similar caveats do not trigger the protections of law afforded classified information;

SECOND: making certain that you have the necessary clearances to permit your access to classified information. Most AUSAs are cleared for access to material classified at the “Secret” level. Unless there is a specific case or project-related need, no AUSA will have a codeword clearance. Those can take some time, so you should submit your paperwork as early as possible for such a clearance. If your office does not have a security specialist on site, someone at the supervisory level should contact your headquarters security officer for assistance in starting the process of obtaining requisite clearances.

If classified documents or information are to be a part of your case, it will happen in one of three ways:

FIRST: you come across information and/or documents during your investigation that are classified or which lead to classified information or documents;

SECOND: the defendant will demand to be provided classified documents from the government as being helpful to his defense; or

THIRD: the prosecutor, in investigating the case, learns that there are classified documents and/or information that either are relevant and helpful to the government's case-in-chief, or that the government will be required to disclose once its discovery obligation kicks in.

When either of the foregoing events happens, here is your to-do list:

FIRST: notify your supervisor immediately, who will then give notification to the appropriate

person or persons in your Headquarters Office;

SECOND: notify the United States Attorney's Office's National Security Coordinator.

In the scenario described at the outset of this writing, you and your prosecutor should anticipate that the defendant may defend by, among other things, claiming that the $500,000 was intended to fund the Sudanese rebels on behalf of the CIA. Under Federal Rule of Criminal Procedure 16 and the requirements of *Brady*, the United States must produce for the defendant anything in its possession that would tend to support that defense. That does not mean only that which is in the possession of your agency or the U.S. Attorney's Office; it means in the possession of the U.S. government as a whole.

The good news is that meeting the foregoing requirements is primarily the responsibility of the AUSA. The reality, however, is that your AUSA will need your assistance in conducting the searches necessary to be able to demonstrate to the court that the government has made a reasonable effort to locate information to which the defendant is entitled to have access.

Commencement of the process will require the involvement of the Department of Justice's (DOJ) Criminal Division. With your assistance and that of the AUSA, DOJ's Criminal Division attorneys will be responsible to determine which of the various agencies within the Intelligence Community (IC) are likely to have possession of information that is subject to the government's discovery obligation or is otherwise relevant to prosecution of the case and then to submit search requests to those agencies.

Both criminal investigators and federal prosecutors must realize, however, that, while the IC will certainly do its part to assist the prosecutor in meeting the government's discovery obligations, as a rule, classified information should not be presumed to be available to bolster an otherwise weak criminal prosecution. There are certainly exceptions to that rule, most notably in terrorism cases, but otherwise the criminal case should be investigated and prosecuted without counting on the IC for assistance. The reasoning behind that caveat is simple: every public disclosure of sensitive and/or classified information carries with it the heavy cost of disclosure of sources and methods to our enemies.

B. CIPA in Court

Returning to the scenario, let's assume that you and your AUSA have concluded your search at the appropriate IC agencies. As the result of those efforts, you have gathered 15 documents that are discoverable and approximately 500 documents that you deem may possibly be discoverable. What do you do now? Or precisely, what should you expect your AUSA to do now?

Section 2 - Pretrial Conference

Section 2 of CIPA 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 [the] Act, and the initiation of the procedure established by [the Act to determine the use, relevance, or admissibility of classified information]." Section 2 is a vital component of the CIPA scenario. It and Section 3 of CIPA are the government's first and best chances to seize control of a process that will, at first, seem confusing and perhaps even annoying to the Court. Most defense counsel will not understand it, and even if they do, they will invariably lash out at CIPA and at your AUSA in the attempt to have the Court curtail its effect. The AUSA and you must be ready to educate the court and to make the invocation of CIPA as painless as possible for the court.

Section 3 – Protective Order

How do you do that? Your AUSA will seek a Protective Order under Section 3 of CIPA by filing a motion with a memorandum of law and a proposed Protective Order. Section 3 requires the court, upon the request of the Government, to issue an order "to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case."

In that motion, your AUSA must also ask the court to appoint a Court Security Officer (CSO). The CSOs come out of DOJ's Security Division, and they are trained in the handling and processing of classified information. They will work with you, the AUSA, and the District Security Officer, for example, to arrange for approved storage facilities for classified information. All classified information is subject to certain requirements concerning storage and transporting. Information that is classified at the SECRET or CONFIDENTIAL levels may be stored in an approved safe in the U.S. Attorney's Office. TOP SECRET material must, however, be stored in an approved facility that is constructed according to exacting specifications and is alarmed. Before storage may be commenced, it must be approved by the IC. That is done via the CSOs.

Transportation of a classified document through an unclassified area must be done in accordance with various applicable Executive Orders and agency-approved procedures developed to implement those procedures. For example, if a Criminal Investigator with a SECRET clearance wishes to take a SECRET document from a secure storage facility to a hearing before the Court, that document must be double wrapped and sealed at all times when outside of a secure compartment information facility (SCIF) or other approved storage area or device. In general, a TOP SECRET document must be transported by an approved courier and may not be opened or discussed outside of a SCIF or other facility approved by the document's owner agency. In all events, you, the Criminal Investigator, should consult with the CSO concerning the transporting of classified documents through unclassified areas.

Section 4 - Discovery of Classified Information by Defendant

In our hypothetical, you will recall, there were 15 documents that you believed to be discoverable and 500 "possibles." Let's look at the 15 documents first. Assume that, as to one of those documents, the CIA has advised that with certain redactions it could be declassified. Let's also assume that, as to some of the 500 "maybe's" the AUSA concludes that they are not

discoverable but the government will want the Court's approval on that decision.

Section 4 provides in pertinent part 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. Section 4 also permits the Government to demonstrate in an in camera, ex parte submission to the court that the use of such alternatives is warranted. In other words, the defense attorney and the defendant will not be present. Section 4 then becomes the government's private opportunity to show the Court that the AUSA and you have undertaken your discovery obligations in a good faith manner and to identify and explain the ramifications of disclosure of particular information. Though the defense attorney will not be present and, therefore, will not then have the opportunity to challenge the government's arguments, be assured that the trial judge will be extremely sensitive to that absence and the need to ensure that the defendant has been given due process.

Up to this point, we have discussed only the flow of discovery from the government to the defense. You must also consider the issue of reciprocal discovery in these cases, in particular where the defense may be that of "public authority." In asserting that defense, the defendant is claiming that he had actual or believed authority from a law enforcement or intelligence agency of the federal government to commit the acts for which he is indicted.

Several defenses may apply when a defendant claims he that performed the charged acts in response to a request from an agency of the government. First, the defendant may allege that he lacked criminal intent because he honestly believed he was performing the otherwise-criminal acts in cooperation with the government. "Innocent intent" is not a defense per se, but a defense ***strategy*** aimed at negating the *mens rea* for the crime. The Courts have recognized "innocent intent" as a legitimate defense tack.

A second possible defense is "public authority." With this affirmative defense, the defendant seeks exoneration based on the fact that he reasonably relied on the authority of a government official to engage him in a covert activity. The validity of this defense depends upon whether the government agent in fact had the authority to empower the defendant to perform the acts in question. If the agent had no such power, then the defendant may not rest on the "public authority."

A third possible defense is "entrapment by estoppel." This defense applies not when a defendant has committed an illegal act based on the real or apparent authority of a government official, but rather when a government official tells a defendant that certain conduct is legal and the defendant commits what would otherwise be a crime in reasonable reliance on that government official's representation. Most courts have recognized, at least in theory, the defense of entrapment by estoppel. The federal courts have, however, stopped short of permitting such a defense to be asserted merely because the defendant claims that he honestly, albeit mistakenly, believed that he committed the charged crimes while working on behalf of the government.

Sections 5 and 6 - Pretrial Evidentiary Rulings

Following the discovery process, there are three critical pretrial steps in the handling of classified information under CIPA:

FIRST: Section 5 requires the defendant to 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 either redacted versions of classified documents, written admissions of certain relevant facts, or summaries in place of classified information that the Court has ruled admissible.

The Section 5(a) Notice Requirement

The linchpin of CIPA is Section 5(a) which requires a defendant who intends to disclose, or to cause the disclosure of, classified information to provide timely pretrial written notice to the government of his intention. Section 5(a) expressly requires that such notice "include a brief description of the classified information," and the Courts have held that Section 5(a) requires that such notice –

must be particularized, setting forth specifically the classified information which the defendant reasonably believes to be necessary to his defense.

This requirement applies both to documentary exhibits and to oral testimony that the defense anticipates it will bring out either on direct or on cross-examination.

If a defendant fails to provide a sufficiently detailed notice far enough in advance of trial to permit the implementation of CIPA procedures, Section 5(b) provides for preclusion. 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.

The Section 6(a) Hearing

The purpose of the hearing pursuant to 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 . . . ." The statute expressly provides that after a pretrial Section 6(a) hearing on the admissibility of evidence, the court shall rule prior to the commencement of trial.

After hearing from both parties at the Section 6(a) hearing, the Court must rule, first, on whether the classified information identified by the defense is relevant under the standards of Fed. R. Evid. 401. Second, if the Court finds that the classified information is relevant, it must then rule on whether it is admissible. These findings by the Court must be put into the form of a written order.

Substitution Pursuant to Section 6(c)

Section 6(c) is of particular importance to the AUSA and you as the criminal investigator. Just as substitutions and redactions may be permitted as to the discovery material, the same applies to classified material that the Court rules to be relevant and admissible at trial. In that event, the government has the options of "substituting" and "redacting" pursuant to Section 6(c) of

CIPA. 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. The Court must grant that motion if the "statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specified classified information."

But what do you do if the Court rejects your proposed substitutions? The answer is that you must tee up the issue for resolution by the Attorney General who will then have two options: (1) order the case to be dismissed; or, (2) file an affidavit effectively prohibiting the use of the contested classified information. At that point, the Court may impose sanctions against the government, which may include striking all or part of a witness' testimony, resolving an issue of fact against the United States, or dismissing part or all of the indictment.

Section 7 - 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, imposing sanctions for nondisclosure of classified information, or 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 classified information that the court orders the government to divulge to the defendant or to others as well as classified information already possessed by the defendant which he or she intends to disclose to unapproved people. Such appeal is ex parte and en camera to the appropriate Circuit Court of Appeals.

Section 8 - 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.

An issue of utmost importance to the intelligence community is that of public testimony at trial by an employee of the one of the agencies making up that community. For certain of the IC agencies, the answer is always the same: its agents will not testify. Others are not as adamant on the issue. Regardless, if you and your AUSA want an IC agent to testify, it will not be an easy matter for which to obtain approval, either from DOJ or from the agency at issue. So, the lesson is that such testimony should be by far the exception rather than the rule.

III. CONCLUSION

CIPA has proven to be a wonderful tool for criminal investigators, agents, and prosecutors, as well as for the agencies of the Intelligence Community. It represents what objectively may be called a compromise between (1) allowing a defendant to threaten disclosure classified information as a strategy for inducing the government to abandon its criminal prosecution of him for fear of such disclosure, and (2) allowing the government to withhold classified evidence from a criminal defendant merely because of its sensitivity and without consideration of the evidence would be relevant and admissible in support of a defendant’s defense.

In all events, it is important that you remember that CIPA does not change the scope of the government's duty of discovery. Rather, CIPA changes how the government goes about meeting that right of the defendant. When all is said and done, the defendant's ability to defend his case must have been substantially ***unaffected*** by the fact that classified documents and/or information were a part of the case. If that may fairly be said, the Due Process Clause of the Fifth Amendment requires no more, and the defendant has been given a fair trial.

From: (b)(6) [redacted]
Sent: Thursday, December 3, 2020 9:10 AM
To: (b)(6) [redacted]
(b)(6) [redacted]
Cc: (b)(6) [redacted]
Subject: RE: FOIA_21-008

Thank you.

From: (b)(6) [redacted]
Sent: Wednesday, December 2, 2020 9:48 AM
To: (b)(6) [redacted]
(b)(6) [redacted]
Cc: (b)(6) [redacted]
Subject: RE: FOIA_21-008

Good morning (b)(6) [redacted]
Not yet, but I just sent out another request and should know if anyone knows where it is by the end of the day.

Thanks,

(b)(6) [redacted]

From: (b)(6) [redacted]
Sent: Wednesday, December 2, 2020 9:42 AM
To: (b)(6) [redacted]
(b)(6) [redacted]
Cc: (b)(6) [redacted]
Subject: RE: FOIA_21-008

Hi (b)(6) [redacted]

Just touching base on the below. Have you been able to locate the full document?

Sincerely,

(b)(6)

From: (b)(6)
Sent: Wednesday, November 18, 2020 9:14 AM
To: (b)(6)
Cc: (b)(6)
(b)(6)
Subject: RE: FOIA_21-008

Good morning (b)(6)

I was able to locate a reference to the item (b)(6), which seems to include an excerpt, but I could not locate the full item itself. I'm going to ask my folks if they are familiar with this, and will also reach out to (b)(6) who wrote the article in the Informer, to see if he knows more about it.

It is on P. 3 and 4 of the attached Informer from 2007.

(b)(6)

From: (b)(6)
Sent: Tuesday, November 17, 2020 3:25 PM
To: (b)(6)
Cc: (b)(6)
(b)(6)
Subject: FOIA_21-008

Good afternoon,

Please see FOIA request from (b)(6).

(b)(6) it also seems that the full article is no longer available on the FLETC.gov website.

Please provide any responsive records to our office NLT November 27 ,2020. If there are a voluminous amount of records, please contact our office for a SharePoint link to upload the records.

Please do not forward this email should you feel the records reside in another office, please contact our office and advise.

Should you have any questions, please feel free to contact me or (b)(6)

Thank you,

(b)(6)