

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,

v.

STEPHEN JIN-WOO KIM,

Defendant.

Criminal No. 10-225 (CKK)

ORDER

(October 28, 2013)

Presently before the Court is Defendant's [170] Motion to Strike the Government's *Ex Parte, In Camera*, Under Seal Classified Addendum to its First Motion for Hearing Under Seal Pursuant to CIPA Section 6(a). On September 18, 2013, the Government filed a Motion for a Hearing Under Seal Pursuant to Section 6(a) of the Classified Information Procedures Act, which set forth its objections to the introduction at trial of certain classified information identified by the Defendant in his First CIPA Section 5 Notice. Along with this Motion, the Government filed with the Court an *Ex Parte, In Camera*, Under Seal Classified Addendum. On October 11, 2013, Defendant moved to strike this Addendum with his present motion. At the request of the Court, the Government filed its [178] Opposition to Motion to Strike and Defendant filed his [182] Reply in Support of the Motion to Strike on an expedited basis. Upon consideration of the parties' submissions, the relevant legal authorities, and the record as a whole, the Court DENIES Defendant's [170] Motion to Strike the Government's *Ex Parte, In Camera*, Under Seal Classified Addendum to its First Motion for Hearing Under Seal Pursuant to CIPA Section 6(a).

The Government states – and the Court's review of the *ex parte* filing confirms – that the Classified Addendum has been submitted for the limited purpose of establishing the classified

information privilege for a narrow subset of classified information noticed by the Defendant. The basis for the privilege is grounded in *other* classified information that has not been disclosed to the defense as part of discovery on the issues involved in this case. Rather, the Addendum supplies additional classified information that provides the context necessary for the Government to establish the privilege over a portion of the classified information noticed by the Defendant for use at trial. Although CIPA does not make explicit provision for the Court's consideration of *ex parte* materials at the Section 6(a) stage, the Government points out that such *ex parte* proceedings are not prohibited at this stage by the text of the statute. Rather, the Government contends, CIPA leaves room for the Government to rely on *ex parte, in camera* review as part of the process for establishing an applicable privilege, here the classified information privilege.

Having reviewed the Addendum, the Court agrees with the Government, and will permit this *ex parte* filing for the limited purpose of establishing the classified information privilege over certain classified information noticed by Defendant in his First CIPA Section 5 filing. First, the D.C. Circuit has sanctioned the consideration of *ex parte, in camera* filings in ruling on the classified information privilege. *See United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989) (noting, albeit in the CIPA Section 4 context, that “the Court should determine if the assertion of privilege by the government is at least a colorable one” including through *ex parte, in camera* review). *See also United States v. Klimavicious-Viloria*, 144 F.3d 1249, 1261 (9th Cir. 1998) (While “[e]x parte hearings are generally disfavored, . . . [i]n a case involving classified documents, however, *ex parte, in camera* hearings in which government counsel participates to the exclusion of defense counsel are part of the process that the district court may use in order to decide the relevancy of the information.”) (citing *Yunis*, 867 F.2d at 620). Indeed, such consideration of *ex parte, in camera* filings is consistent with the general practice that allows for

such review when evaluating privilege. For example, “[t]he standard practice when evaluating a claim that the state secrets privilege applies is to conduct *in camera* and *ex parte* review of documents.” *Doe v. Tenet*, 329 F.3d 1135, 1152 (9th Cir. 2003), *rev’d on other grounds*, *Tenet v. Doe*, 544 U.S. 1, 125 S.Ct. 1230, 161 L.Ed.2d 82 (2005). *See also In re Sealed Case*, 494 F.3d 139, 144 (D.C. Cir. 2007) (“On the basis of its review” of “the *ex parte, in camera* submission” “the district court concluded that national security would be compromised if the portions of the IG reports for which the United States claimed a privilege were disclosed.”). Even outside of the national security context, *ex parte, in camera* submissions are used to prevent the proponent of a privilege from having to divulge additional privileged information in support of its privilege. *See, e.g., In re Grand Jury Subpoenas dated March 19, 2002 and August 2, 2002*, 318 F.3d 379, 386 (2d Cir. 2003) (describing the presentation of documents for *in camera* review as a “practice both long-standing and routine in cases involving claims of privilege”); *Abourezk v. Reagan*, 785 F.2d 1043, 1061 (D.C. Cir. 1986) (“When one side, seeking to block consideration of relevant matter, asserts an evidentiary privilege, the court may inspect the evidence *in camera* and alone for the limited purpose of determining whether the asserted privilege is genuinely applicable.”).

Second, other courts have made clear that the Government is entitled to invoke applicable privileges at the CIPA Section 6(a) stage. *See United States v. Zettl*, 835 F.2d 1059, 1066-67 (4th Cir. 1987) (“the state secret and informer’s privilege should be asserted in the 6(a) hearings,” but also can be raised during CIPA Section 6(c) proceedings). This second point is supported by the text of Section 6(a), which allows the Court, at the request of the Government, “to conduct a hearing to make *all* determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceeding.” 18 U.S.C. App. 3 §6(a) (emphasis added). The decision as to whether a specific document is

protected by an applicable privilege is by definition a decision as to the “admissibility” of this document. *See, e.g., Montana v. Egelhoff*, 518 U.S. 37, 42, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996) (“The accused does not have an unfettered right to offer evidence that is incompetent, privileged, or otherwise inadmissible.”) (quoting *Taylor v. Illinois*, 484 U.S. 400, 410 (1996)) (emphasis added). Accordingly, pursuant to both of these principles, the Court concludes that in this case, the Government is entitled to submit *ex parte, in camera* filings containing additional classified information at the CIPA Section 6(a) stage for the limited purpose of permitting the Court to rule on the invocation of the classified information privilege.

Defendant devotes much of his motion and reply to the argument that CIPA Section 6(a) does not explicitly provide for the *ex parte* submission made here by the Government, in contrast to other provisions in CIPA, namely Sections 4 and 6(c), which do explicitly provide for *ex parte* submissions by the Government. *See* 18 U.S.C. App. 3 §§ 4, 6(c). In support of this contention, Defendant invokes (and relies primarily on) the Supreme Court’s statement in *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983), that “where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” Yet, in declining to apply this presumption as a matter of course in subsequent cases, the Supreme Court has cautioned that the *Russello* presumption “should not be elevated to the level of interpretive trump card.” *Field v. Mans*, 516 U.S. 59, 67, 116 S.Ct. 437, 133 L.Ed.2d 351 (1995). Here, as discussed, there is reason to believe that although Congress failed to make explicit provision for *ex parte* proceedings in the text of Section 6(a), Congress did not intend to exclude such proceedings in all cases, such as where necessary to establish the classified

information privilege.¹ This Court notes that it is not making a blanket statement that *ex parte* proceedings are permissible generally at the CIPA Section 6(a) stage. Rather, because of the practice of using *ex parte* proceedings in assessing privilege, as well as the fact that such a privilege can be asserted at the Section 6(a) stage, the Court will permit the Government's *ex parte* filing in this particular instance, where it is purportedly necessary to establish the classified information privilege.

As other members of this court have noted, “[t]he CIPA does not provide a detailed roadmap for courts to follow; in fact, the course is primarily uncharted.” *United States v. Libby*, 429 F.Supp.2d 18, 22 (D.D.C. 2006), *as amended by* 429 F.Supp.2d 46 (D.D.C. 2006). “CIPA is a procedural statute, and the legislative history of it shows that Congress expected trial judges to fashion creative solutions in the interests of justice for classified information problems.” *United States v. North*, 713 F.Supp. 1452, 1452 (D.D.C. 1989) (citing H.R. Conf. Rep. No. 96-1436 (96th Cong., 2nd Sess. 11, 14 (1980), U.S. Code Cong. & Admin. News 1980, p. 4294). Accordingly, “in crafting the process the parties will be required to follow,” the Court must “endeavor to properly balance the defendant’s right to receive a fair trial and the government’s need to protect classified information.” *Libby*, 429 F.Supp.2d at 22.

In this case, these practical considerations similarly support the Court’s conclusion. There is little prejudice to Defendant from allowing the Court to conduct *in camera* review of the Government’s *Ex Parte* Classified Addendum for the limited purpose of assessing whether the

¹ Similar considerations render Defendant’s citation to *United States v. Mejia*, 448 F.3d 436 (D.C. Cir. 2006), unavailing. In *Mejia*, the D.C. Circuit noted that “CIPA §§ 5 and 6 establish procedures for participation by defendants in certain *in camera* hearings” *Id.* at 457 (citing 18 U.S.C. App. 3, §§ 5(a), 6(a)). Yet while stating the general proposition that CIPA Section 6(a) provides for participation by a defendant, *Mejia* did not conclude that the provision precludes a court from considering an *ex parte* submission by the Government where necessary in a specific case to assess a claim of privilege by the Government.

classified information privilege applies. Indeed, as discussed, such *ex parte* proceedings are common in making privilege determinations. Moreover, the Government's request for *in camera* review here is narrowly circumscribed, as the vast majority of the Government's arguments and materials in support of the Government's First CIPA Section 6(a) Motion are being filed with defense counsel. Furthermore, although lacking access to the Addendum, Defense counsel has access to the underlying classified documents over which the privilege is being claimed, and therefore has the ability to present arguments and oppose application of the privilege by arguing for this classified information's use, relevance, and admissibility. Finally, the Court notes that should a subsequent, more searching analysis of the Government's invocation of the classified information privilege reveal that the Government has unnecessarily filed the Addendum *ex parte*, the Court will promptly notify the parties.

Conversely, forcing the Government to disclose this Classified Addendum at this stage to Defendant would require the Government to disclose the *new* classified information contained in the Addendum in order to protect the classified information already provided to Defendant through the discovery process. Under Defendant's view, the Government would be forced to either abandon its invocation of privilege, or provide Defendant with contextual information that, despite its irrelevance to the merits of this case, explains the full significance of certain classified information and the potential harms its disclosure could cause to national security. Forcing the Government to this choice would defeat the very purpose of privilege.

Accordingly, for the reasons stated, the Court DENIES Defendant's [170] Motion to Strike the Government's *Ex Parte, In Camera, Under Seal Classified Addendum* to its First Motion for Hearing Under Seal Pursuant to CIPA Section 6(a). Given the specific facts surrounding the Government's submission here, the Government is entitled to submit its *ex*

