

GOVERNMENT CLAIMS CLASSIFIED INFORMATION PROCEDURES ACT ALSO APPLIES TO UNCLASSIFIED INFORMATION

The government's making outrageous secrecy claims again, this time in the Thomas Drake NSA leak case.

As Steven Aftergood first reported, the government is trying to protect unclassified information using the CIPA process, basically making substitutions for information that its own expert says is not classified. They're doing this by citing the National Security Agency Act, which protects National Security Agency information in civil cases; for precedent, they're citing a bunch of civil cases, primarily FOIA. In other words, they're trying to use civil standards to gain an advantage in a criminal case, using a tool the name of which—*Classified* Information Procedures Act—makes clear that it applies only to classified information.

Just as interesting as yet another example of the government abusing legal process to try to expand government secrecy is what appears to be their goal.

The defense explains that the government dumped this claim on the defense after the preliminary CIPA discussion happened, basically just informing the defense it would provide substitutions for unclassified information by actually proposing substitutions.

Of the government's proposed substitutions, roughly a quarter of it substituted unclassified

information.

Among the objections noted by the defense was the fact that the government had proposed a significant number of substitutions or redactions for unclassified information, a measure that CIPA does not permit or contemplate. This included information in the government's own exhibit binder that its classification expert has deemed unclassified. The defense estimated that approximately 25% of the proposed substitutions were for unclassified information.

And it appears that the government is trying to obscure unclassified information in five documents that—the indictment alleges—Drake improperly retained.

The proposals included substitutions/redactions for unclassified information in the five allegedly classified documents charged in the willful retention counts.

The indictment describes those five documents this way:

- A classified email entitled "What a Success"
- A two-page classified document deemed "the Regular Meetings" document
- A four-page document "bearing the features of an email" titled "Volume is our Friend"
- A three-page titled "Trial and Testing"
- A five-page email titled "the Collections Sites"

Now, the fact that the government is trying to substitute information for unclassified information from these five documents is crucial to the way the other charges piggyback on the charges relating to each of these documents. In addition to four false statement charges and one obstruction charge that hinge on Drake's claims about whether the information he took was classified, one of the false statement charges pertains to Drake's claim that he only cut and paste unclassified information into a Word document.

As the defense notes (complaining that they had to reveal their defense strategy during the CIPA substitution hearings), they intend to cross-examine the government's expert about whether this stuff is really classified.

During the four-day substitution hearing, the defense continually noted its objection to the substitution of unclassified information considered "protected material" by the government. When asked by the Court to respond to the proposed substitutions, the defense was required to reveal its strategy, particularly as it relates to the cross-examination of the government's expert, Ms. Murray. This, too, significantly prejudiced Mr. Drake and gave the government undeserved insight into defense strategy, which will not be reciprocated.

As it happens, when the defense first got the government's binder full of evidence, it had Murray's notes explaining the basis for her decisions on what was and was not classified.

On April 25, 2011, the government provided the defense with a binder of classified exhibits that it intends to introduce at trial. The exhibits in the binder contained both classified and unclassified information. Significantly, the government's exhibits also contained

numerous handwritten annotations by its classification expert, Ms. Catherine Murray, that reflect Ms. Murray's opinion about which portions of the documents she deems classified and which portions of the documents she deems unclassified.

In other words, it seems the defense planned to (and did not object to the evidence in the binder based on that plan) to cross-examine Murray on the substance of her decisions about what was and was not classified in the documents Drake is alleged to have illegally retained and copied. It goes to the heart of the case against Drake. But the government wants to hinder the defense efforts by making sure that even things Murray decided were unclassified can't be revealed in raw form to the jury.

It almost makes you wonder whether they hadn't checked with their own experts before charging Drake, and belatedly discovered that much of it—according to their own expert—is not classified, and are now trying to endow that unclassified information with additional gravity by hiding it behind CIPA substitutions.