



U.S. Department of Justice

Office of Legislative Affairs

Assistant Attorney General

Washington, D.C. 20530

March 9, 2010

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This responds to your letter, dated October 26, 2009, to the Attorney General concerning the "need-to-know" principle and access to classified information by private counsel in connection with representation of a client. You note that counsel for Jonathan Pollard were not given access to classified information to pursue a petition for executive clemency.

Section 1.1(h) of Executive Order 12968 (Federal Register Vol. 60, No. 151 (August 7, 1995), as amended by EO 13467 (2008) defines "need-to-know" as "a determination made by an authorized holder of classified information that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function." As you note in your letter, the District of Columbia Circuit found that it lacked jurisdiction to compel access to classified documents in the context of a petition for clemency because clemency is within the exclusive power of the President. Further, counsel representing Pollard at the time of his plea and sentencing had access to the classified information they needed in their efforts to rebut the government's case.

You asked that we consider other contexts in which an individual might request and be denied access to classified information. Generally, in all federal criminal prosecutions, defense counsel and defendant access to classified information is governed by the Classified Information Procedures Act (CIPA), 18 U.S.C. App. 3 §1-12. CIPA's fundamental purpose is to "harmonize a defendant's right to obtain and present exculpatory material [at] trial and the government's right to protect classified material in the national interest." *United States v. Pappas*, 94 F.3d 795, 799 (2d Cir. 1996). CIPA does not substantively alter any of the various rules providing for discovery and producing information to the defense in criminal cases. Rather, CIPA applies preexisting general discovery law in criminal cases to classified information and restricts discovery of classified information to protect the government's well recognized compelling interest in protecting national security interests. See *Baptista-Rodriguez*, 17 F.3d at 1363-64; *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1261 (9th Cir. 1998); *United States v. Yunis*, 867 F.2d 617, 621 (D.C. Cir. 1989). Accordingly, CIPA is a procedural framework

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applying the traditional rules of discovery under which the government is not required to provide criminal defendants with information that is neither exculpatory nor, in some way, helpful to the defense." *United States v. Varca*, 896 F.2d 900, 905 (5th Cir. 1990).

CIPA provides that the government, upon sufficient showing, may seek court authorization to withhold, delete or make a substitution for otherwise discoverable classified information only when such information is neither relevant nor helpful to the defense nor essential to a fair determination of the case. Thus, the government may withhold discoverable information from the defense only when permitted by the court. If the court finds that the classified information must be produced to the defense, CIPA presents the government with limited options. These options include producing the classified information or an acceptable substitute or stipulation to the defense, seeking appellate review of the court's order or withholding the information or incurring a court imposed sanction for doing so, including, potentially, dismissal of charges. In sum, in federal criminal prosecutions CIPA provides a procedural framework wherein defendants receive that classified information they need and to which they are entitled to present a defense.

We hope this information is helpful. Please do not hesitate to contact this office if we may be of assistance with this, or any other matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Ronald Weich".

Ronald Weich
Assistant Attorney General