

Federal Procedure, Lawyers Edition

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§ 22:1198. Generally

The Classified Information Procedures Act^[1] (CIPA) provides for the protection of classified information that the defendant seeks to discover in a federal criminal prosecution. The statute was designed to establish procedures to harmonize defendant's right to obtain and present exculpatory material upon trial and the government's right to protect classified material in the national interest,^[2] and it seeks to minimize the problem of "graymail," involving a threat by the defendant to disclose classified information in the course of a trial, by requiring a ruling on admissibility of classified information before trial.^[3] Significant security concerns may justify denying a defendant who is charged with conspiracy to commit acts of terrorism transcending national boundaries access to certain classified information.^[4]

CIPA was not intended to expand the traditional rules of criminal 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.^[5]

As required by CIPA,^[6] the Chief Justice prescribed regulations (hereinafter "the Burger Regulations") establishing security procedures for the protection of classified information in the custody of the federal courts.^[7]

CIPA and its regulations do not violate the principle of separation of powers. Therefore, the executive branch may conduct reasonable background investigations of judicial personnel, pursuant to Burger Regulation 4, subject to district court review, before such personnel are cleared to work on a case involving classified information.^[8]

CIPA applies to classified testimony as well as to classified documents; it defines classified information as including information and material subject to classification or otherwise requiring protection from public disclosure, which information includes knowledge derived from one's work experience. Therefore, a person's testimony about his or her work which involves classified information falls under the restrictions of CIPA.^[9] Technical data on a transmitting device worn by an undercover officer, however, is not classified information and therefore CIPA does not apply in such situations.^[10] If the government does not have information that particular materials are classified,

the materials may be introduced by the defendant at trial.[11]

The term "disclosure," as used in CIPA, encompasses both disclosure to the public and to the defendant.[12]

Observation:

[Section 9](#) of CIPA[13] and the Burger Regulations governing the manner in which courts must handle classified information in criminal proceedings do not apply in civil cases.[14]

Comment:

The notice provisions of CIPA have been held not to violate due process,[15] the privilege against self-incrimination,[16] the right to assistance of counsel,[17] or the prohibition on ex post facto laws.[18] In addition, the provisions of CIPA authorizing pretrial conferences,[19] ex parte in camera proceedings,[20] the substitution of classified information procedures,[21] and the security procedures[22] have all been held to be constitutional.

FEDPROC § 22:1198

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