

# 'I'm Sorry, That's Classified.' Navigating Issues of Classified Information in White Collar Prosecutions

By Sidhardha Kamaraju and Aaron Wiltse

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The interaction between classified information and criminal prosecutions has long been a part of national security prosecutions, such as cases involving terrorism or espionage. But in a string of high profile criminal cases, including the prosecutions of Senator Robert Menendez, New York City mayor Eric Adams, deputy chief of staff to the governor of New York, Linda Sun, and popular American rapper Prakazrel Samuel Michel, prosecutors have disclosed that the criminal charges implicate classified information.

Indeed, issues related to classified information have popped up in criminal prosecutions involving insider trading. Given that these issues are creeping further and further into white collar criminal prosecutions, it is critical for defense counsel to understand the ways in which federal courts handle classified information, and to be prepared to leverage those mechanisms wherever appropriate in defense of their clients.

## What is Classified Information?

Although the term is bandied about with increasing frequency due to certain recent high-profile prosecutions, the phrase “classified information”



**Sid Kamaraju, partner at Pryor Cashman.**



**Aaron Wiltse, associate at Pryor Cashman.**

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is amorphous. To be sure, it is easy to conjure images of nuclear launch codes or UFOs, but in truth, classified information can include a much wider swath of information than one might originally imagine. Put simply, “classified information” refers to information that a U.S. government agency has determined should be protected because unauthorized disclosure would cause varying levels of harm to the nation’s security. Critically, and perhaps surprisingly to some, agency designations concerning classification are given wide deference by federal courts, which

are loath to place themselves into the position of having to weigh various national security concerns that the courts are unfamiliar with.

Given the wide latitude afforded to agencies, it is hardly surprising that material that is routinely part of discovery in criminal cases, such as statements of a defendant to U.S. government agents, intercepted communications, or source information, may be classified. While the fact that information is classified does not automatically place it outside the scope of the government's discovery obligations, it does mean that the information will be subject to a heightened level of protection under the Classified Information Procedures Act, 18 U.S.C. App. 3, customarily referred to as "CIPA."

As any fan of spy movies will know, only individuals with the appropriate level of security clearance can review classified information. That limitation persists in criminal prosecutions as well—counsel does not have a right to review relevant and discoverable classified information does not entitle counsel simply by virtue of their representation of a defendant in a criminal case. Rather, defense counsel must seek to obtain security clearance (a process that can take months to complete) or counsel with the appropriate clearance must join the defense team. If there is a possibility that classified information will be at issue in a prosecution, a defendant would be wise to consult with experienced CIPA counsel who have appropriate security clearances in place already.

## CIPA

CIPA is the principle statute concerning the use of classified information in criminal prosecutions. CIPA's purpose is to balance a criminal defendant's constitutional and statutory discovery rights with the government's national security interests. The statute is thus constructed to give the government multiple opportunities to protect classified information that would otherwise be

discoverable in a criminal prosecution. Before the Department of Justice commences prosecutions that involve classified information, prosecutors typically review the relevant classified information and adopt a plan for how to address it under CIPA. At the same time, defense counsel who are experienced with the statute's framework can also leverage it to their client's benefit.

### A. The Pre-Trial Phase

The first step in such a plan is generally to have a sealed, *ex parte* conference under Section 2 of CIPA, at which the government describes for the court the classified information at issue and the government's proposal for handling such information. That proposal typically includes some combination of two paths with respect to any particular piece of classified information.

First, the government can propose to simply produce the information to the defendant, either in classified form or after declassification. When the government elects to produce classified discovery, Section 3 of CIPA provides for the entry of a protective order specifically tailored to classified information.

Second, the government can move under Section 4 of CIPA to either withhold, or "delete," classified information from discovery or to disclose the classified information to the defense in some substitute form (think all of those documents in the movies with only every third word left unredacted).

If the government chooses to move under Section 4, then it has a right to do so *ex parte*. In the Second Circuit, the government has the burden in a Section 4 motion to establish that the classified information is not "relevant or helpful to the defense," and that, even if it is, national security interests outweigh the defendant's interest to the information. The government may, and at times does, argue that even

if the defendant is entitled to some part of the classified information, the government should be able to package that disclosure in a form that protects more sensitive or purportedly irrelevant classified information from disclosure.

As noted, Section 4 motions are routinely made *ex parte*, which means that the court is called upon to make determinations as to what may be helpful to a defendant without the benefit of argument from defense counsel. As one court put it, the court was called upon to put itself into “defense counsel’s shoes” when evaluating the government’s Section 4 motion.

Accordingly, to properly arm the court, it is important that defense counsel—upon learning of the government’s intention to file a Section 4 motion—leverage CIPA’s Section 2 conference provisions for the defense’s benefit. Specifically, defense counsel should consider requesting their own *ex parte* Section 2 conference.

At that conference, counsel can describe the defense’s theories, so that the court has them in mind when considering the government’s Section 4 arguments. Moreover, because that conference is held *ex parte*, counsel may have the freedom to be more explicit as to particular government allegations that would be undercut by certain information, without fear of prematurely revealing defense trial strategy (although more on that later).

If the government does produce classified discovery, cleared defense counsel will have an opportunity to review it, typically in a secure facility in the courthouse (often known as a “SCIF”). Under Section 5 of CIPA, the defense must then identify, with “specificity” and “particularity,” what portions of the classified information the defense intends to introduce at trial.

Importantly, that requirement applies not only to documentary evidence but also witness testimony. The defense must serve its Section 5 notice on

both the court and the government, meaning that the government may receive pre-trial disclosure of a considerable amount of defense strategy. The defense must carefully balance the value of any classified information against the potential harm that can result from prematurely revealing defense strategies to the government.

Once the defense gives its Section 5 notice, CIPA Section 6 provides the government with essentially two bites at the apple to prevent the defense from using the information in its produced form. First, Section 6(a) empowers the government to essentially file a motion in *limine* seeking to preclude the use of the classified information based on well-worn evidentiary principles, such as relevance, hearsay, or Rule 403 prejudice.

Unlike Section 4 practice, under Section 6, the defense is afforded an opportunity to respond. Second, assuming that the defense can overcome the government’s evidentiary objections, CIPA Section 6(c) permits the government to file a second motion arguing that the government should be permitted to summarize the relevant classified information, and excise what the government argues is irrelevant, for the defendant’s use.

Section 6 is ultimately intended to produce a version of classified information for use at trial that the government can live with. There are times, however, where courts find that the defense is entitled to more than the government can swallow. In those cases, it is important to remember that the court cannot order the government to declassify the material. Rather, CIPA Section 6(e)(2) empowers the court to enter a number of sanctions against the government, including preclusion of evidence, striking of certain counts, or even dismissal of the indictment. Where that happens, the government has a right to an expedited interlocutory appeal under CIPA Section 7.

## B. Trial

While the pre-trial phase of classified litigation is a grind, defense counsel cannot afford to lose sight of classified information issues once trial nears. For one, CIPA permits the government to introduce evidence at trial that remains classified, meaning there may be complicated issues of public access to the courtroom or to the trial evidence.

Moreover, because classified information is generally marked as such—including, where appropriate, with flashy yellow “Top Secret” stickers—defense counsel has to be mindful of what signal that marking sends to the jury. For example, does it improperly bolster the government’s standing in the jury’s mind, because some of the government’s evidence is classified?

The same is even true of evidence that has been declassified: in those cases, the government’s practice is often to simply strike through the original classification marking, leaving, for the jury to see, that the information was once classified. Of course, the nature and likelihood of such harm has to be evaluated in the context of a specific case, but defense counsel must think through such issues and raise them with the court promptly, or risk waiving them.

Similarly, as noted above, CIPA Section 5 governs not just documentary evidence, but witness testimony. As any trial practitioner knows, potential lines of cross-examination frequently do not emerge until after the government has produced its § 3500 material (*i.e.*, witness statements), which typically does not happen until close to trial.

As a result, it may not be apparent until just before trial that classified information may be implicated by a witness’s cross-examination. CIPA mandates that the defense give Section 5 notice as soon as

practicable—indeed, for example, in *United States v. Schulte*, 17 Cr. 548 (PAC) (S.D.N.Y.), there was litigation shortly before and during trial concerning the potential use of classified information in cross-examination. Failure to give such notice could lead to waiver of the line of cross-examination.

Moreover, as a strategic matter, it is important for defense counsel to press the matters when appropriate, because it may cause the government to reconsider pursuing a potential line of inquiry, or calling a witness, that may be damaging to the defense’s case.

## Conclusion

Litigating issues of classified information in criminal prosecutions is a specialized field that often requires an expert. But while that expertise is important, it is equally true that the types of cases in which classified information is at issue is broader than people may think—it now spans everything from securities fraud to public corruption to money laundering to theft of trade secrets.

In our opinion, that trend is not likely to cease—as long as the Department of Justice continues to prosecute white collar cases involving foreign influence or actors, then there will always be the possibility that those prosecutions bump up against the American intelligence apparatus. And, where that happens, there will always be a need for savvy defense counsel to negotiate the obstacles and opportunities presented by the existence of classified information.

**Sidhardha ‘Sid’ Kamaraju** is a partner in Pryor Cashman’s white-collar defense + investigations, financial institutions, and litigation groups. **Aaron Wiltse** is an associate in the firm’s white-collar defense + investigations group.