

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re: Motion to Disclose)
Intercepted Communications)
) No. 08 CR 1010
)
)
UNITED STATES OF AMERICA)
)
 v.) Chief Judge James F. Holderman
)
)
ROD BLAGOJEVICH and)
JOHN HARRIS)

**Motion to Disclose Intercepted Communications
to the Special Investigative Committee
of the Illinois House of Representatives**

The UNITED STATES OF AMERICA, by its attorney, Patrick J. Fitzgerald, United States Attorney for the Northern District of Illinois, respectfully submits this Motion to Disclose Intercepted Communications to the Special Investigative Committee of the Illinois House of Representatives, and in support of the motion, states as follows:

Statement

1. On October 29, 2008, pursuant to Title 18, United States Code, Section 2518, this Court entered an order authorizing the interception of oral communications, for a thirty-day period, on the residential phone of Governor Rod Blagojevich. On November 26, 2008, this Court (through the then-acting chief judge) extended the authorization for another thirty-day period. In November 2008, this Court authorized the interception of oral communications on the cellular phone of Lobbyist 1. Special Agents of the Federal Bureau of Investigation monitored and recorded communications over these target phones.

2. On December 9, 2008, agents of the Federal Bureau of Investigation arrested Governor Blagojevich pursuant to a criminal complaint. The criminal complaint charges Blagojevich with two counts:

a. First, Blagojevich is charged with conspiring to defraud the citizens of Illinois of their right to his honest services, in violation of the mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343, 1346, and 1349. (08 CR 1010, Docket Entry No. 1.) Specifically, the complaint charges that Blagojevich, together with others, obtained and attempted to obtain financial benefits for Blagojevich, members of his family, and third parties including Friends of Blagojevich, in exchange for appointments to state boards and commissions, state employment, state contracts, and access to state funds. *Id.* ¶ 13(a), ¶¶ 16-68. It is also charged, as part of that continuing honest services fraud scheme, that Blagojevich conspired and attempted to use his authority to appoint a United States Senator for the purpose of obtaining personal benefits for Blagojevich, including, among other things, appointment as Secretary of Health & Human Services in the President-elect's administration, and alternatively, a lucrative job which Blagojevich and others schemed to induce a union to provide to him in exchange for appointing an individual whom Blagojevich believed the union officials favored. *Id.* ¶ 13(c), ¶¶ 86-116.

b. Second, Blagojevich is charged with corruptly soliciting and demanding the firing of Chicago Tribune editorial board members who had been critical of Blagojevich, in exchange for the awarding of millions of dollars in financial

assistance from the State of Illinois, 18 U.S.C. § 666(a)(1)(B) and § 2. *Id.* ¶ 13(b), ¶¶ 69-85.

3. The Illinois Constitution grants the state House of Representatives “the sole power to conduct legislative investigations to determine the existence of cause for impeachment” Ill. Const., Article IV, § 14. On December 15, 2008, the Illinois House of Representative adopted resolution HR1650 by a vote of 113 to zero. The resolution created a Special Investigative Committee “for the purpose of (i) investigating allegations of misfeasance, malfeasance, nonfeasance, and other misconduct of Governor Rod R. Blagojevich and (ii) making a recommendation as to whether cause exists for impeachment.”¹ The resolution requires the Committee, which is composed of 21 members of the House, to submit a report to the full House before the expiration of the 95th General Assembly at midnight on January 14, 2009.

4. The United States has received a bipartisan request from the Committee for the disclosure of various materials, including intercepted communications.² The Committee’s leadership and staff have represented to the government that they seek such disclosure in the interest of making a fully-informed investigation and report, but without interfering with the federal criminal investigation or prosecution.

5. After careful deliberation, the government applies for authorization to disclose a limited number of intercepted communications in redacted form. Although

¹The text of HR1650 is attached as Exhibit 1.

²A copy of the letter from the Committee is attached as Exhibit 2.

many relevant communications were intercepted, the government believes that, on balance, it is appropriate to seek the disclosure of four intercepted calls, in redacted form, to the Committee, and that disclosure of the calls by themselves would not interfere with the ongoing criminal investigation. These calls bear on a discrete episode of criminal conduct alleged in the complaint affidavit, specifically at Paragraph 68(e), and the calls are evidence of a criminal offense that the government was authorized to monitor under the wiretap order. Under separate cover and under seal, the government provides to this Court for its *ex parte, in camera* review, both a set of the full audio recordings of these four calls (Exhibit 3) and a set of proposed redacted recordings (Exhibit 4) omitting portions of the conversations not material to the episode described in Paragraph 68(e) of the complaint affidavit.³

6. The United States takes no position on whether or not the Committee should recommend impeachment, whether the House should file articles of impeachment, or, if articles of impeachment are filed, whether the Senate should convict on any charges. By filing this motion, the United States presents only questions of law for this Court's consideration and resolution, namely, whether the Special Investigative Committee is qualified to receive disclosure of, and thereafter to use, intercepted communications under 18 U.S.C. § 2517(1) and (2).

³Similarly, the government will also provide to the Court, *ex parte* (at least for the time being) and under seal subject to a protective order, draft transcripts of the full and the redacted calls when the drafts are completed.

Legal Analysis

7. As discussed more fully below, although Title 18, United States Code, Section 2510, *et seq.*, does not necessarily require the government to obtain judicial authorization before disclosing intercepted communications to other law enforcement or investigative officers, the government does so here out of an abundance of caution and in order to afford the interceptees in the recorded calls an opportunity to be heard and to object, if they so choose, under 18 U.S.C. § 2518(10)(A). Section 2518(10)(A) permits any “aggrieved person,” that is, an interceptee,⁴ to file a motion to suppress the contents of an intercepted communication.

8. As a threshold matter of procedure, the government requests authorization to disclose, under seal and subject to a protective order, the full and redacted versions of the four recordings to those interceptees who participated in the respective calls. *See* § 2518(10)(A) (empowering court to order disclosure of those intercepted communications that, “in the interests of justice,” are necessary to litigate suppression motion). If the Court were to grant such authorization, each interceptee would receive (under seal and subject to a protective order) only those calls in which

⁴The definition reads in full: “aggrieved person’ means a person who was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed.” 18 U.S.C. § 2510(11).

he participated.⁵ The proposed protective order would be submitted to the Court via electronic mail pursuant to the Court's case management procedures.

9. Section 2517(1) of Title 18 authorizes an investigative or law enforcement officer to disclose the contents of intercepted communications to another "investigative or law enforcement officer" for the proper performance of his or her duties:

Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire, oral, or electronic communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

18 U.S.C. § 2517(1).

10. Section 2510(7) defines "investigative or law enforcement officer" as "any officer of the United States or of a State or political subdivision thereof, who is empowered *by law to conduct investigations* of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses." 18 U.S.C. § 2510(7) (emphasis added).

11. For reasons firmly grounded in statutory text and case precedent, the government believes that state legislative officials and their staff who are investigating whether to recommend impeachment qualify as "investigative or law enforcement

⁵The government would have no objection to disclosing all four of the *redacted* versions of the calls to all of the interceptees, including those who were not a party to all four calls. If disclosure to the Special Investigative Committee is ultimately approved, the four calls will likely be viewed together as relating to one alleged criminal episode, and it may thus be appropriate for the interceptees on any one call to receive copies of all four redacted calls in order to respond to this motion.

officer[s]” to whom federal officers may disclose intercepted communications in the proper performance of their duties.

a. First, the text of § 2510(7) is broad, and includes not only those officers who have power “to make arrests,” but rather also includes those empowered “by law” – with no limitation to *federal* law – “to conduct investigations” of federal offenses. Exercising authority founded on the Illinois Constitution, the House of Representatives enacted – “by law” – the resolution which created the Special Investigative Committee and granted the Committee comprehensive authority to “investigat[e] allegations of misfeasance, malfeasance, nonfeasance, and other misconduct of Governor Rod R. Blagojevich.” The broad mandate of the Illinois Constitution and the House resolution encompasses the investigation of alleged federal crimes committed by Blagojevich.

b. Federal courts have construed the scope of an officer’s investigation as including federal offenses so long as the federal offenses may be the predicate for action by the investigatory authority. For example, the Eleventh Circuit affirmed an order permitting disclosure of intercepted communications to the federal House Judiciary Committee, which was investigating whether to recommend impeachment of a federal judge in Florida. *In re Grand Jury Proceedings*, 841 F.2d 1048, 1054 (11th Cir. 1988), affirming *In re Grand Jury 86-3 (Miami)*, 673 F. Supp. 1569, 1574 (S.D. Fla. 1987). The House Judiciary Committee was qualified to receive disclosure of intercepted communications because it was investigating possible impeachment of the judge, and impeachment may be based on the commission of a federal offense.

c. Similarly, the Sixth Circuit held that where an attorney disciplinary commission could disbar a lawyer for professional misconduct, including the commission of a federal offense, investigation of the federal offense is within the investigating commission's authority. *In re Electronic Surveillance*, 49 F.3d 1188, 1190 (6th Cir. 1995). So too with Pennsylvania State Police officers who were conducting, on behalf of the state's gaming control board, a background investigation of an individual who had applied to the gaming board for a gambling license. *In re Application of United States*, 431 F. Supp.2d 544, 547 (E.D. Pa. 2006).

12. Because the Special Investigative Committee impeachment investigators qualify to receive the disclosure of the four intercepted communications that the government seeks to disclose, the Committee may further "use" the communications "to the extent such use is appropriate to the proper performance of [their] official duties." 18 U.S.C. § 2517(2). Both this provision, as well as § 2517(3), permit further disclosure of the communications into the Special Investigative Committee's record, because such record is compiled as part of a "proceeding held under the authority . . . of any State or any political subdivision thereof." 18 U.S.C. § 2517(3).

a. The term "proceeding" is broad – indeed the term is modified by the word "any," which is itself a signal that Congress intended "proceeding" to take a broad meaning. The Seventh Circuit noted, in *dictum*, that § 2517(3) seems to be complementary to § 2515, which is the statutory provision that contains the general ban on the use of intercepted communications obtained in violation of Title III as evidence in "any trial, hearing, or *other proceeding* in or before any court, grand jury,

department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof . . .” 18 U.S.C. § 2515 (emphasis added) (quoted by *In re High Fructose Corn Syrup Antitrust Litigation*, 216 F.3d 621, 624 (7th Cir. 2000)). The Seventh Circuit labeled the two provisions “complementary,” stating that the word “proceeding” in § 2517(3) “seems merely a shorthand for the longer and unambiguous definition in the complementary section 2515.” 216 F.3d at 624.

b. Furthermore, the legislative history makes clear that the text means what it says, and that “proceeding” is not limited to criminal prosecutions. *In re Electronic Surveillance*, 49 F.3d at 1193 (attorney disciplinary commission is a covered proceeding) (citing Organized Crime Control Act of 1970, Pub.L. No. 91-452, § 902(b), 84 Stat. 947 (1970), and H.R.Rep. No. 91-1549, 1970 U.S.C.C.A.N. 4007, 4036)). As the Sixth Circuit explained, before 1970, the “disclosure of intercepted communications could only be made in connection with state and federal criminal proceedings. Congress amended the subsection (3) in that year to allow disclosure in *any* authorized proceeding.” 49 F.3d at 1193 (emphasis added).

c. Likewise, federal court decisions interpreting § 2517(1) in the context of disclosures to a federal House Judiciary Committee and a state gambling license commission give a broad definition to the term “any proceeding.” *See* 841 F.2d 1048, 1054; 431 F. Supp.2d 544, 547.

d. For the reasons stated above (broad statutory text, legislative history, and case precedent), the proceedings before the Special Investigative

Committee and any further impeachment proceedings should also be deemed to qualify as “any proceeding” in which the intercepted communications may be disclosed.

Conclusion

13. For all the foregoing reasons, the United States respectfully asks this Court to rule on the questions of law presented and to order that:

a. the United States is authorized to serve, under seal, copies of the full and redacted recordings on the respective interceptees, subject to a proposed protective order that the government will submit to the Court pursuant to its case management procedures;

b. the interceptees and the Special Investigative Committee shall be given an opportunity to respond;

c. after hearing from all parties, the United States is authorized to disclose to the Special Investigative Committee the four intercepted communications identified by the government and redacted as Exhibit 4; and

d. the Special Investigative Committee is authorized to use the intercepted communications as appropriate in the proper performance of official duties,

including to introduce the recordings into the proceedings of the Committee and at any further impeachment proceedings.

Respectfully submitted,

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Date: December 29, 2008

CERTIFICATE OF SERVICE

The undersigned Assistant United States Attorney hereby certifies that the following document:

Government's Motion to Disclose Intercepted Communications to the Special Investigative Committee of the Illinois House of Representatives,

was served on December 29, 2008, in accordance with FED. R. CRIM. P. 49, FED. R. CIV. P. 5, LR 5.5, and the General Order on Electronic Case Filing (ECF) pursuant to the district court's system as to ECF filers, and also served by electronic mail and/or facsimile on the following counsel for the interceptees:

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