UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
	)	Case No. CR-10-225 (CKK)
v.	)	
	)	
STEPHEN JIN-WOO KIM,	)	
	)	
Defendant.	)	

DEFENDANT STEPHEN KIM'S REVISED SECOND CIPA § 5 NOTICE

Defendant Stephen Kim, by and through undersigned counsel, respectfully submits his revised second notice pursuant to Section Five of the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. 3 § 5, and this Court's Memorandum Opinion of December 9, 2013. Pursuant to this Court's prior orders, this notice addresses several, but not all, of the core classified documents and information that defendant reasonably expects to disclose at trial as part of his defense. Defendant anticipates filing additional CIPA § 5 notices as described during the January 7th Status Hearing that will address classified information that has not been included in his first two notices, particularly in light of the fact that classified discovery remains ongoing in this case.

CIPA § 5 provides that if the defendant "reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with any trial or pretrial proceeding," the defendant shall "notify the attorney for the United States and the court in

writing." 18 U.S.C. App. 3 § 5(a). The notice shall include a "brief description" of the classified information the defendant reasonably expects to disclose.[1]

In its December 9th Memorandum Opinion, the Court set forth the following four-part definition for when a defendant "reasonably expects to disclose" information for CIPA § 5 purposes: (1) based on information presently available; (2) it is the defendant's present intention; (3) to present the information at trial; (4) with no expectation of later narrowing the information. Op. at 8. The defense respectfully objects to the fourth prong of this definition, which places an unfair burden on a defendant in a CIPA case – particularly a case such as this one in which the government has classified the vast majority of potentially relevant information provided during discovery. At this stage of the proceedings, the government has not provided the defendant with its witness list, its exhibit list, or even its Jencks material. The defendant does not know how the government intends to present its case, who it intends to call as witnesses, and what the testimony of those witnesses will entail. As a result, the defense does not know which of the documents provided in classified discovery it will need to cross-examine these witnesses, or which documents it will need with other witnesses to rebut the government's testimony. As a result, the defense cannot know whether it will need to use one document, ten documents, or

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[1] If the government objects to the disclosure, it may ask the Court to conduct a hearing under CIPA § 6(a) regarding "the use, relevance, or admissibility" of the classified information. 18 U.S.C. App. 3 § 6(a). Prior to that hearing, the government must "identify the specific classified information at issue whenever that information previously has been made available to the defendant by the United States." 18 U.S.C. App. 3 § 6(b). If the Court determines that disclosure of the classified information is warranted under Section 6(a), the government may file a motion under Section 6(c) to permit "a statement admitting relevant facts that the specific classified information would tend to prove" or "a summary of the specific classified information" as a substitute for disclosure of the information. 18 U.S.C. App. 3 § 6(c).

dozens of documents during cross-examination. Nor can the defendant yet know whether he will need to call particular witnesses in his case-in-chief, or take the stand in his own defense in order to rebut the government's evidence.[2]

Because CIPA requires the defendant to provide notice of any classified information that he reasonably expects to disclose at trial or risk forfeiting his right to use that information, see 18 U.S.C. App. 3 § 5(b), at this stage of the proceedings the defendant must notice information that may be narrowed or removed at a later time, once trial begins and the government's case is known. This does not mean that the defense is attempting to burden the Court or the government; rather, it is a function of the CIPA process and the government's decisions to classify the vast majority of evidence produced in this case and to refuse to disclose the particular witnesses, exhibits, and testimony that it intends to introduce at trial. The fourth prong of the Court's definition of "reasonably expects" appears to preclude the defense from noticing classified information that may be subsequently narrowed or removed, depending on the government's case-in-chief and defendant's decisions at trial. The defense respectfully submits that such a requirement draws no support from CIPA and infringes on his Fifth and Sixth Amendment rights. Accordingly, the defendant objects and submits that the Court should revise its definition of "reasonably expects" by removing the fourth prong.

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[2] It is well-established that a defendant in a criminal case bears no burden of proof. As a result, the notice requirements placed on a defendant by the rules of criminal procedure are very limited. While CIPA creates such a limited intrusion, it does make the disclosure obligations on the parties equal. Unlike the government in a criminal case or a plaintiff in a civil case, the defendant has no obligation to present a case-in-chief or any affirmative evidence whatsoever.

Based on defendant's understanding of CIPA § 5's requirements and the foregoing, defendant provides notice that he reasonable expects to disclose or to cause the disclosure of the classified information contained in the following items:[3]

1. Investigative questionnaires completed by [redacted] on the "List of 118"[4] who accessed the intelligence report at issue, as well as accompanying FBI cover memoranda and notes. (CLASS 334-39, 346-69, 375-553, 566-76, 580-600, 604-07, 612-17, 621-32, 636-63, 673-760, 1394-99)

2. Badge records for [redacted] on the "List of 118" who accessed the intelligence report at issue. (CLASS_1412, 1419, 1422, 1424, 1428, 1430, 1454, 1463, 1468, 1473, 1475, 1479, 1482, 1489, 1493, 1508, 1512, 1518, 1524, 1529, 1533, 1537, 1540, 1551, 1554, 1558, 1560, 1564, 1569, 1573, 1586, 1603, 1610, 1618, 1629, 1639, 1645, 1649, 1657, 1660, 1666, 1673, 1682, 1692)

3. Electronic document access records, including "drafting emails," for [redacted] on the "List of 118" who accessed the intelligence report at issue. (CLASS_1413-15, 1420-21, 1423, 1425-27, 1429, 1431-53, 1455-62, 1464-67, 1469-72, 1474, 1476-78, 1480-81, 1483-88, 1490-92, 1494-1507, 1509-11, 1513-17, 1519-23, 1525-28, 1530-32, 1534-36, 1538, 1539, 1541-50, 1552-53, 1555-57, 1559, 1561-63, 1565-68, 1570-72, 1574-85, 1587-89, 1604-09, 1611-17, 1619-1626, 1627, 1628, 1630-38, 1640-44, 1646-48, 1650-56, 1658-59, 1661-65, 1667-72,[5] 1674-81, 1683-91, 1693-96, 2884-88)

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[3] Throughout classified discovery, the government has produced revised or corrected versions of some documents bearing an "A," "B," or "C" suffix at the end of the Bates number (e.g., CLASS_3210A is a revised version of CLASS_3210). During the course of discovery alone, the government has altered the classification status of well over 100 documents that were originally produced "with incorrect classification markings." See Dkt. 153, Ex. 9. This does not include the hundreds of pages originally produced with the "treat as classified" header, without proper classification markings. To be clear, when the defendant cites a Bates range in his CIPA § 5 notices, he intends to include whatever revised versions of those documents have also been produced by the government.

[4] During the course of classified discovery in this case, the list of individuals who accessed the alleged intelligence at issue has expanded to 170 individuals.

[5] Two pages from this Bates range (CLASS_1668-69) were included in defendant's first CIPA § 5 notice as "drafting emails" or predecessor documents for the intelligence report at issue. See

(Cont'd on following page)

4. Phone records for [redacted] on the "List of 118" who accessed the intelligence report at issue. (CLASS_1385-87, 2878-81, 2920)

5. FBI 302s reflecting interviews of [redacted] on the "List of 118" who accessed the intelligence report at issue, with attachments.[6] (CLASS_370-74A, 577-79, 601-03, 608A-11, 618-20, 633-35, 1377-84, 1388-93, 2839-54, 2869-77, 2882-83, 2910-11, 2912-17)

6. The "List of 78" shown to [redacted] during an FBI interview. (CLASS_2893-2909)

(Cont'd from preceding page)

First CIPA § 5 Notice, Item 1. These pages have been included in defendant's second notice for consistency purposes, as CLASS_1667-72 also comprise the electronic document access records for [redacted].

[6] In its December 9th Memorandum Opinion, the Court urged – but did not require – the defense to narrow the amount of classified information noticed in this item. See Op. at 7-9. The defense does not know which of these potential witnesses will be called at trial, and therefore cannot know which of these reports will be necessary to refresh the recollection of a witness, to impeach a witness with a prior inconsistent statement, or to rehabilitate a witness with a prior consistent statement. For that reason – and because the government has marked all the FBI 302s as classified – the defense has noticed these reports in their entirety, as failing to do so would risk a subsequent argument by the government that the reports could not be used for these common evidentiary purposes because they had not been noticed.

If the government were to provide a witness list, it is possible that this item could be narrowed. To date, the government has not done so. The defense also notes that, in many instances, the actual reports contained in defendant's second CIPA § 5 notice consist of nothing more than a recounting of a witness's answers to the questions posed in the government's investigative questionnaires, which several employees and contractors refused to complete. The government did not object to the sufficiency of defendant's notice with respect to the written investigative questionnaires, and fails to explain why an FBI-302 containing the exact same information as the questionnaires should be treated any differently. Under CIPA § 6(b), it is the government's obligation to identify the specific classified information contained in these documents to which it objects. The government could therefore lessen the burden on the Court by identifying the specific classified information contained in these FBI 302s to which it actually objects, rather than issuing a blanket objection to the sufficiency of this section of defendant's notice. The government is certainly aware of the information contained in these documents, as they are the products of the government's own investigation in this case.

7. With respect to a [redacted] being drafted on June 11, 2009:[7]

   a. The [redacted] provided in discovery and email correspondence relating to the [redacted]. (CLASS_3085-3125, 3205-18)

   b. [redacted] classified statements to the FBI on July 12, 2012 (CLASS_3077-81).

   c. The factual basis for [redacted] statement in his 8:51 a.m. email on June 11, 2009, that he was aware that [redacted] "should be out in minutes" (i.e., the document, conversation, email, or other thing that caused [redacted] to believe that [redacted] would be "out in minutes."). The government has not provided the defendant with any discovery (including any Jencks material) indicating the basis for [redacted] assertion. Accordingly, the defense cannot at this time identify a specific classified document, e-mail, conversation, or other item that will be disclosed. The defense reasonably expects to elicit testimony at trial as to how [redacted] knew that [redacted] would be "out in minutes" as of 8:51 a.m. on June 11, and the defendant reasonably expects that such testimony may cause the disclosure of classified information.

   d. Any documents, classified communications, or classified information already known to [redacted] upon which he relied for the statement in the email that [redacted]." As with item 7(c), the government has not provided the defendant with any discovery which would indicate whether (or to what extent) [redacted] relied on (i) classified documents or information other than [redacted] for this statement, or (ii) information contained in [redacted] (or its precursor intelligence reports) prior to the time of first access identified by the government in discovery. Accordingly, the defense cannot at this time identify a specific classified document, e-mail, conversation, or other item that would be disclosed. The defense reasonably expects to elicit testimony at trial as to how [redacted] knew the topics of [redacted] before it was released, and thus identified the list of topics that would need to be discussed. If [redacted] relied on documents, communications, or other classified information already

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[7] Per the Court's December 9th Opinion, the defense expressly reserves its right to elicit additional classified testimony regarding these topics and documents at trial. See Op. at 11.

known to him, the defense reasonably expects that those items will be disclosed in the testimony that is elicited. The defendant thus reasonably expects that that testimony may cause the disclosure of classified information.

e. Any documents, classified communications, or classified information already known to [redacted] upon which he relied for the statement in the email that "[redacted]." As with item 7(d), the government has not provided the defendant with any discovery which would indicate whether (or to what extent) [redacted] relied on (i) classified documents or information other than [redacted] for this statement, or (ii) information contained in [redacted] (or its precursor intelligence reports) prior to the time of first access identified by the government in discovery. Accordingly, the defense cannot at this time identify a specific classified document, e-mail, conversation, or other item that would be disclosed. The defense reasonably expects to elicit testimony at trial as to how [redacted] knew the topics of [redacted] before it was released, and thus identified the list of topics that would need to be discussed. If [redacted] relied on documents, communications, or other classified information already known to him, the defense reasonably expects that those items will be disclosed in the testimony that is elicited. The defendant thus reasonably expects that that testimony may cause the disclosure of classified information.

f. The existence and contents (as they relate to [redacted], the intelligence therein, or [redacted] of a "planning meeting" [redacted] at 10:30 am on June 11, during which [redacted] of the information contained [redacted] were discussed and the [redacted] was questioned [redacted].[8]

[8] The Court's December 9, 2013, Memorandum Opinion directs the defense to provide a more specific notice about the identifiable classified information that would be disclosed by this item. *See* Memorandum Opinion at 23. The only information provided by the government in discovery concerning this meeting is a singular, one-paragraph email (CLASS_0003110) that reveals the existence of the meeting and the fact that [redacted]." Because the government has not produced any notes from the meeting or other information concerning the participants, topics, etc. the defendant cannot detail the classified information with any greater specificity than that provided. The defense submits that the revised language is sufficient to provide the government

(Cont'd on following page)

g. The intended and actual distribution of [redacted]

h. Electronic document access and badge records for all authors and recipients of (a) the [redacted] or (b) the email correspondence relating to [redacted]. (CLASS_3126-77, 3219-27).

i. The fact that [redacted] on June 11, 2009, that included information relating to the content of the intelligence report at issue.

j. The content of the [redacted] prepared on June 11, 2009, as they relate to the content of the intelligence report at issue.

k. The method by which the individuals who drafted or commented on the June 11 [redacted] communicated with each other (e.g. by email, through handwritten comments on hard copy drafts).

l. Whether any hard copy drafts [redacted] were created during June 11, 2009, and, if so,

   i. Who created the hard copies;
   ii. The distribution of those hard copies;
   iii. The existence of any records reflecting what happened to the hard copies, who reviewed the hard copies, and the retention or disposal of the hard copies.

m. To the extent classified, the identity of all authors and recipients of (a) the [redacted] or (b) the email correspondence relating to [redacted]

n. A general description of:

   i. What a [redacted] is;
   ii. The function and purpose of a [redacted]
   iii. How and when a [redacted] is prepared;
   iv. Who determines when a topic is included in a [redacted]

(Cont'd from preceding page)

with its required notice – particularly given that the government knows (or has access to) what was discussed at the meeting, but has refused to provide that information to the defense.

v. The intended audience of [redacted], including [redacted]

8. With respect to the [redacted] email concerning North Korean [redacted]:[9]

a. An [redacted] describing North Korean [redacted] "[redacted]" (CLASS_1368-69).

b. [redacted]

c. Whether [redacted] transmitted the email to the various distribution lists identified in the header (#SUITE, #CPS-NSC, #DEEFENSE-NSC, #EAST-ASIA) over a classified email system.

d. Whether [redacted] was informed at any time prior to, during, or after he drafted and distributed his email that the information contained in the unredacted portions of the email was classified, or, alternatively, whether he submitted the information in the unredacted portions of the email for classification review prior to its distribution [redacted].

e. Whether the information concerning the North Korean [redacted] appeared in a classified report prior to [redacted].

f. Whether the information concerning the North Korean [redacted] appeared in a classified report after [redacted]

9. With respect to a [redacted], email from [redacted] concerning North Korea's [redacted]".[10]

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[9] Per the Court's December 9, 2013, Memorandum Opinion, the defense expressly reserves its right to elicit classified testimony relating to these topics and documents that may arise during testimony at trial. See Op. at 11.

a. [redacted] email. (CLASS_3204)

b. [redacted]

c. Whether [redacted] transmitted the email (to the redacted recipient list) over a classified email system).

d. Whether [redacted] marked the email as classified at the time it was created, or, alternatively, whether he submitted the email for classification review prior to its distribution at [redacted]

e. Whether the information contained in the email appeared in a classified report prior to [redacted].

f. Whether the information contained in the email appeared in a classified report after [redacted].

10. With respect to Daniel Russell's June 11, 2009, email concerning the "[redacted] [redacted]:[11]

a. Russel's email. (CLASS_1370)

b. Russel's classified statements to the FBI on August 10, 2009. (CLASS_1360-65)

c. Electronic document access records for Russel. (CLASS_1832-44)

(Cont'd from preceding page)

[10] Per the Court's December 9, 2013, Memorandum Opinion, the defense expressly reserves its right to elicit classified testimony relating to these topics and documents that may arise during testimony at trial. See Op. at 11.

[11] Per the Court's December 9, 2013, Memorandum Opinion, the defense expressly reserves its right to elicit classified testimony relating to these topics and documents that may arise during testimony at trial. See Op. at 11.

d. The meaning of the reference by Russel in the email to "[t]oday's [REDACTED] [redacted]

e. If the source document or information described by Russel using the term [redacted] (identified in (d), above) is something other than [redacted]."

f. If the [redacted]" is [redacted] or its predecessor reports, the manner by which Russel accessed the information described in the email prior to 8:59 a.m. on June 11, 2009.

g. The identity and/or contents of any documents or other information that formed the basis for Russel's statement that the [redacted]."

h. The identity and/or contents of any documents or other information that formed the basis for Russel's statement that North Korea [redacted]

11. With respect to the distribution of copies of [redacted] to persons within the White House:[12]

a. The distribution of hard copies of [redacted] by Darlene Bartley to Matt Spence and Thomas Donilon.

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[12] The Court's December 9, 2013, Memorandum Opinion directs the defense to provide a more specific notice about the identifiable classified information that would be disclosed by this item. See Memorandum Opinion at 23. The only information provided by the government in discovery concerning this email is the email itself. The government has thus far not been ordered to provide any discovery on [redacted]" referred to in the email, as well as what [redacted]" contains. Accordingly, the defendant cannot detail the classified information with any greater specificity than that provided. The defense submits that the revised language is sufficient to provide the government with its required notice – particularly given that the government knows the identity and content of [redacted]

[13] Per the Court's December 9, 2013, Memorandum Opinion, the defense expressly reserves its right to elicit classified testimony relating to these topics and documents that may arise during testimony at trial. See Op. at 11.

b. Building access or badge records for June 11, 2009, for Bartley, Spence, Donilon, Russel, and Lutes. (CLASS_1306)

c. Darlene Bartley's investigative questionnaire. (CLASS_1298-1304)

d. Electronic document access records for Darlene Bartley. (CLASS_1824-30)

e. A June 11, 2009, email from Daniel Russel asking that a hard copy of [redacted] be provided to Thomas Donilon and Matt Spence. (CLASS_1305, 1371)

f. The use, existence (or lack thereof), destruction, and/or current location of any classified cover sheets, distribution logs, or other document control mechanisms reflecting the distribution of hard copies of [redacted] as well as the reasons why these sheets were (or were not) created or used.

g. Darlene Bartley's classified statements to the FBI during interviews on August 3, 2009, August 4, 2009, and February 3, 2011. (CLASS_1288-91, 1292-94, 1295-97) The defense specifically notices the following paragraphs of the first (August 3) FBI 302: ¶¶ 2, 4, 8, 9, 10. The defense specifically notices the following paragraphs of the second (August 4) FBI 302: ¶¶ 2, 8. The defense specifically notices the following paragraphs of the third (February 2011) FBI 302: ¶¶ 1, 2, 3, 4, 5, 6, 7.

h. Charles Lutes' classified statements to the FBI during an interview on January 28, 2011. (CLASS_1324-29) The defense specifically notices the following paragraphs of the FBI 302: ¶¶ 1, 2, 3, 4, 5, 6, 7, 8, 9, 10.

i. Charles Lutes' emails from June 11, 2009, with Darlene Bartley and Christine Clark. (CLASS_1340-43)

j. Charles Lutes' investigative questionnaire. (CLASS_1333-39)

k. Matthew Spence's classified statements to the FBI during interviews on August 19, 2009, and April 3, 2012. (CLASS_1373-74, 2891-92) The defense specifically notices the following paragraphs of the first (August 2009) FBI 302: ¶¶ 3, 4, 5. The defense notes that every substantive paragraph of the second (April 2012) FBI 302 is marked "U" for unclassified, yet the document itself is marked [redacted]." The defense objects to having to notice this document through the CIPA process. The government's failure to declassify this

document places a burden on the defendant that he does not have under the law. In an abundance of caution, defendant has no choice but to notice this document.

l. Electronic document access records for Matthew Spence. (CLASS_1845)

m. Thomas Donilon's classified statements to the FBI during interviews on September 25, 2009, and August 1, 2012. (CLASS_1307-09, 3045-49) The defense specifically notices the following paragraphs of the first (September 2009) FBI 302: ¶¶ 2 (only as to the charged article), 3, 4. The defense specifically notices the following paragraphs of the second (August 2012) FBI 302: ¶¶ 1, 2, 7, 9, 10, 12, 13, 14, 15.

n. Electronic document access records for Thomas Donilon. (CLASS_1831)

12. With respect to all contacts between White House/NSC officials and Fox News on June 11, 2009:[14]

    a. The substance of any discussion concerning [redacted], the information contained in [redacted], or the Rosen article.

    b. The method or means by which the government acquired the McDonough-Major Garrett emails produced in discovery. (See CLASS_1110-11)[15]

13. The "Eleven Questions" document relating to the alleged disclosure. (CLASS_27-30) Per the Court's December 9, 2013, Memorandum Opinion, the defense reasonably expects to disclose the following classified questions and answers from this document:[16]

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[14] Per the Court's December 9, 2013, Memorandum Opinion, the defense expressly reserves its right to elicit classified testimony relating to these topics and documents that may arise during testimony at trial. See Op. at 11.

[15] The government has since determined that the McDonough-Garrett emails are unclassified.

[16] Question/answer #1, 6, 7, 8, 9, and 10 are marked unclassified, and are thus not subject to CIPA. In its December 9 Memorandum Opinion, the Court notes the government's assertion that this document includes information relating to an uncharged disclosure. See Mem. Op. at 16. The document appears to contain only one paragraph that fits this description, within the 4-page

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a. Question/answer #2, except for the paragraph at the top of page CLASS_000028 beginning with the phrase "[redacted]...";
b. Question/answer #3;
c. The classified portion of question/answer #4;[17]

14. [Withdrawn]

15. With respect to (i) any office, component or unit of [redacted] that had personnel who accessed [redacted] or its underlying intelligence reports on June 11, 2009; (ii) any office, component, or unit of [redacted] whose personnel made classification decisions regarding the discovery produced in this case (including the classification review of the "treat as" documents); and (iii) any office, component, or unit of the FBI whose personnel have been involved in the investigation and prosecution of the defendant, during the period from 2009 (the time of the alleged disclosure) through December 2013 (the period of the investigation of the defendant):

a. The process by which original classification decisions, including determinations of classification level, were made concerning intelligence reports involving North Korea.

b. The process by which classification decisions, including determinations of classification level, were made and/or changed concerning any emails, documents, investigative reports (such as FBI 302s) and memoranda provided to the defendant in discovery in this case.

c. The process by which individuals within the agency offices described above determine what information can be shared with members of the media (whether through formal public statements or informal (e.g. "off the record") conversations, such as the communications between John Hertzberg and James Rosen).

16. During 2009, the process by which components of the State Department (such as EAP and VCI) prepared a public or media statement that was derived from or relates to classified information, or otherwise communicates or discusses information with the

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document. That paragraph has now been removed from the defendant's notice, see item 13(a), above.

[17] The majority of question/answer #4 is marked unclassified, and is thus not subject to CIPA.

media that is derived from classified information. The defendant reasonably expects to elicit testimony describing the preparation of unclassified press guidance documents that contain proposed answers to media questions and "background" discussions of the facts and circumstances underlying the proposed answers. The defendant reasonably expects to elicit testimony concerning the extent to which the drafters of these unclassified press guidance documents review any classified reports concerning the topics of the press guidance documents and/or otherwise determine whether the information contained in the unclassified press guidance documents otherwise exists in a classified report.

In the Court's December 9 Memorandum Opinion, the defense was directed to provide an example of the types of documents/communications with the media referred to in this notice item. As the press guidance documents are unclassified, they are not subject to the CIPA process, and thus the defense has not provided formal notice to the government of its intent to use any particular guidance document at trial. Per the Court's direction, however, the defense provides the following example for illustrative purposes.

On April 27, 2009, an unclassified EAP press guidance document was prepared. This document discussed the U.S. reaction to an April 14, 2009, announcement by North Korea of the "countermeasures" that it would take in response to U.N. condemnation of its April 5 missile launch. The press guidance contained a statement that the U.S. "cannot confirm" the report that North Korea had begun work on a facility to reprocess spent fuel rods. It also contained a statement that, despite reports to the contrary, "[i]t is more likely that work on the reprocessing facility has begin and actual reprocessing is still some time off." The defense will elicit testimony as to whether (a) these statements are based on information that appears in classified reports; (b) regardless of whether such reports were reviewed by the EAP personnel who prepared the press guidance, whether these statements did, in fact, appear in classified reports that existed on or before April 27, 2009; and (c) how drafters of the press guidance would determine whether these statements could be included in an unclassified press guidance document and shared with the media.

Dated: January 13, 2014

Respectfully submitted,

/s/

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~~Treat as Classified~~ [redacted]; ~~Contents Subject to CIPA Protective Order~~

REDACTED / CLEARED FOR PUBLIC RELEASE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
	)	Case No. CR-10-225 (CKK)
v.	)	
	)	
STEPHEN JIN-WOO KIM,	)	
	)	
Defendant.	)	

DEFENDANT STEPHEN KIM'S THIRD CIPA § 5 NOTICE

Defendant Stephen Kim, by and through undersigned counsel, respectfully submits his third notice pursuant to Section Five of the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. 3 § 5. Section Five requires the defendant to provide a "brief description" of any classified information that he "reasonably expects to disclose or to cause the disclosure of … in any manner in connection with any trial or pretrial proceeding." 18 U.S.C. App. 3 § 5(a). Pursuant to that requirement, defendant provides notice that he reasonably expects to disclose or to cause the disclosure of the classified information contained in the following items:[1]

1. The Navy cover sheet for [redacted]3630-09 provided to the FBI by William Farren. (CLASS_943-45)

[1] Throughout classified discovery, the government has produced revised or corrected versions of some documents bearing an "A," "B," or "C" suffix at the end of the Bates number (e.g., CLASS_340A is a revised version of CLASS_340). During the course of discovery alone, the government has altered the classification status of well over 100 documents that were originally produced "with incorrect classification markings." See Dkt. 153, Ex. 9. This does not include the hundreds of pages originally produced with the "treat as classified" header, without proper classification markings. To be clear, when the defendant cites a Bates range in his CIPA § 5 notices, he intends to include whatever revised versions of those documents have also been produced by the government.

~~Treat as Classified~~ [redacted] ~~Contents Subject to CIPA Protective Order~~

2. Document control records for [redacted] at the State Department on June 11, 2009. (CLASS_1001-03)

3. The "classified spreadsheet" containing the "List of 118" provided by the government during classified discovery. (CLASS_1107-09)

4. "Security Briefing for Receipt of Logon ID and Password" document signed by John Herzberg. (CLASS_2762)

5. Email sent by John Swegle to the defendant on June 11, 2009. (CLASS_3053)

6. Email correspondence involving Robert Roesler and the defendant on August 8-12, 2008. (CLASS_2100-03)

7. Email correspondence between Daniel Russel, Tom Donilon, Matthew Spence, and Jeffrey Bader on June 11, 2009 (CLASS_3050-52). The defense notes that the government still has not produced portion-marked copies of this correspondence, despite the Court-imposed deadline of November 1, 2013. See Dkt. 151. The Court permitted the government over three months to identify and review all "treat as classified" documents and to produce portion-marked copies to the defense. See Dkt. 119, 144, 151. The Court should find that the government has waived any objection to the disclosure of information contained in documents that still do not bear proper classification markings. See 18 U.S.C. App. 3 § 1.

8. The PACOM cover sheet for the charged intelligence report. (CLASS_2804)

9. The defendant's prior work product on North Korea. (CLASS_208, 1860-65, 1870-94, 1895-1927, 1936-69, 1969-85, 2063-73, 2074-91, 2149-52, 2198-2229, 2230-42, 2243-64, 2265-84) The defense notes that the only classified information contained in these documents can be found on pages CLASS_208, 1860, 1880, 1899, 1904, 1910, 1941, 1946, 1952, 1971, 1973, 2064, 2075-76, 2078, 2149-52, 2200, 2214, 2232, 2237-38, 2240-42, 2248, 2250, and 2270.

10. Email correspondence between the defendant and Debora Fisher on June 12, 2009, regarding intelligence information related to North Korea's nuclear program. (CLASS_2104-12)

11. Email correspondence and attachments between the defendant and T.C. McCarthy on June 10, 2009, regarding intelligence information related to North Korea's nuclear program. (CLASS_2153-97)

12. Email correspondence concerning a misclassified [redacted] briefing on June 19, 2009. (CLASS_2115-17)

13. Email correspondence regarding the defendant's [redacted] access and screening responsibilities at the State Department. (CLASS_2121-23, 2128-30, 2133)

~~Treat as Classified~~ [redacted] ~~Contents Subject to CIPA Protective Order~~

14. Email correspondence involving the defendant and State Department colleagues regarding North Korean defectors on September 30, 2008. (CLASS_2125-26)

15. Email correspondence regarding the defendant's meeting with Sung Kim and North Korean diplomacy on April 15-16, 2009. (CLASS_2131-32)

16. FBI report of computer examination dated April 11, 2011. (CLASS_2751-55)

17. State Department Diplomatic Security Service "report of investigation" regarding entry into the defendant's State Department office. (CLASS_112-15) The defense notes that a single sentence of this document is marked classified.

18. Email correspondence between John Herzberg and James Rosen (CLASS_2960-3031). By letters dated June 13, 2013, and July 23, 2013, the defense specifically requested official classification review of these "treat as classified" documents. See Dkt. 118, Ex. 13; Dkt. 153, Ex. 4, at 3-4. Despite the Court-imposed deadline of November 1, 2013, see Dkt. 151, the government still has not produced portion-marked copies of these documents. The Court should find that the government has waived any objection to the disclosure of information contained in documents that still do not bear proper classification markings. See 18 U.S.C. App. 3 § 1.

19. With respect to the creation of [redacted], testimony concerning the process by which that document was created, from the original [redacted] to the final version distributed via [redacted]. The testimony will entail the identification of the people involved in the drafting process, as well as an explanation of how the [redacted]" portion of the report was created and revised during this process. See CLASS_0002869.

20. Testimony concerning [redacted]." See CLASS_000372A.

21. With respect to policies existing in June 2009 within [redacted] the handling of hard copies of classified documents:

    a. The existence and content of such policies;

    b. The content of policies requiring the use of cover sheets to reflect the individuals who accessed classified documents;

    c. The content of policies requiring the retention of such cover sheets and/or the underlying classified reports to which the cover sheets pertain;

d. Department of State Document Control Branch policies for the acceptance, release, and return of [redacted] documents.

22. FBI 302, agent's notes, and emails regarding a separate unauthorized disclosure of classified information [redacted].[2] (CLASS_3232-38)

With respect to potential witnesses at trial:[3]

23. FBI 302 and agent's notes from a November 9, 2010, interview with Rajeev Wadhwani. (CLASS_1257-58) The defense notes that every substantive paragraph of this 302 is marked "U" for unclassified, yet the document itself is marked [redacted]" The defense objects to having to notice this document through the CIPA process. The government's failure to declassify this document places a burden on the defendant that he does not have under the law. In an abundance of caution, defendant has no choice but to notice this document.

24. FBI 302 and agent's notes from a May 19, 2011, interview with Erica Thibault. (CLASS_2734-35). The defense notes that every substantive paragraph of this 302 is marked "U" for unclassified, yet the document itself is marked '[redacted]" The defense objects to having to notice this document through the CIPA process. The government's failure to declassify this document places a burden on the defendant that he does not have under the law. In an abundance of caution, defendant has no choice but to notice this document.

25. FBI 302 and agent's notes from an August 30, 2011, interview with Ambrose Sayles. (CLASS_2763-65). The defense notes that every substantive paragraph of this 302 is marked "U" for unclassified, yet the document itself is marked '[redacted]" The defense objects to having to notice this document through the CIPA process. The government's failure to declassify this document places a burden on the defendant that he does not have under the law. In an abundance of caution, defendant has no choice but to notice this document.

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[2] The defense notes that these documents are the subject of a pending discovery request. See Dkt. 242, Ex. 1, Item 2. As a result, this item will likely be modified.

[3] The defense notes that many of the 302s noticed below contain unclassified information (i.e., paragraphs portion-marked "U"). The defense assumes that the government does not object on CIPA grounds to the disclosure at trial of the information contained in these unclassified paragraphs, as well as disclosure of those portions of the documents themselves that contain such information. If the government disagrees, the defense reserves the right to notice the entire document.

26. FBI 302 and agent's notes from an August 31, 2013, interview with Edgar Vasquez. (CLASS_2775-78). The defense notes that every substantive paragraph of this 302 is marked "U" for unclassified, yet the document itself is marked "[redacted]" The defense objects to having to notice this document through the CIPA process. The government's failure to declassify this document places a burden on the defendant that he does not have under the law. In an abundance of caution, defendant has no choice but to notice this document.

27. FBI 302 and agent's notes from a September 14, 2011, interview with Henry Shin. (CLASS_2766-74). The defense notes that every substantive paragraph of this 302 is marked "U" for unclassified, yet the document itself is marked [redacted]" The defense objects to having to notice this document through the CIPA process. The government's failure to declassify this document places a burden on the defendant that he does not have under the law. In an abundance of caution, defendant has no choice but to notice this document.

28. FBI 302s from interviews on April 27, 2010, and May 26, 2010, with John Mee. (CLASS_1180-82) The defense notes that every substantive paragraph of this 302 is marked "U" for unclassified, yet the document itself is marked [redacted]" The defense objects to having to notice this document through the CIPA process. The government's failure to declassify this document places a burden on the defendant that he does not have under the law. In an abundance of caution, defendant has no choice but to notice this document.

29. FBI report from an August 10, 2009, interview with Patricia Parker. (CLASS_1345-46) The defense notes that every substantive paragraph of this 302 is marked "U" for unclassified, yet the document itself is marked [redacted]" The defense objects to having to notice this document through the CIPA process. The government's failure to declassify this document places a burden on the defendant that he does not have under the law. In an abundance of caution, defendant has no choice but to notice this document.

30. FBI 302, agent's notes, and attachments from a November 22, 2011, interview with Cindy Chang. (CLASS_2833-38) The defense notes that this document contains a single paragraph marked "classified." That paragraph states, "Due to the nature of her job, Chang has talked to many members of the media, but has no memory of ever talking to James Rosen from Fox News. Chang stated she knew who Rosen was due to her interest in a variety of media outlets." (CLASS_2833) This paragraph appears to have been classified solely because it refers to James Rosen and/or Fox News, and therefore should have been declassified. See Dkt. 153, Ex. 7. The government's failure to declassify this document places a burden on the defendant that he does not have under the law. In an abundance of caution, defendant has no choice but to notice this document.

31. FBI 302, agent's notes, and attachments from a September 1, 2010, interview with John Herzberg. (CLASS_1198-1229) The defense specifically notices the following paragraphs of the 302: ¶¶ 2, 11, 23.[4]

32. FBI 302, agent's notes, and attachments from an August 13, 2012, interview with John Herzberg. (CLASS_2937-59)

33. FBI 302 and agent's notes from a January 24, 2012, interview with Denis McDonough. (CLASS_2865-68) The defense notes that a single paragraph (¶ 2) of this 302 is marked classified.

34. FBI 302, agent's notes, and attachments from an August 22, 2012, interview with John Brennan. (CLASS_3038-44) Consistent with his prior notices, the defendant does not intend to notice those portions of the attachments reflecting [redacted], which is not at issue in this case. The information contained in this 302 appears to have been classified solely because it refers to James Rosen and the charged article, neither of which should be classified at the time of trial.

35. FBI 302s and agent's notes from interviews on September 10, 2010, and September 8, 2011, with David Albright. (CLASS_3178-99) The defense specifically notices the following paragraphs of the first (September 2010) FBI 302: ¶¶ 7, 8, 9, 10, 12. The defense specifically notices the following paragraphs of the second (September 2011) FBI 302: ¶¶ 5, 10, 11, 12. 13, 14, 24, 25, 29, 30, 31, 32, 33.

36. FBI 302, agent's notes, and attachments from a September 20, 2010, interview with Christine Clark. (CLASS_1186-92) Consistent with his prior notices, defendant does not intend to notice those portions of the attachments reflecting [redacted] which is not at issue in this case.[5] The defense specifically notices the following paragraphs of the 302: ¶¶ 1, 2, 3, 4.

37. FBI 302 and agent's notes from a September 27, 2010, interview with David Foley. (CLASS_1193-94) The defense specifically notices the following paragraphs of the 302: ¶¶ 3, 4.

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[4] The defense has noticed specific paragraphs of the FBI 302s when possible. In some instances this was not possible, given the extent of classification of witness interviews in this case and the way in which certain 302s were marked. If the defense has not identified specific paragraphs, it intends to notice all of the classified information contained in the document.

[5] As the defense explained in its addendum opposition to the government's first CIPA § 6(a) motion, [redacted]. See Add. Opp. at 16. [redacted]. Id.

38. FBI 302 and agent's notes from a September 8, 2010, interview with Mi Young [redacted] (CLASS_1112-1134) The defense specifically notices the following paragraphs of the 302: ¶¶ 1, 2, 3, 4, 6, 8, 13, 14, 15, 16, 17, 18, 19, 20, 21.

39. FBI 302 and agent's notes from a March 26, 2010, interview with Melanie Higgins. (CLASS_1230-33) The defense notes that a single paragraph (¶ 5) of this 302 is marked classified.

40. FBI 302, agent's notes, and attachments from a September 30, 2010, interview with John Mattey. (CLASS_1237-41) Consistent with his prior notices, defendant does not intend to notice those portions of the attachment reflecting [redacted], which is not at issue in this case.

41. FBI 302 and agent's notes from a September 1, 2010, interview with Todd Schwartz. (CLASS_1248-53) The defense notes that a single paragraph (¶ 4) of this 302 is marked classified.

42. FBI 302 and agent's notes from a July 26, 2011, interview with Sara Horner. (CLASS_2606-08) The defense notes that a single paragraph of this 302 is marked classified. Within that paragraph, the defense only intends to disclose the first sentence of that paragraph.

43. FBI 302 and agent's notes from an October 8, 2010, interview with Janey Wright. (CLASS_1259-76)

44. FBI 302, agent's notes, and attachments from a September 21, 2010, interview with Paula DeSutter. (CLASS_2524-37) The defense specifically notices the following paragraphs of the 302: ¶¶ 3, 6, 13.

45. FBI 302s and agent's notes from interviews with Jeffrey Eberhardt on May 25, 2011, and July 5, 2011. (CLASS_2576-86) The defense specifically notices the following paragraphs of the first (May 2011) FBI 302: ¶¶ 3, 4, 6, 9, 14, 15 (only with respect to articles two and three), 16. The defense specifically notices the following paragraphs of the second (July 2011) FBI 302: ¶¶ 2, 3.

46. FBI report, agent's notes, and attachments from interviews with Mary Proctor on July 16, 2009, and August 2, 2010. (CLASS_1347-59)

47. FBI 302s, agent's notes, and attachments from interviews with Gregory Cefus on September 14, 2010, and April 5, 2011. (CLASS_2489-2523) The defense notes that the government still has not produced portion-marked copies of the attachments, despite the Court-imposed deadline of November 1, 2013. See Dkt. 151. The Court permitted the government over three months to identify and review all "treat as classified" documents and to produce portion-marked copies to the defense. See Dkt. 119, 144, 151. The Court should find that the government has waived any objection to the disclosure of information contained in

documents that still do not bear proper classification markings. See 18 U.S.C. App. 3 § 1. The defense specifically notices the following paragraphs of the first (September 2010) FBI 302: ¶¶ 1, 2, 5, 6, 7, 8, 10, 12, 14, 15, 16, 17, 19. The defense specifically notices the following paragraphs of the second (April 2011) FBI 302: ¶¶ 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 16, 19, 20, 21.

48. FBI 302s, agent's notes, and attachments from interviews with T.C. McCarthy on September 14, 2010, April 5, 2011, and June 29, 2011. (CLASS_2618-69) The defense notes that the government still has not produced portion-marked copies of the attachments, despite the Court-imposed deadline of November 1, 2013. See Dkt. 151. The Court permitted the government over three months to identify and review all "treat as classified" documents and to produce portion-marked copies to the defense. See Dkt. 119, 144, 151. The Court should find that the government has waived any objection to the disclosure of information contained in documents that still do not bear proper classification markings. See 18 U.S.C. App. 3 § 1. The defense specifically notices the following paragraphs of the first (September 2010) FBI 302: ¶¶ 1, 2, 3, 12, 14, 19. The defense specifically notices the following paragraphs of the second (April 2011) FBI 302: ¶¶ 1, 5, 6, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 22, 24, 26. The defense specifically notices the following paragraphs of the third (June 2011) FBI 302: ¶¶ 3, 4, 6, 7.

49. FBI 302, agent's notes, and attachments from an April 5, 2011, interview with Ronald Staggs. (CLASS_2703-07) The defense specifically notices the following paragraphs of the 302: ¶¶ 1, 2, 3, 4, 5, 6, 7, 8, 9.

50. FBI 302s, agent's notes, and attachments from interviews with John Swegle on September 14, 2010, and April 5, 2011. (CLASS_2708-33) The defense notes that the government still has not produced portion-marked copies of the attachments (CLASS_2726-33), despite the Court-imposed deadline of November 1, 2013. See Dkt. 151. The Court permitted the government over three months to identify and review all "treat as classified" documents and to produce portion-marked copies to the defense. See Dkt. 119, 144, 151. The Court should find that the government has waived any objection to the disclosure of information contained in documents that still do not bear proper classification markings. See 18 U.S.C. App. 3 § 1. The defense specifically notices the following paragraphs of the first (September 2010) FBI 302: ¶¶ 1, 2, 3, 4, 5, 9, 16, 20. The defense specifically notices the following paragraphs of the second (April 2011) FBI 302: ¶¶ 1, 2, 3, 4, 7, 8, 9, 10, 11, 13, 14, 15.

51. FBI 302s, agent's notes, and attachments from interviews with Robert Roesler on September 28, 2010, and May 18, 2011. (CLASS_2670-95) The defense notes that the government still has not produced portion-marked copies of the attachments (CLASS_2683-95), despite the Court-imposed deadline of November 1, 2013. See Dkt. 151. The Court permitted the government over three months to identify and review all "treat as classified" documents and to produce portion-marked copies to the defense. See Dkt. 119, 144, 151. The Court should find that the government has waived any objection to the disclosure of information contained

in documents that still do not bear proper classification markings. See 18 U.S.C. App. 3 § 1. The defense specifically notices the following paragraphs of the first (September 2010) FBI 302: ¶¶ 1, 2, 5, 7, 9, 11. The defense specifically notices the following paragraphs of the second (May 2011) FBI 302: ¶¶ 1, 2, 3, 4, 5, 6, 7, 9, 10, 14, 15, 17, 18.

52. FBI 302, agent's notes, and attachments from a July 12, 2012, interview with Anthony Gouge. (CLASS_2927-34) The defense notes that the government still has not produced portion-marked copies of the attachments, despite the Court-imposed deadline of November 1, 2013. See Dkt. 151. The Court permitted the government over three months to identify and review all "treat as classified" documents and to produce portion-marked copies to the defense. See Dkt. 119, 144, 151. The Court should find that the government has waived any objection to the disclosure of information contained in documents that still do not bear proper classification markings. See 18 U.S.C. App. 3 § 1. The defense specifically notices the following paragraphs of the 302: ¶¶ 2, 3.

53. FBI 302 and agent's notes from a June 28, 2011, interview with Susan Hoff. (CLASS_2598-2605) The defense specifically notices the following paragraphs of the 302: ¶¶ 2, 3, 4, 5, 6, 7, 8, 9, 10, 11.

54. FBI 302 and agent's notes from an August 8, 2011, interview with Edward Kim. (CLASS_2612-13)

55. FBI 302, agent's notes, and attachments from a July 21, 2011, interview with Jennifer Urizar. (CLASS_2855-59)

56. FBI 302 and agent's notes from a May 25, 2011, interview with Dora Kale. (CLASS_2609-11) The defense specifically notices the following paragraphs of the 302: ¶¶ 1, 2, 3, 4, 5.

57. FBI 302 and agent's notes for a July 12, 2012, interview with [redacted] (CLASS_3082-84) The defense specifically notices the following paragraphs of the 302: ¶¶ 2, 3, 4.

"Investigatory Materials"

58. Investigative questionnaires completed by government employees who accessed the intelligence report at issue, as well as accompanying FBI cover memoranda and notes. (CLASS_340-45, 554-65, 764-70, 896-927, 935-41, 951-57, 961-67, 971-77, 990-95, 1006-12, 1024-30, 1037-43, 1048-54, 1078-84, 1281-87, 3061-67)

59. Badge and facilities access logs for government employees who accessed the intelligence report at issue. (CLASS_771, 1310, 1344, 1372, 1376, 1596, 3202-03, 3229, 3231)

60. Electronic document access records for government employees who accessed the intelligence report at issue. (CLASS_1416-18, 1590-95, 1597-1602, 1697-1800, 1809-23, 1846-52)

61. Phone records for government employees who accessed the intelligence report at issue.[6] (CLASS_946-48, 958-60, 968-70, 978-80, 2756-59, 2864, 3200-01, 3696-97, 3699-3749)

62. FBI 302s, agent's notes, and attachments from interviews of government employees who accessed the intelligence report at issue.[7] (CLASS_814-15, 873, 928-31, 932-34, 942, 949-50, 987-89, 996-1000, 1004-05, 1019-23, 1034-36, 1044-47, 1074-77, 1277-80, 1311-23, 1330-32, 2862-63, 3054-57)

As the parties discussed at the January 7th Status Hearing, the defense has endeavored to include all classified discovery that defendant reasonably expects to disclose at trial in this third CIPA § 5 notice. This notice does not include any documents that the defense may request the government submit for final classification review no later than January 28, 2014. See Dkt. 119. This notice also does not include any documents provided by the filter team this afternoon (January 13, 2013). The defense intends to file additional CIPA § 5 notices for the reasons set forth at the January 7th hearing.

Dated: January 13, 2014

Respectfully submitted,

/s/
Abbe David Lowell
Keith M. Rosen
Scott W. Coyle

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[6] The phone records contained in CLASS_3699-3749 are the subject of a pending discovery request, as they were heavily redacted/substituted by the government. See Dkt. 242, Ex. 1, Item 5. Defendant intends to notice more detailed versions of CLASS_3699-3749 once they are produced by the government.

[7] As defendant explained in his revised second CIPA § 5 notice, for those individuals who accessed the intelligence report at issue and were questioned by the FBI regarding their access, the defense intends to notice all of the classified information contained in their FBI 302s. See Revised Second CIPA § 5 Notice, Item 5. If the government were to provide a list of the witnesses that it intends to call at trial, the defense may be able to narrow this item. The government, however, has refused to do so.

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Filed with the Classified Information Security Officer
CISO
Date 11/5/2013

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	Criminal No.: 10-225 (CKK)
	)	
v.	)	Filed In Camera and
	)	Under Seal with the Classified
STEPHEN JIN-WOO KIM,	)	Information Security Officer
also known as Stephen Jin Kim,	)	
also known as Stephen Kim,	)	
also known as Leo Grace,	)	
	)	
Defendant.	)	

Leave of Ct. Granted
Judge CKollar-Kotelly
1/30/14

FILED
JAN 30 2014
Clerk, U.S. District & Bankruptcy Courts for the District of Columbia

GOVERNMENT'S IN CAMERA, UNDER SEAL OPPOSITION TO THE DEFENDANT'S SIXTH MOTION TO COMPEL DISCOVERY AND REQUEST FOR CLARIFICATION OF THE COURT'S OCTOBER 9, 2013, ORDER

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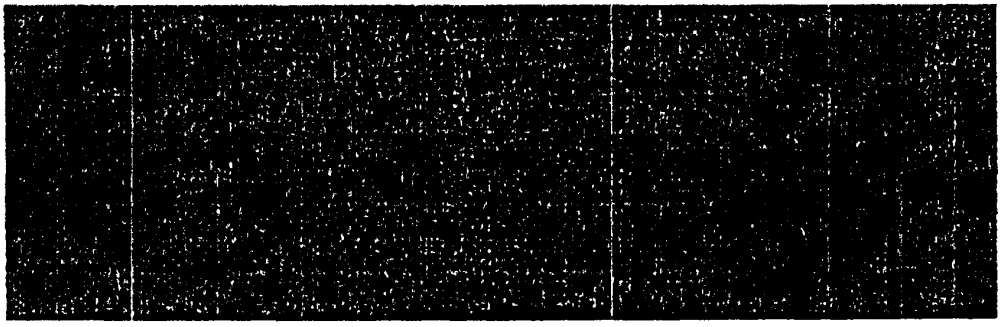
[redacted]

[redacted]

(U)[1] I. **Introduction**

[redacted] On October 22, 2013, the defendant filed his sixth motion to compel discovery and request for clarification of the Court's October 9, 2013, Order ("Sixth Motion to Compel").[2] The motion arises from this Court's October 9, 2013, Memorandum Opinion ruling on the defendant's Fifth Motion to Compel Discovery ("Fifth Memorandum Opinion"). In its order, this Court noted that the defendant raised

[1] (U) The classification and control markings affixed to this memorandum and accompanying paragraphs were made pursuant to the requirements of Executive Order 13526 and applicable regulations. The classification level of this memorandum as a whole is the same as the highest classification level of information contained in any of its paragraphs. Each paragraph of this classified document is portion-marked. The letter or letters in parentheses designate(s) the degree of sensitivity of the paragraph's information. When used for this purpose, the letters "U," "C," "S," and "TS" indicate respectively that the information is either "UNCLASSIFIED," or is classified "CONFIDENTIAL," "SECRET," or "TOP SECRET." Under Executive Order 13526, the unauthorized disclosure of material classified at the "TOP SECRET" level, by definition, "reasonably could be expected to cause exceptionally grave damage to the national security" of the United States. Exec. Order 13526 § 1.2(a)(1), 75 Fed. Reg. 707 (December 29, 2009). The unauthorized disclosure of information classified at the "SECRET" level, by definition, "reasonably could be expected to cause serious damage to national security." Exec. Order 13526 § 1.2(a)(2). The unauthorized disclosure of information classified at the "CONFIDENTIAL" level, by definition, "reasonably could be expected to cause damage to national security." Exec. Order 13526 § 1.2(a)(3).



[2] (U) For ease of reference in this pleading, the United States will refer to each of (a) the defendant's prior motions to compel, (b) the government's oppositions to those motions, and (c) the Court's prior rulings on those motions as follows: (a) First Motion to Compel, etc.; (b) Opposition to First Motion to Compel, etc.; and (c) First Memorandum Opinion, etc., respectively.

[redacted]

[redacted]

for the first time in his reply in support of his Fifth Motion to Compel demands for (1) the [redacted] related to the June 11, 2009, [redacted] report (the [redacted] Report") and (2) "revisions" to the [redacted] that were drafted or circulated prior to 3:16 p.m. on June 11, 2009. Fifth Memorandum Opinion at 12-13. To permit the United States to respond to these belated requests, the Court instructed the parties to meet and confer on these issues and seek further relief from the Court as appropriate. Id. at 12-13. Defense counsel met and conferred with the United States on these issues on October 18, 2009. Four days later, the defendant filed his Sixth Motion to Compel seeking production of the above-mentioned material. As demonstrated below, the defendant's demands for the [redacted] and pre-3:16 p.m. revisions to the [redacted] should be denied.

[redacted] However, the defendant's motion does not end there. It goes far beyond the issues contemplated by this Court's Fifth Memorandum Opinion. Without expressly saying so, the defendant uses his Sixth Motion to Compel as a vehicle to re-visit discovery disputes that were argued and resolved by this Court at the September 27, 2013, sealed hearing and in its October 9, 2013, Order concerning the government's review of damage [redacted] assessments, if any, related to the [redacted] Report. See Sixth Motion to Compel at 4-11. Indeed, the bulk of the defendant's motion is in fact a motion for reconsideration – or as the defendant puts it, a "request to clarify" disguised as a new motion to compel. The defendant should not be permitted to compel discovery from the United States that the Court has already ordered the government need not provide. In any event, as demonstrated further below, much like his requests for the [redacted] and revisions to the [redacted] the defendant's requests for other

[redacted]

[redacted]

relief from the Court should be denied as moot.

(U) **II. Argument**

[redacted] **A. The [redacted] for the [redacted] Report**

[redacted] On April 5, 2013, in response to a defense discovery request, the United States advised the defendant that it had searched for the [redacted] for the [redacted] related to the [redacted] Report and had located no such document that pre-dates the "cut-off time" on June 11, 2009, by which time both parties agree the Rosen article had been published, i.e., 3:16 p.m. See Notice of Filing, ECF Docket No. 118, Exhibit 3 (government classified discovery letter, dated April 5, 2013, item number 12); see also Notice of Filing, ECF Docket No. 93 (defense classified discovery letter, dated December 10, 2012, item number 12). In the intervening months, the government's information has not changed. The United States has not identified any version or draft of the [redacted] that pre-dates the 3:16 p.m. cut-off time.

[redacted] Conversely, the defendant has cited no document, nor proffered any other evidence, to demonstrate that the [redacted] came into existence prior to the cut-off time. Instead, all of the emails that he cites in his motion – one as late as 2:54 p.m. on June 11th (see CLASS_3212) – indicate that the [redacted] was an anticipated "action" item associated with [redacted] Thus, consistent with the government's search, the defendant's own proffered evidence does not demonstrate that the document had in fact been created prior to the cut-off time. Accordingly, the defendant's motion to compel the production of the [redacted] should be denied as moot.

[redacted]

[redacted]

[redacted] Further, the defendant's assertion that the [redacted] would be relevant and helpful to the defense, even if it were created after the cut-off time, is without merit. According to the defendant, the document "may tend to show what information was likely shared with the White House on June 11, 2009" or the "content of any White House" briefing. See Sixth Motion to Compel at 3. As the defendant acknowledges in his motion, however, [redacted] Id. Any such briefing would have occurred the following day, on the morning of June 12, 2009, when the content of the [redacted] Report would have been [redacted] following the unauthorized disclosure to Fox News reporter James Rosen and the subsequent publication of that intelligence information no later than 3:16 p.m. on June 11, 2009.

[redacted] Similarly unpersuasive is the defendant's assertion that he is entitled to the discovery of "individuals involved in the drafting and dissemination of the [redacted] - presumably following the 3:16 p.m. cut-off time[3] - because they would have had "reason to believe that the information contained in the intelligence report [redacted] Sixth Motion to Compel at 3. According to the defendant's theory, those individuals may have been the source of [redacted] Id. The defendant's theory presupposes, however, that any such individual must have derived that

[redacted] The United States has identified for the defendant the individuals who the government believes were involved in the drafting of [redacted] and its related documents.

[redacted]

[redacted]

information, even if from the [redacted] prior to the 3:16 p.m. publication of the Rosen article. Identifying other individuals who may have become aware of the [redacted] after the 3:16 p.m. cut-off time would simply not advance the defendant's theory.

[redacted] Finally, the defendant speculates that any alleged analysis in the [redacted] whenever it was produced, "may support the defense's theory" that the [redacted] in the [redacted] Report [redacted] "nothing more than [redacted] and that "someone in Mr. Kim's position would not reasonably have believed that disclosure of the information would damage the United States or help a foreign nation." Sixth Motion to Compel at 3. The defendant's asserted "theory" is unavailing for at least four reasons. First, the defendant never had access to, or authority to access, [redacted] He did not rely on it, and does not, even today, know its contents (assuming it even exists). Therefore that document could have no bearing on his state of mind on June 11, 2009, concerning whether the disclosure of the information from the [redacted] Report could be used to the injury of the United States or to the advantage of a foreign nation. See Third Memorandum Opinion at 17 (rejecting the defendant's argument that the "reason to believe" element could be proved through documents to which the defendant "had no authority or capacity to access"). The statute's plain language requires that the defendant must first be shown to have known the facts from which he reasonably should have concluded that the information could be used for the prohibited purpose. See United States v. Truong Dinh Hung, 629 F.2d 908, 919 (4th Cir. 1980) (citing with approval the district court's jury instructions which defined the term "reason to believe" as meaning

[redacted]

[redacted]

that "a defendant must be shown to have known facts from which he concluded or reasonably should have concluded that the information could be used for the prohibited purpose").

[redacted] Second, the defendant's speculation as to what the [redacted] may contain is insufficient to satisfy his "heavy burden" required to pierce the government's classified information privilege.[4] See United States v. Skeens, 449 F.2d 1066, 1070 (D.C. Cir. 1971) (defense counsel's speculation as to what the privileged information might show does not satisfy the defendant's "heavy burden" under Roviaro); United States v. Smith, 780 F.2d 1102, 1108 (4th Cir. 1985) ("The defendant must come forward with something more than speculation as to the usefulness of such disclosure."). Third, the defendant's assertion that the [redacted] may corroborate other evidence in his case is also inadequate to overcome the government's privilege. This Court "may order disclosure only when the information is at least essential to the defense, necessary to [the] defense, and neither merely cumulative nor corroborative, nor speculative." See United States v. Abu Ali, 528 F.3d 210, 248 (4th Cir. 2008) (internal quotations omitted).

(U) Fourth, the defendant should not be heard, yet again, to demand the disclosure of classified information so that he and his attorneys can conform or construct, post hoc in late 2013, what he purportedly believed on June 11, 2009. Such an approach does violence to the D.C. Circuit's holding in United States v. Yunis, 867 F.2d 617 (D.C. Cir. 1989). Prior to the compelled production of any classified information, the defense

[4] [redacted] The Intelligence Community has informed the undersigned that, if the [redacted] were to exist, it would be classified because [redacted]

[redacted]

[redacted]

cannot just advance a "theory" but must make a substantive showing of what the defendant knew at the time of the charged unauthorized disclosure that informed his "reason to believe" – at the time of the offense, not at the time of trial – that the unauthorized disclosure at issue could not be used to the injury of the United States or to the advantage of any foreign nation, including the documents, or other information, on which he relied to substantiate that knowledge. See Yunis, 867 F.2d at 624 ("[T]he information [the defendant and his counsel] seek is not available to them until such a showing is made."); United States v. Mejia, 448 F.3d 436, 459 (D.C. Cir. 2006); see also United States v. Passaro, 577 F.3d 207, 220 (4th Cir. 2009) ("We recognize that such a showing may well be difficult given national security concerns, but at the very least [the defendant] could have proffered a specific conversation that he had with a superior, or a particular document on which he relied, that purported to [substantiate his defense].").[5] Such a showing would provide a basis for the Court to evaluate the defendant's claimed need for the classified information and to balance that need against the equities underlying the government's classified information privilege.

[redacted] Requiring the defendant to make this showing would not impose upon him any more of a burden of "absolute memory, omniscience, or superhuman mental capacity" than was faced by the defendant in Yunis. Id. at 624. It was surely memorable for the defendant to provide covertly the contents of a TOP

[5] (U) Nor should the defendant be heard to object that any substantive proffer he may provide could be used against him by the United States at trial. The United States has agreed not do so. Furthermore, CIPA protects against such trial use of statements of a defendant in CIPA proceedings. See 18 U.S.C. App. 3 § 2 ("No admission made by the defendant at [a pretrial] conference may be used against the defendant unless the admission is in writing and is signed by the defendant and by the attorney for the defendant.").

[redacted]

[redacted]

SECRET//SENSITIVE COMPARTMENTED INFORMATION intelligence report [redacted] to a national news reporter and then see that same intelligence information broadcast to the world only a few hours later. During the pendency of these criminal proceedings, the defendant has never claimed that he has forgotten this event.[6] Thus, this Court should deny the defendant's motion to compel any [redacted] post-dating the 3:16 p.m. cut-off time because he has failed to make a sufficient, substantive showing of what he knew, and his basis for knowing it, bearing on his alleged belief on June 11, 2009, that the unauthorized disclosure of classified information from the [redacted] Report could not be used to the injury of the United States or to the advantage of any foreign nation, or because he has otherwise failed to meet his "heavy burden" under Yunis and Roviaro.

[redacted] B. **Proposed Revisions to the** [redacted]

[redacted] The defendant's motion to compel "proposed revisions" to the [redacted] prior to the 3:16 p.m. cut-off time should also be denied. See Sixth Motion to Compel at 3-4. The United States has responded to this request multiple times. See Opposition to

[redacted] Nor can the defendant simply rely on (feigned) memory loss to obtain the classified discovery that he seeks. See United States v. Smith, 780 F.2d 1102, 1108 (4th Cir. 1985) (disclosure of classified information "is not required despite the fact that a criminal defendant may have no other means of determining what relevant" privileged information may exist). Further, a post-indictment failure of memory related to the defendant's purported "reason to believe" would run straight into his pre-indictment statements to the FBI, which were quite specific on this score. When interviewed by the FBI in March 2010, the defendant did not suggest that he (or anyone else) would have reason to believe that the unauthorized disclosure could not harm the United States. To the contrary, the defendant told the FBI that the unauthorized disclosure was "egregious," "bad," involved [redacted] and could result in at least three potential harms to the United States, namely, that: [redacted]

[redacted]

[redacted]

Fifth Motion to Compel at 41. Without conceding its discoverability, the United States searched for, and produced, the [redacted] material prior to the 3:16 p.m. cut-off time. See id. Included in those productions were any drafts -- or revisions -- of the [redacted] itself. The Court has reviewed the government's redactions to those materials multiple times and has determined that they contain no discoverable information. The defendant's motion to compel proposed revisions to the [redacted] prior to the 3:16 p.m. cut-off time should be denied as moot.

(U) C. The Defendant's Challenges to this Court's Rulings at the September 27, 2013, Sealed Hearing and in its October 9, 2013, Order

[redacted] The defendant spends the rest of his brief effectively seeking reconsideration of multiple decisions this Court made at the September 27, 2013, sealed hearing and in its October 9, 2013, Order. See Sixth Motion to Compel at 4-11. It is not proper for the defendant to seek to compel relief from the United States that the Court has ordered the government need not provide. Compare id. at 5, 8, n. 3 (moving to compel the production of "any classified intelligence reports [redacted] as the charged intelligence report" and any documents addressing the [redacted] with October 9, 2013, Order at 2-3 (ordering that "the Government shall gather all intelligence reports accessed by the Defendant . . . [redacted] as the [redacted] report, regardless of the [redacted] Where litigants have "once battled for the Court's decision, they should [not] , . . . without good reason[,] [be] permitted to battle for it again," much less do so in a motion styled as anything other than a motion for reconsideration. United States v. Sunia, 643 F. Supp. 2d 51, 61 (D.D.C. 2009) (citation and internal quotations omitted). The defendant's multiple complaints with this Court's rulings concerning the review of

[redacted]

[redacted]

damage [redacted] assessments, if any, related to the [redacted] Report are both procedurally improper and substantively without merit. Nevertheless, to avoid further litigation on the matter and to preserve judicial resources, the United States has voluntarily taken additional steps that make the defendant's flawed demands moot.

[redacted] **1. Review of Intelligence Reports** [redacted]

[redacted] Without conceding the relevance or helpfulness of such classified material or any obligation to search for it, the United States advises that it has now searched for any [redacted] report accessed by the defendant between June 1, 2008 and June 11, 2009, and [redacted] The government's search identified no such reports. Accordingly, the defendant's demand that the United States compare such material regarding the [redacted] to [redacted] related to the [redacted] Report, if any exist, should be denied as moot. See Sixth Motion to Compel at 4-7.

(U) **2. Review of Defendant's Emails to Determine Intelligence Reports Known to the Defendant**

[redacted] Without conceding the relevance or helpfulness of such classified material or any obligation to search for it, the United States has also searched within the defendant's classified electronic media for any North Korean intelligence information attached to, or contained within, emails sent or received by the defendant between May 1, 2009 and June 11, 2009. The United States will include any such material within the collection of reports that it will compare to damage assessments related to the [redacted] Report, if any exist, as directed by the Court in its October 9,

[redacted]

[redacted]

2013, Order. Accordingly, the Court should deny as moot the defendant's demand that the United States include any such material found within the defendant's classified email when making that comparison. See Sixth Motion to Compel at 7-8.

[redacted] **3. Review of the Defendant's Classified Electronic Media for Discoverable Information Concerning** [redacted]

[redacted] Without conceding the relevance or helpfulness of such classified material or any obligation to search for it, the United States has also searched the defendant's classified electronic media for any information concerning the [redacted] the [redacted] Report, that was accessed by the defendant between May 1, 2009, and June 11, 2009. It found none. Accordingly, this Court should deny as moot the defendant's demand that the United States consider such material in the Court-ordered review of [redacted] related to the [redacted] Report, if any exist. See Sixth Motion to Compel at 8-9.

[redacted] **4. Review of the Collected Intelligence Reports for Discoverable Information Concerning the** [redacted]

[redacted] Without conceding the relevance or helpfulness of such classified material or any obligation to search for it, the United States will review the collected intelligence reports accessed by the defendant between June 1, 2008 and June 11, 2009, for discoverable information concerning the [redacted] the [redacted] Report "independent of the comparison process" of [redacted] if any exist, described by the Court in its October 9, 2013, Order. Accordingly, the Court should deny as moot the defendant's demand that the United States do so. See Sixth Motion to Compel at 9-11.

[redacted]

(U) **III. Conclusion**

(U) For all of the foregoing reasons, the defendant's Sixth Motion to Compel should be denied in its entirety.

Respectfully submitted,

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Date: November 5, 2013

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 5th day of November, 2013, I caused a true and correct copy of the foregoing filing to be served on counsel of record through the Classified Information Security Officer.

G. Michael Harvey
Assistant United States Attorney

[redacted]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	Criminal No.: 10-225 (CKK)
	)	
v.	)	Filed In Camera and
	)	Under Seal with the Classified
STEPHEN JIN-WOO KIM,	)	Information Security Officer
also known as Stephen Jin Kim,	)	
also known as Stephen Kim,	)	
also known as Leo Grace,	)	
	)	
Defendant.	)	

Leave to File Granted
Judge CK Kollar-Kotelly
1/30/14

ADDENDUM TO THE GOVERNMENT'S IN CAMERA, UNDER SEAL OPPOSITION TO THE DEFENDANT'S SIXTH MOTION TO COMPEL DISCOVERY

[redacted] On November 5, 2013, the United States filed its In Camera, Under Seal Opposition to defendant's Sixth Motion to Compel Discovery ("Government's Opposition"). In this Opposition, the United States represented that it had searched for the [redacted] for the [redacted] related to the [redacted] Report at issue in this case and had located no such document that pre-dates the 3:16 p.m. "cut-off time" on June 11, 2009, and that even if such a document existed, it would not be discoverable. On November 26, 2013, the United States learned [redacted] that an [redacted] document, identified in the last week, bears the electronic file name, [redacted] This electronic file name does not appear on the document itself. Instead, the title that appears in the document is [redacted] to accompany the [redacted] Report. Given the discrepancy in these titles as well as the actual content of the

[1] (U) The "date modified" information for the document is 9:34 a.m. on June 11, 2009.

[redacted]

[redacted] it is unclear whether the document is in fact the [redacted] for the [redacted] related to the [redacted] report requested by the defendant in a discovery request. The United States nonetheless files this addendum to inform the Court of the existence of this document and to reaffirm why it is not discoverable.

[redacted] The [redacted] is marked [redacted] It was located only in [redacted] files, and there is no evidence that it was ever disseminated. Of course, the defendant never had access to any document contained only in [redacted] files, including the [redacted] The [redacted] is not a potential source document for the charged unauthorized disclosure as it does not contain any of the intelligence information in the [redacted] Report. Moreover, there is no otherwise discoverable information in the [redacted] for the reasons stated in the Government's Opposition.[2] See Government's Opposition at 4-9.

[redacted] Upon request, the United States will make the [redacted] available for the Court's ex parte, in camera review on a read and return basis.

[2] [redacted] Although the United States set forth these reasons to counter the defense's argument that [redacted] would be relevant and helpful to the defense even if created after the cut-off time, these reasons apply equally to the pre-cut-off [redacted]

[redacted]

[redacted]

Respectfully submitted,

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Date: November 27, 2013

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 27th day of November, 2013, I caused a true and correct copy of the foregoing filing to be served on counsel of record through the Classified Information Security Officer.

Thomas A. Bednar
Assistant United States Attorney

[redacted]

~~Treat as Classified~~ [redacted] ~~Contents Subject to CIPA Protective Order~~

Filed with Classified Information Security Officer
CISO
Date 1/16/13

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	Criminal No. 10-225 (CKK)
	)	
v.	)	
	)	
STEPHEN JIN-WOO KIM,	)	
	)	
Defendant.	)	

Leave to File Granted
Judge C Kollar-Kotelly
1/30/14

DEFENDANT'S ADDENDUM OPPOSITION TO THE GOVERNMENT'S FIRST MOTION FOR A HEARING UNDER SEAL PURSUANT TO CIPA SECTION 6(a)

Defendant Stephen Kim, by and through undersigned counsel, respectfully submits the following addendum opposition to the government's first motion for a hearing under seal pursuant to CIPA § 6(a).

I. FACTUAL & PROCEDURAL BACKGROUND

On July 30, 2013, defendant filed his first CIPA § 5 notice in this case. Section 5 requires a defendant who "reasonably expects to disclose or to cause the disclosure of classified information" at trial to "notify the attorney for the United States and the court in writing." 18 U.S.C. App. 3 § 5(a). Defendant's first CIPA § 5 notice addressed two sets of documents: (1) the government's own "trial-ready" set, which consists of documents the government plans to declassify and use against Mr. Kim at trial; and (2) the first set of "treat as classified" documents, which the government submitted to the intelligence community for classification review.

On September 18, 2013, the government moved for a hearing under seal pursuant to CIPA § 6(a). Section 6(a) permits the government to "request the court to conduct a hearing to make all determinations concerning the use, relevance, or admissibility" of classified information contained in the defendant's Section 5 notice. 18 U.S.C. App. 3 § 6(a). Prior to the hearing,

Section 6(b) requires the government to "provide the defendant with notice of the classified information that is at issue" and to "identify the specific classified information at issue whenever that information previously has been made available to the defendant by the United States." 18 U.S.C. App. 3 § 6(b).

On October 7, 2013, defendant responded to the government's first Section 6(a) motion. The defense noted, in particular, that the legal standard espoused by the government in its motion had already been rejected by Judge Walton in United States v. Libby, 453 F. Supp. 2d 35 (D.D.C. 2006), as well as in a series of cases from the Eleventh Circuit upon which the government subsequently relied in objecting to the adequacy of defendant's second CIPA § 5 notice. See Response at 22-28. Once the appropriate legal standard had been established, the defense stated that it would be prepared to address the specific classified information identified in the government's motion at the Section 6(a) hearing.

The government responded to defendant's arguments by asserting, in both its reply brief and at a status hearing held on October 28, 2013, that the defense should be required to brief the use, relevance, and admissibility of every piece of classified information contained in its first CIPA § 5 notice. The defense rejected this assertion, noting that CIPA does not require the defendant to present his theories of use, relevance, or admissibility in a detailed pleading prior to the hearing mandated by Section 6(a). Following a colloquy with the Court, however, defense counsel agreed to file a pleading that briefly addresses the government's arguments on use, relevance, and admissibility for each "grouping" of classified information contained in the government's first motion for a hearing under CIPA § 6(a). The defense has attempted to do so below, without waiving its objections to the briefing process requested by the government. For the reasons previously raised with the Court, and because classified discovery in this case

remains ongoing, the defense expressly reserves its right to raise additional arguments regarding use, relevance, and admissibility at the Section 6(a) hearing.

II. THE GOVERNMENT'S FIRST CIPA SECTION 6(a) MOTION

The government's first motion for a hearing pursuant to CIPA § 6(a) addressed two sets of documents: (1) the government's own "trial-ready" set, which consists of documents the government intends to declassify and use against Mr. Kim at trial; and (2) the first batch of formerly "treat as classified" documents, which have undergone classification review. As the defense explained in its response to the government's motion, only one of these two sets of documents is properly before the Court now during Section 6(a) hearings (as opposed to hearings under CIPA Section 6(c), which specifically addresses substitutions). The defense addresses these two sets of documents separately below.

A. The "Trial Ready" Set

More than half of the items contained in defendant's first Section 5 notice consist of classified documents that the government itself intends to use against Mr. Kim at trial.[1] These documents have been described by the government as the "core documents" in its case against Mr. Kim, and the government proposed its "trial ready" versions before the defendant had even filed his first Section 5 notice. See Mot. at 14-15. The "trial ready" versions, however, contain significant additional substitutions that are not acceptable to the defense. The government's "trial ready" version of the charged intelligence report, for example, replaces [redacted] with a substitution drafted by the government (which Mr. Kim has never seen before, and certainly did not view on June 11, 2009). See First

[1] The documents the parties have referred to as the "trial ready" set consist of the nine items identified in Section I of defendant's first CIPA § 5 notice, as well as items 5 and 11 in Section II of the notice. The government indicated that these latter items should be included in the "trial ready" set in its first Section 6(a) motion. See Mot. at 56, 60.

CIPA § 5 Notice, Ex. 3. The government's "trial ready" version of the charged intelligence report also replaces the classification markings on the report viewed by Mr. Kim with substituted markings that were not present on the copy of the report allegedly view by Mr. Kim on June 11, 2009. Id.

As the defense explained in its response to the government's motion, the government cannot seriously dispute that the "core documents" in its case against Mr. Kim are useful and relevant to the defense. Indeed, the government conceded as much when it notified the defense that these "core documents" would be declassified before trial and produced a set of "trial ready" versions containing the government's proposed substitutions. The dispute between the parties at this point hinges on whether the additional substitutions proposed by the government "provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information." 18 U.S.C. App. 3 § 6(c). That issue is properly addressed during hearings under CIPA Section 6(c), which expressly addresses substitutions proposed by the government, rather than Section 6(a). See Response at 16-18, 34.

B. The First Set of "Treat as Classified" Documents

Defendant's first CIPA § 5 notice also contained several items previously marked "treat as classified" that the intelligence community deemed "classified" during its classification review. The government's motion indicates that, upon further review, several of the items noticed by the defendant should not have been deemed "classified," and therefore are not subject to a hearing under CIPA Section 6(a).[2] The remaining "treat as classified" items are addressed below.

[2] Specifically, the government determined that the following items are not properly at issue during CIPA Section 6 proceedings: (1) the Eric Richardson FBI 302 (Item II-4 in defendant's notice); (2) the Non-Disclosure Agreement signed by Jeffrey Eberhardt (Item II-7); (3) a news

1. **Investigative Questionnaires, Badge Records, and Phone Records for Other Individuals Who Accessed the Intelligence Report**

Defendant's first Section 5 notice included three categories of documents related to those individuals who accessed the intelligence report at issue prior to the "cut-off" time on June 11, 2009. Specifically, defendant noticed his intent to disclose (1) "Investigative questionnaires completed by individuals who accessed the intelligence report at issue, as well as accompanying FBI cover memoranda and notes" (Item II-1); (2) "Badge records for individuals who accessed the intelligence report at issue" (Item II-2); and (3) "Phone records for individuals who accessed the intelligence report at issue" (Item II-3). See First CIPA § 5 Notice at 5. Defendant's notice identified the relevant documents by Bates number. Id.

The government groups these three categories of documents together in its first CIPA Section 6(a) motion, stating that they "raise the same issues." Mot. at 52. The government then identifies five types of "classified or statutorily-protected information" contained in the documents noticed by the defendant that the government intends to challenge under CIPA Section 6(a). See id. at 53 (containing a bulleted list of the five types of information at issue). The government argues that the bulleted information is inadmissible at trial because the "investigatory materials" noticed by the defendant "are hearsay." Id. at 54. The government also argues that "neither [the investigatory material] nor the classified and statutorily protected information that they contain would be relevant or helpful to the defense at trial," id. at 54-55, but maintains that if the information at issue is deemed relevant and admissible, "substitutions can be proposed in CIPA 6(c) proceedings that will provide the defendant with the same, or

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article entitled, "North Korean Defector Describes Inner Workings of Isolated Regime" (Item II-8); and (4) a news article entitled, "The Madness of Chris Hill" (Item II-9). See Mot. at 55, 57-58

substantially the same, ability to make his defense as would disclosure of the underlying classified information at trial." Id. at 55

It is important to clarify, at the outset, the specific classified information placed at issue by the government's motion. CIPA Section 6 does not permit the government to issue a blanket objection to the disclosure of all "classified information" contained in defendant's Section 5 notice, or to use the Section 6 process to litigate the relevance and admissibility of unclassified portions of classified documents. See 18 U.S.C. App. 3 §§ 6(a), (b). Rather, CIPA Section 6(b) places the burden on the government to review the materials noticed by the defendant and to "identify the specific classified information" contained in those materials that the government will place at issue during Section 6(a) hearings. 18 U.S.C. App. 3 § 6(b). The only items presently before the Court, in other words, are those items of classified information specifically addressed in the government's motion

With respect to what the government refers to as the "investigatory materials," the government's motion places five specific types of information at issue:

[redacted]

(5) The investigative questionnaire and badge records of NSA employee James [redacted] which include his personal identifying information (e.g., last name, social security number, and locations of his entry and exit from NSA facilities) and the names of two other NSA employees who witnesses him signing the investigative questionnaire and statement and waiver.

Mot. at 53. The portions of the questionnaires, badge records, and phone records that contain one of these five types of information are subject to proceedings under CIPA Section 6(a). The portions of those materials that do not contain these five types of information are not at issue for Section 6(a) purposes, as they have not been challenged by the government (and, in any event, do not appear to contain classified information).

a. Investigative Questionnaires

The government objects to the disclosure of certain information contained in Questions 4, 12, 13, 15, and 16 of the investigative questionnaires (as well as the accompanying "statement and waiver" forms), which reference separate news articles that are not at issue in this case.[1] See Mot. at 53 & n.36. [redacted] See Mot., Tab B-1. Questions 4, 13, and 16 reference a separate June 12, 2009, Associated Press article ("South Korea Braces for 3rd Nuclear Test") that "was deemed to contain no classified information." Mot. at 53 n.36; Tab B-1.

Because the June 12th Associated Press article does not contain classified information, references to that article in Questions 4, 13, and 16 of the questionnaires do not implicate CIPA. The government appears to agree, as references to the AP article are not included in the government's bulleted list of the classified information at issue. See Mot. at 53. The relevance, use, and admissibility of Questions 13 and 16 (as well as references to the AP article in Question 4 and in the "Statement and Waiver" forms) therefore are not presently before the Court.

[1] The question numbers referenced in the government's motion appear to correspond to the first several investigative questionnaires attached to the motion as Tab B-1. See Mot., Tab B-1. The defense notes, however, that certain of the noticed questionnaires contain different numbering. See, e.g., Mot., Tab B-1, CLASS_3362-67. When referring to questions by number, the defense follows the same conventions as the government, with the understanding that several of the noticed questionnaires contain slightly different numbering.

Questions 4, 12, and 15 of the questionnaires refer to [redacted] See Mot., Tab B-1. The defense questions how references to the title of this published, publically-available article can constitute "classified information" subject to CIPA, whereas references to the title of another article in the same questionnaire apparently do not.[4] If the Court is satisfied that the references at issue constitute "classified information," however, the defense does not object to the redaction of references to [redacted] article in Questions 4, 12, and 15 of the investigative questionnaires and the accompanying "Statement and Waiver" forms.[5] The government's objections to the disclosure of certain information contained in Questions 4, 12, and 15 of the investigative questionnaires and the accompanying "Statement and Waiver" forms are therefore resolved.

The government also objects to the disclosure of certain information contained in Question 17 of the investigative questionnaires. See Mot. at 53 & n.37. The government states that "Question 17 of each investigative questionnaire references the [redacted] and that [redacted] Mot. at 53 n.37. The government also argues that the information at issue is hearsay and that it would not be relevant and helpful to the defense at trial. Id. at 54. These objections are unavailing, for several reasons.

[4] The government has refused to explain the basis for its objection to the disclosure of any reference to the [redacted] article in the questionnaires, opting instead to describe its supposed "equities" in an ex parte pleading with the Court. See Mot. at 53-54. The defense continues to object to this ex parte process, as the government should not be permitted to hide its arguments from the defense at the Section 6(a) stage.

[5] Based on the representations in its motion, the defense assumes that the government also will not rely on any references to [redacted] article at trial. If that is not the case, the defense obviously makes no such concession.

With respect to any handwritten comments on Question 17 of the questionnaires, the government fails to specify which of the questionnaires contain handwritten material that the government finds objectionable. See Mot. at 53. Under CIPA Section 6(b), the government must "identify the specific classified information at issue whenever that information previously has been made available to the defendant by the United States." 18 U.S.C. App. § 6(b). The defense and the Court should not be left to guess which of the handwritten responses to Question 17 contain the type of classified information described in the government's motion, and which do not. By failing to identify the specific handwritten information to which it objects, the government has failed to satisfy its own obligations under CIPA Section 6(b). The government's motion with respect to any handwritten responses to Question 17 should therefore be denied.

As to the question-and-answer sections of Question 17, it is important to note that the questionnaires themselves were only provided to individuals who accessed the intelligence report at issue prior to the "cut-off" time on June 11, 2009. Question 17 asked those individuals, "Did you have access to the [redacted]eport on which the aforementioned articles were based?"[6] See Mot., Tab B-1. The individual could then check "Yes" or "No," and provide a description of the relevant materials. Id.

For those individuals who did not answer "Yes" to Question 17, the relevance of this information to Mr. Kim's defense is obvious: they lied. The defense will be able to show, based on classified discovery provided by the government, that each of these individuals did access the intelligence report at issue on June 11, 2009, despite their statements to the contrary. These

[6] As government investigators subsequently acknowledged, the use of the phrase [redacted]eport" was actually a mistake. Question 17 was intended to refer to the charged intelligence report, which is a [redacted] not [redacted] report. According to the FBI, "during the initial stages of the FBI's investigation [the charged intelligence report] was inadvertently referred to as [redacted] CLASS_2869.

statements are not hearsay, as they are not being offered for the truth of the matter asserted (indeed, quite the opposite -- the defense will contend that these statements are false). These statements are relevant to Mr. Kim's defense because they tend to show that individuals who accessed the charged intelligence report on June 11, 2009, either (1) lied about their access to the report, or (2) failed to recall accessing an intelligence report that the government now contends contained "national defense information," the disclosure of which compromised national security. The defense will also show that, despite their awareness of these discrepancies, government investigators failed to investigate these false statements or pursue leads that did not point towards Mr. Kim.

For those individuals who did answer "Yes" to Question 17, such information is relevant to Mr. Kim's defense for several reasons. First, if those individuals are called to testify at trial and deny accessing the intelligence report at issue, their answers to Question 17 are relevant for impeachment purposes. Such prior, inconsistent statements are exceptions to the hearsay rule. If these individuals are called to testify and cannot recall whether they had access to the intelligence report, their answers to Question 17 are relevant to refresh their recollection. At this point the government has not identified those witnesses it intends to call at trial. The defense therefore is required to notice these prior statements though the CIPA process. This information is also relevant to demonstrate that government investigators were aware that several government employees and contractors (aside from Mr. Kim) acknowledged accessing the intelligence information at issue on June 11, 2009, but failed to follow-up and properly investigate those individuals. This information will not be offered for the truth of the matter asserted (i.e., that the individual actually accessed the intelligence report), but rather for the simple fact that the

individual checked "Yes" when asked whether he or she accessed the intelligence information at issue. The information therefore is not hearsay.

Finally, the defense notes that the government's concerns with respect to Question 17 appear to focus on the use of the phrase [redacted] See Mot. at 53 & n.37. As noted above, that phrase was used (inaccurately) by government investigators early in the investigation to describe the intelligence report allegedly disclosed to Mr. Rosen (which turned out to be [redacted]). As explained above, Question 17 is relevant to Mr. Kim's defense for several reasons, but those reasons do not necessarily hinge on the use of the specific phrase [redacted] The government's concerns regarding the specific verbiage employed in Question 17 are therefore easily addressed under Section 6(c), which would permit the government to propose a substitution for any references to [redacted] The government's concerns, however, do not provide a basis for finding that Question 17 – which asked government employees whether they accessed the charged intelligence report – is irrelevant to Mr. Kim's defense.[7] If the presence of a classified phrase were sufficient to preclude disclosure of the substantive question-and-answer at trial, the government could simply

[7] In addition to its objections to the content of certain questions contained in the questionnaires, it is not clear to the defense whether the government intended to object to the disclosure of the classification markings that appear at the top of the investigative questionnaires themselves. See Mot. at 53 (vaguely objecting to disclosure of [redacted] without referencing specific documents or Bates pages). The defense agrees that classification markings should be removed from the investigative questionnaires at trial.

The government also specifically objects to the disclosure of the investigative questionnaire of NSA employee James [redacted]. See Mot. at 53. As the defense explains below with respect to Mr. [redacted] badge records, the defense has previously indicated that it will work with the government to resolve concerns about the use of the full names of NSA personnel at trial. See Subsection (b) below. The same is also true with respect to the two NSA employees who witnessed Mr. [redacted] sign his questionnaire. See Mot. at 53.

pepper its questionnaires with classified phrases and thereby preclude use of such questionnaires at trial.

b. Badge Records

The government objects to the disclosure of a single page of badge records noticed by the defendant related to NSA employee James [redacted]. See Mot. at 53. With the exception of Mr. [redacted] records, the government does not identify any other specific classified information contained in the badge records that it finds objectionable.[8] The only badge records presently before the Court are therefore those of Mr. [redacted].

As the government notes, the badge records for Mr. [redacted] contain his first and last name and (presumably) his social security number. See Mot. at 53; Tab B-2 (CLASS_1073). The defense does not seek to use Mr. [redacted] social security number at trial, and therefore will not oppose substitution or redaction of that information. Similarly, with respect to the full names of NSA personnel, the defense remains confident that the parties will agree on a solution as part of the CIPA Section 6(c) process.

The defense disagrees, however, with the government's assertion that Mr. [redacted] badge records should not be disclosed because they identify the "locations of his entry and exit from NSA facilities." Mot. at 53. The badge records at issue are extraordinarily generic - they do not refer to the NSA, and they describe entries and exits in the most vague of terms (e.g., [redacted] Entry"). See Mot., Tab B-2 (CLASS_1073). If the abbreviations contained in these

[8] As with the investigative questionnaires, the government's motion fails to indicate whether the government objects to the disclosure of classification markings at the top of the badge records themselves. See Mot. at 53. The defense questions whether badge records for [redacted] government employees constitute "classified information," particularly in light of the fact that even Mr. [redacted] badge records were originally portion-marked "Unclassified/For Official Use Only." See Mot., Tab B-2 (CLASS_1073). In any event, the defense agrees that classification markings should be removed from the badge records at trial.

records are objectionable for some reason, the government has failed to specifically identify and explain this issue, but remains free to propose substitutions during the CIPA Section 6(c) process. Mr. [redacted] accessed the intelligence report at issue prior to the "cut-off" time on June 11, 2009, and his whereabouts on that date are therefore relevant to the defense. The badge records are not hearsay, as they are official government records kept in the normal course of business. The government's unexplained concerns regarding descriptors or abbreviations contained in these documents are not a proper basis for finding Mr. [redacted] whereabouts on June 11, 2009, irrelevant or inadmissible. Rather, CIPA expressly permits the government to propose substitutions in such circumstances under Section 6(c).

c. Phone records

The government objects to the disclosure of a single page of phone records for [redacted] See Mot. at 53 & n.38. With the exception of [redacted] phone records, the government does not identify any other specific classified information contained in the phone records that it seeks to place at issue.[9] See Mot. at 53. The only phone records presently before the Court are therefore [redacted]

The government's objection to the disclosure of [redacted] phone records is meritless. The government states that "the Court has already ruled that the defense is not entitled to [redacted][10] Mot. at 54, but the phone records noticed by the defendant

[9] As with the investigative questionnaires and badge records, the government's motion fails to indicate whether the government objects to the disclosure of classification markings at the top of the phone records themselves. See Mot. at 53. With the exception of [redacted] every page of phone records noticed by the defendant was originally marked "UNCLASSIFIED." See Mot, Tab B-3. The defense therefore questions whether official work phone records of [redacted] government employees constitute "classified information" subject to CIPA. In any event, the defense agrees that classification markings should be removed from the phone records at trial.

[10] The defense does not agree with the government's characterization of the Court's prior ruling. The Court's Opinion on defendant's fourth motion to compel discovery was expressly limited to

do not contain [redacted] See Mot., Tab B-3 (CLASS_2920). The government also asserts that "there is nothing relevant about the phone records themselves." Mot. at 55. The government does not dispute, however, that [redacted] the intelligence report at issue on the morning of June 11, 2009, and [redacted] prior to the publication of the Rosen article.[11] Those [redacted] are relevant to the defense, as they identify other individuals [redacted] the intelligence information at issue on June 11, 2009. Indeed, as the Court is aware, a filter team is currently reviewing the phone records [redacted] to determine who [redacted] on June 11, 2009.[12]

2. List of SCI Compartments and Access Privileges for VCI Personnel

The government also objects to the disclosure of a document containing a list of classified (SCI) compartments and access privilege for employees in Mr. Kim's bureau at the Department of State. See Mot. at 56-57. Notably, the government does not challenge the relevance or admissibility of this document. Id. Rather, the government asserts that a stipulation entered by the parties during classified discovery "resolves the defendant's need for this document at trial." Id. at 57.

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the record before the Court at that time, see Opinion at 7, and the Court noted that it [redacted] (emphasis in original).

[11] The government's redaction of [redacted] will be addressed in defendant's next motion to compel discovery.

[12] In addition, [redacted] For example, a government witness may testify that he or she [redacted] In such circumstances, CIPA envisions the defendant putting the government on notice before trial that such [redacted] may be disclosed. Otherwise, the trial would have to be delayed or interrupted while the parties litigated the admissibility of [redacted] that contradicted the witness's testimony.

As the defense explained in its response to the government's motion, the proposed stipulation does not resolve defendant's need for this document. See Response at 40. The terms of the stipulation have not been finalized, so it is premature for the government to assert that it "resolves the defendant's need" for the document. Moreover, the stipulation relied upon by the government addressed separate discovery requests submitted after the government produced the list of SCI compartments. The stipulation was intended to authenticate the noticed document and to resolve those additional requests, but certainly was not designed to "resolve the defendant's need for" the list of SCI compartments at trial. The defense did not agree to rely on the stipulation in place of the noticed document, and the tentative stipulation itself contains no such language. See Dkt. 80, Ex. 10, at 14 (June 22, 2012 Discovery Letter); see also Dkt. 58, Ex. 24, at 4 (October 6, 2011 Discovery Letter).

In any event, the issues raised by the government's motion are not properly before the Court under CIPA Section 6(a). By proposing a stipulation in place of the noticed document, the government has conceded that the classified information contained therein is relevant and admissible for Section 6(a) purposes. Whether the proposed stipulation provides the defendant "with substantially the same ability to make his defense as would disclosure of the specific classified information" is properly addressed under Section 6(c). See 18 U.S.C App. 3 § 6(c).

3. Email Regarding the Charged Article Sent by [redacted] over an Unclassified System on June 16, 2009

The government objects to the disclosure of certain information contained in an email sent [redacted] over an unclassified system. See Mot. at 58-59. Specifically, the government objects to the disclosure of (1) [redacted] and (2) [redacted] Mot. at 59.

The version of the email noticed by the defendant does not contain [redacted] See Mot., Tab B-9. The government's objection as to [redacted] is therefore misplaced.

The version of the email noticed by the defendant does contain the [redacted] which is not at issue in this case. See Mot., Tab B-9. The defense agrees that the [redacted] is not relevant to Mr. Kim's defense. The defense notes, however, that the government's description of the [redacted] in its motion is not accurate. See Mot. at 59. The version of the article charged in the Indictment in this case is attached as Exhibit 1 (CLASS_25-26). [redacted] The same also applies to any other copies of the Rosen article contained in the "trial ready" or "treat as classified" sets.

4. **The FBI 302 and Agent's Notes from a September 20, 2010, Interview with Mi Young** [redacted]

The government objects to the disclosure of certain information contained in an FBI 302 and agent's notes from an interview with NSA employee Mi Young [redacted] See Mot. at 60-61. The government states that, "[i]f the defendant were to agree to refer to Ms. [redacted] and [NSA Special Agent Stormc] [redacted] at trial by their first name and last initial, as well as to forgo the disclosure at trial of Ms. [redacted] NSA telephone number, then the Court's ruling on any objection to the defendant's use of the FBI 302 and agent's notes of Ms. [redacted] September 8, 2010, interview can await trial." Id.

As the defense noted in its response to the government's motion, these types of substitutions are more properly addressed under Section 6(c), as the concerns raised by the

government do not relate to the relevance of the objectionable material to Mr. Kim's defense. However, as noted above, the defense does not foresee any issues with the government's proposal as to these two individuals. The defense is confident that the parties will reach an agreement on the treatment of the full names and identifying information of NSA personnel as part of the Section 6(c) process.

Respectfully submitted,

DATED: December 6, 2013

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[redacted] Filed with the Classified Information Security Officer
CISO
Date 12/16/2013

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	Criminal No.: 10 225 (CKK)
	)	
v.	)	
	)	Filed In Camera and
STEPHEN JIN-WOO KIM,	)	Under Seal with the Classified
also known as Stephen Jin Kim,	)	Information Security Officer
also known as Stephen Kim,	)	
also known as Leo Grace,	)	
	)	
Defendant.	)	

Leave to File Granted
Judge CKollar-Kotelly
1/30/14

(U) GOVERNMENT'S REPLY TO ADDENDUM OPPOSITION TO THE GOVERNMENT'S FIRST MOTION FOR A HEARING UNDER SEAL PURSUANT TO CIPA SECTION 6(a) AND NOTICE OF OBJECTIONS CONCERNING USE, RELEVANCE AND ADMISSIBILITY OF CLASSIFIED INFORMATION IDENTIFIED IN DEFENDANT'S FIRST CIPA SECTION 5 NOTICE

(U) On September 18, 2013, the United States submitted its Motion for Hearing Under Seal Pursuant to CIPA Section 6(a) and Notice of Objections Concerning Use, Relevance and Admissibility of Classified Information Identified in the Defendant's First CIPA Section 5 Notice (hereinafter "Section 6(a) Motion"). In that filing, the United States provided a detailed explanation of its objections to specific items of classified information that the defendant claims he would disclose at trial in his second CIPA Section 5 notice. The defendant filed a response to the government's motion on October 7, 2013, in which he declined to respond substantively to the government's objections and instead asserted that he would wait until the Section 6(a) hearing to set forth any defense theory demonstrating the use, relevance and admissibility of the classified information he had noticed. See Defendant Stephen Kim's Response to the Government's First Motion for a Hearing Under Seal Pursuant to CIPA Section 6(a) (hereinafter, "Opposition"). When ordered by the Court to respond to the government's objections in more detail, on December 6, 2013, the defendant filed his Addendum Opposition to the Government's

[redacted]

[redacted]

First Motion for a Hearing Under Seal Pursuant to CIPA Section 6(a) (hereinafter, "Defense Addendum"). As demonstrated below, the Defense Addendum, in large part, still fails to offer any arguments as to the use, relevance and admissibility of the specific classified information to which the government objected in its motion. Because the defense has twice failed to carry its burden on these issues, the Court should preclude the defendant's public disclosure of the specific classified information objected to in the government's Section 6(a) Motion.

[redacted] What is most remarkable about the Defense Addendum is how little disagreement it identifies between the parties concerning the specific classified information raised in the government's Section 6(a) Motion. It is replete with concessions, near-concessions, or failures to provide any coherent response to the government's objections. As many of these concessions concern the same issues about which defense counsel refused to meet-and-confer last August, the Defense Addendum reveals clearly what the defendant's CIPA Section 5 and 6 stratagems have cost: a substantial waste of government time and resources. A comparison between the Defense Addendum and the government's August, 27, 2013, letter[1] seeking to meet and confer with defense counsel concerning many of the issues finally addressed by the defendant in his Addendum, demonstrates that many of these issues could have been resolved, or at least significantly narrowed, prior to the filing of the government's (very burdensome) CIPA Section 6(a) Motion:

- Redactions to the June 11, 2009 article: The government's Aug. 27 Letter asked whether the defendant would agree that [redacted] portion-marked June 11th article may be redacted from the trial version of that document. See Aug. 27 Letter at 1. The defendant refused to respond to that request at the September 3, 2013, meet-and-confer session. Three months later, in his Addendum, the

[1] See Notice of Filing, ECF Docket No. 153, Exhibit 8 (classified letter, dated August 27, 2013 ("Aug. 27 Letter")); see generally Section 6(a) Motion at 12-14.

[redacted]

[redacted]

defendant finally "agree[d] that [redacted] is not relevant to Mr. Kim's defense." Defense Addendum at 16.

- References to [redacted] The government's Aug. 27 Letter asked whether the defense would confirm that it did not object to the redaction of certain uncharged classified material from the government's "trial ready" set of documents, including references to [redacted] See Aug. 27 Letter at 1. The defendant refused to respond to that request at the September 3, 2013, meet-and-confer session. Three months later, in his Addendum, the defendant finally confirmed that he "does not object to the redaction" of these references and called the government's objections "resolved." Defense Addendum at 8.

- Substitutions/Redactions to "trial ready" materials: The government's Aug. 27 Letter asked whether the defendant actually objected to each and every proposed substitution and redaction in the "trial ready" materials, and specifically identified the types of classified information that the government would object to use at trial in those materials (e.g., the terms [redacted] See Aug. 27 Letter at 2-3. The defendant refused to respond to that request at the September 3, 2013, meet-and-confer session. In his Addendum, the defendant still does not respond to the whole of the government's objection regarding this classified information but, where he does attempt to meet the government's objection, he concedes that his reasons for noticing the classified document in question "do not necessarily hinge on the use of the specific phrase" to which the United States had objected, i.e., "'[redacted]

- List of classified compartments: The government's Aug. 27 Letter noted that the parties had previously agreed to enter a stipulation that the defendant had access to at least 79 SCI compartments, and asked whether the defense agreed that the proposed stipulation resolved the need for the list of SCI compartments and access privileges identified by the defendant in his first CIPA Section 5 notice. See Aug. 27 Letter at 2. The defendant refused to respond to that request at the September 3, 2013, meet-and-confer session. In his Addendum, the defendant now claims that the "terms of the stipulation have not been finalized, so it is premature for the government to assert that it 'resolves the defendant's need' for the document." Defense Addendum at 15. In the past three months, the defense has made no effort to "finalize" that stipulation, despite the government's request in August.

(U) Because of defense counsel's refusal to engage in productive discussions concerning these same issues, members of the Intelligence Community were forced to assemble and draft detailed declarations setting forth the legal and factual bases for the classified information privilege protecting this information from public disclosure. Further, the government was

[redacted]

[redacted]

required to draft a 63-page motion seeking to preclude this same material from use at trial, much of which the defendant now concedes, or effectively concedes, is not relevant to any issue in this case. The conduct of the defense in this case stands in stark contrast to the productive negotiations that have occurred prior to the beginning of CIPA Section 6 proceedings in other cases before this Court. See Section 6(a) Motion at 14, n. 5. For all these reasons, the government's Section 6(a) Motion should be granted.

(U) I. Trial Ready Set

[redacted] In his Addendum, the defendant continues to persevere in his incorrect assertion that the United has conceded that every item of classified information in the "trial ready" set – including the classified information underlying the proposed substitutions and redactions to those documents – is admissible if offered by the defense at trial because the United States will use those documents in its case-in-chief at trial. The United States has repeatedly and consistently stated otherwise. See, e.g., Section 6(a) Reply at 6 ("The defendant is wrong in his assumption."). Far from conceding anything, in its Section 6(a) Motion, the United States identified page-by-page the differences between the trial ready set of documents and the versions of those documents produced in classified discovery. The United States then set forth at length and in detail its objections to the use of the classified information underlying the government's proposed substitutions and redactions in the trial ready set, and its claim of privilege over those items of classified information. See Section 6(a) Motion at 36-51; [redacted]

[redacted] The government's position with respect to the classified information underlying the proposed substitutions and redactions to the trial ready set of documents is also clear: during the CIPA Section 6(a) stage, "the Court should decide [whether] the classified information underlying th[e] additional substitutions and redactions [in the trial ready set] is . . . relevant or

[redacted]

[redacted]

helpful to the defense and should . . . otherwise be admitted at trial by the defense." Section 6(a) Motion at 35-36; see also Section 6(a) Reply at 6 (quoting same). "Accordingly, the defendant must meet his burden at the CIPA Section 6(a) stage of demonstrating the use, relevance and admissibility of the classified information underlying the government's substitutions and redactions in the trial ready set." Section 6(a) Reply at 7.

(U) The government's position is consistent with the law. As this Court has already held, it must decide the permissibility of the government's proposed substitutions and redactions in CIPA only if it has previously "determine[d] at [the CIPA Section 6(a)] hearing that disclosure of the classified information identified by the defendant is warranted . . . ." Memorandum Opinion (Dec. 9, 2013) at 3; see also 18 U.S.C. App. 3 § 6(c) (only calling for the Court to pass on substitutions and redactions after a "determination by the court authorizing the disclosure of specific classified information"). Put another way, no classified information that the United States has substituted or redacted will even reach the 6(c) stage unless the defendant has first successfully argued as to the use, relevance, and admissibility of the underlying classified information at the Section 6(a) stage. The defendant's cavalier approach to the trial ready set also runs afoul of another holding of this Court: that Section 6(a) proceedings focus on the relevance, use and admissibility by the defense of specific classified information, not classified documents. See Memorandum Opinion (Dec. 9, 2013) at 16 ("It is not enough for Defendant to identify the specific classified documents that he expects to disclose at trial. Rather, Defendant must specify the specific classified information he reasonably expects to disclose at trial."); see also United States v. Rezaq, 134 F.3d 1121, 1142 (D.C. Cir. 1998) (Yunis standard "applies to sub-elements of individual documents"); 18 U.S.C. App. 3 § 5 (defendant must notice intention to use "classified information," not documents).

[redacted]

[redacted]

(U) Ignoring these clear statements of law, the defendant fails to offer any argument in his Addendum demonstrating the use, relevance or admissibility of the specific classified information underlying the government's proposed redactions and substitutions to the trial ready set. The defense merely claims that "the government cannot seriously dispute that the 'core documents' in its case against Mr. Kim are useful and relevant to the defense." Defense Addendum at 4. That conclusory statement does not even begin to satisfy the defendant's burden concerning the use, relevance, and admissibility of the specific classified information in those documents that is in dispute. Accordingly, the Court should find that the defense has waived its opportunity to present that classified information at trial. As a result, the Court should permit for use at trial only the versions of the trial ready set proposed by the United States in its Section 6(a) Motion.

(U) **II. <u>The First Set of "Treat As Classified" Documents</u>**

(U) The defendant also failed to meet the government's arguments regarding the "treat as classified" documents. As an initial matter, the defendant wrongly accuses the United States of making an improper "blanket objection to the disclosure of all 'classified information' contained in defendant's Section 5 notice." Defense Addendum at 6. The United States did not do this. As is evident from its lengthy Section 6(a) Motion, the United States carefully reviewed the materials noticed by defendant in his first Section 5 Notice, and notified the Court of numerous items that were not in dispute under Section 6(a). The United States then made specific objections, breaking down by bullet point the particular items of classified information at issue.[2]

[2] (U) The defendant also claims that the Court cannot rule on the relevance and admissibility of unclassified portions of classified documents at the Section 6 stage. Defense Addendum at 6. To the contrary, as the United States noted, the Court may properly rule on other issues of privilege at the Section 6 stage, particularly where they are closely related to the classified

[redacted]

[redacted]

For instance, the United States grouped together several sets of similar documents, consisting of investigative questionnaires, employee badge records, and employee phone records. The United States then stated that "[t]hese materials contain the following classified or statutorily-protected information:" and provided a bullet-point list of the specific classified information to which it objected, see Section 6(a) Motion at 52-53, and asserted its privilege over that material, see id. at 53-54. In addition to its privilege argument, the United States made evidentiary arguments, noting that "none of the investigatory materials that the defendant has noticed would be admissible at trial" because they are hearsay, and "neither those materials nor the classified and statutory protected information that they contain would be relevant or helpful to the defense at trial." Section 6(a) Motion at 54. Accordingly, the defendant's assertion that the government has made a "blanket objection to the disclosure of all 'classified information' contained in defendant's Section 5 notice" is specious. As demonstrated below, his arguments concerning the specific classified information objected to in the government's Section 6(a) Motion fare no better.

(U) A. Investigative Questionnaires, Badge Records, and Phone Records for Individuals on the Access List

[redacted] The Defense Addendum largely ignores the government's objections to the specific items of classified information the government's Section 6(a) Motion identifies in the investigative questionnaires.[3] Where defendant has offered no response to the

information privilege. See Section 6(a) Motion at 48-49; see also United States v. Drake, No. RDB 10-181, 2011 WL 2175007, *5-*7 (D. Md. June 2, 2011).

[3] (U) The defendant claims that "it is not clear to the defense whether the government intended to object to the disclosure of the classification markings that appear at the top of the investigative questionnaires themselves." Defense Addendum at 11 n.7. The defendant makes the same claim with respect to classification markings at the top of the badge records and phone records. Id. at

[redacted]

government's objections, and has failed to set forth any theory concerning use, relevance and admissibility, the Court should find that the defendant has conceded these objections and hold that the defendant is prohibited from using the identified classified information. For instance, the United States objected to the use of references in the investigative questionnaires to a [redacted] See Section 6(a) Motion at 53 and n.36. See also Ex Parte Classified Addendum. The defendant's only response is to question whether that information is really classified. See Defense Addendum at 8. The defendant's opinion about the classification of information has no bearing on the CIPA process, and should be rejected. See, e.g., United States v. Smith, 750 F.2d 1215, 1217 (4th Cir. 1984), vacated on other grounds, 780 F.2d 1102 ("[T]he government . . . may determine what information is classified. A defendant cannot challenge this classification. A court cannot question it."). Otherwise, the defendant does not assert that references to [redacted] are relevant or admissible. To the contrary – three months after the government sought to resolve this issue – the defense "does not object to the redaction" of these references, and "[t]he government's objections . . . are therefore resolved." Defense Addendum at 8. Accordingly, the Court should find that the defendant is not allowed to introduce any references to [redacted] in the investigative questionnaires, or anywhere else they might appear in documents to be used at trial.

[redacted] The United States also objected to references in the investigative questionnaires to types of classified [redacted] specifically [redacted]

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12 n.8; id. at 13 n.9. The United States will consent to the removal at trial of classification markings from these items subject to additional agreed-to conditions, such as the defense not commenting on the lack of classification markings and an appropriate jury instruction. The United States will address the issue of classification markings on other documents on a case-by-case basis.

[redacted] See Section 6(a) Motion at 53 and n.37; [redacted] In his Addendum, the defendant does not address why the use of these terms is relevant or helpful to the defense. Instead, he attempts to offer a theory of relevance and admissibility of the overall documents in which the terms appear, or of questions in documents containing those terms. In doing so, the defendant ignores that the government's objection is focused on the specific classified words and phrases identifying the types of [redacted] identified in its motion. See Section 6(a) Motion at 52-53. For instance, the defendant provides the example of Question 17 from the investigative questionnaire, see Defense Addendum at 9, which reads "Did you have access to the [redacted] report in which the aforementioned articles were based?" The government objected to the use of the references to the [redacted] contained in this question. While defendant offers a theory of relevance and admissibility as to Question 17, see Defense Addendum at 9-11, he provides no justification for why the phrase [redacted] are themselves relevant. Indeed, the defendant concedes that all of his reasons for using Question 17 "do not necessarily hinge on the use of the specific phrase [redacted] Defense Addendum at 11. Again, the Court should find that the defendant has conceded that he should not be allowed to use the terms [redacted] at trial, and that no further proceedings under Section 6 are necessary to that determination.[4]

[4] (U) The defendant sets forth theories of use, relevance and admissibility as to the non-classified portions of Question 17 and other items from the investigative questionnaires. See Defense Addendum at 8-12. The government hereby preserves its objections to the admission of these items or elicitation of testimony therefrom on relevance, hearsay and any other grounds. But [redacted]

[redacted]

(U//FOUO) With respect to National Security Agency (NSA) employee James [redacted] the United States objected to the investigative questionnaire and badge records of Mr. [redacted] which the defendant noticed and which contain identifying information, as well as the names of two other NSA employees who witnessed him signing the investigative questionnaire and statement and waiver. See Section 6(a) Motion at 53 and n. 39. The defense asserts that it will not seek to use Mr. [redacted] social security number, and that "with respect to the full names of NSA personnel, the defense remains confident that the parties will agree on a solution as part of the CIPA Section 6(c) process." Defense Addendum at 12. This assertion, however, misses the point, because in order to progress to the Section 6(c) stage, there must be a prior "determination by the court authorizing the disclosure of specific classified information." 18 U.S.C. App. 3 § 6(c). Only if the defense carries its burden on use, relevance and admissibility is it necessary for the Court to opine on the propriety of a substitution or redaction. Because the defendant has failed to carry his burden on those issues with respect to Mr. [redacted] identifiers, the government's Section 6(a) Motion should be granted.

(U//FOUO) As for Mr. [redacted] NSA badge records, the defendant asserts that because Mr. [redacted] accessed the intelligence report at issue, "his whereabouts on that date are therefore relevant to the defense." Defense Addendum at 13. Defendant's theory suffers from two important flaws.[5] First, the defendant has not identified anything about the whereabouts of this

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because the theories of use, relevance and admissibility set forth by the defense do not relate to the specific classified information at issue, they need not be resolved by the Court in the Section 6(a) proceedings.

[5] (U) The defense also questions whether the badge records should be classified. Defense Addendum at 12 n.8. Again, the defendant's opinion has no bearing on the classification of a document. See, e.g., Smith, 750 F.2d at 1217.

[redacted]

[redacted]

particular person that has any probative value in this case. Without something more, the mere whereabouts of a person on the Access List on June 11, 2009, has no probative value to any issue in this case, and would simply mislead and distract the jury. Second, even if Mr. [redacted] whereabouts in particular had some relevance to the case, the only privilege the United States has asserted with respect to his whereabouts is a (statutory) privilege over the references to the precise building locations (NSA entries and exits) used by Mr. [redacted] The defendant has offered no theory as to why the precise building locations of Mr. [redacted] entries or exits into a specific NSA facility would be relevant to any issue in this case.

[redacted] Just as with the badge records, the defendant should not be able to claim that the phone records of an individual are admissible at trial merely because the individual is on the Access List.

(U) B. List of SCI Compartments and Access Privileges

(U) In its Section 6(a) Motion, the United States set forth its belief that the stipulation to which the parties had previously agreed to enter concerning the defendant's access to at least 79 different SCI compartments as of June 2009 would vitiate the defendant's need for the list of those same compartments noticed in his First CIPA Section 5 notice. Section 6(a) Motion at 56-57. That certainly was the government's intent when it agreed to enter that stipulation. See Notice of Filing, ECF Docket No. 80, Exhibit 10 (classified discovery letter, dated June 22, 2012). In his Addendum, however, the defendant reveals for the first time that the information he intends to use from the document in question goes beyond the stipulation. Namely, the

[redacted]

[redacted]

defendant apparently both wants to disclose publicly the specific compartments to which he had access on June 11, 2009, as well as the names of the specific compartments to which other State Department employees had access. Defense Addendum at 12. The United States objects to the admission of this irrelevant, classified information.[6] At the outset, the compartments to which other State Department employees had access are not relevant and helpful to the defense, and are more likely than not to confuse and mislead the jury, and to waste time in presentation. The defense offers no argument to the contrary in his Addendum. See id. Similarly, the defendant offers no argument as to the relevance of the specific compartments to which he had access on June 11, 2009 (as opposed to the number and/or volume of those compartments). See id. The defendant claims that because the United States agreed to the admissibility of the aforementioned proposed stipulation, it has conceded the relevancy of the list of the specific 79 SCI compartments. This argument is specious. The United States has never conceded the relevance of the specific compartments, and the defense still has offered no basis for their relevance or admission at trial.

[redacted] C. Email Regarding the June 11, 2009 Fox News Article Sent by [redacted]

[redacted] In noticing the June 11, 2009, email sent by [redacted] the defendant did not specify whether he was noticing a version that contained [redacted] or one that did not. As it has with other [redacted] the United States objected on the grounds that [redacted] is covered by the classified information privilege and is not

[6] (U) In its Section 6(a) Motion, the United States reserved its right to object where, as here, the defendant raises his intention to use different classified information than was previously apparent. See Section 6(a) Motion at 34.

[redacted]

[redacted]

relevant or helpful to the defense. See Section 6(a) Motion at 58-59. The United States specifically stated that if the defense agreed to use the version of the email that did not include [redacted] and contained a redaction [redacted] June 11, 2009 article, then the Court's decision on any objection to the use of this email could await trial, since the classified CIPA issues would be resolved. Section 6(a) Motion at 59. The defense did not respond to this statement in its Opposition. In its Addendum, the defense finally states that it seeks to use the version of the email that does not contain [redacted] and in any event offers no justification for why [redacted] would be relevant or admissible at trial. See Defense Addendum at 16.

[redacted] The defense also states that it "agrees that [redacted] June 11, 2009 Fox News article is not relevant to Mr. Kim's defense," despite having noticed the email in its entirety, which included this specific classified information. See Defense Addendum at 16. The defendant goes on, however, to assert that more information should be redacted from the Fox News article than has been redacted in the trial ready set. Id. If the defense objects to the information on relevance or other grounds, it may lodge such an objection and seek relief outside of the CIPA process.

(U/FOUO) D. The FBI 302 and Agent Notes from September 20, 2010, Interview of Mi Young [redacted]

(U//FOUO) In its Section 6(a) Motion, the United States asserted objections over the public disclosure of NSA employee Mi Young [redacted] last name and telephone number, and the last name of another NSA employee, all of which appear in Ms. [redacted] FBI 302 and associated agents' notes. Section 6(a) Motion at 60-61. This information is subject to a NSA statutory privilege. See id.; see also [redacted] ¶ 12c. The United States stated that if the defendant

[redacted]

[redacted]

agreed to refer to Ms. [redacted] and Special Agent Storme [redacted] by their first names and last initials, as well as to forgo disclosure of Ms. [redacted] NSA telephone number, then the Court's ruling on any other objection to the use of these materials could await trial. Section 6(a) Motion at 60-61. Absent such an agreement, the United States objected to the use of this privileged information as hearsay that is not relevant and helpful to the defense. Id. at 61.

(U//FOUO) Without asserting any basis for the relevance or admissibility of this information, and without contesting the valid statutory privilege that the NSA holds in this information, the defendant claims in his Addendum that "these types of substitutions are more properly addressed under Section 6(c)." Defense Addendum at 16. The defense goes on to claim that it "does not foresee any issues with the government's proposal as to these two individuals" and "is confident that the parties will reach agreement on the treatment of the full names and identifying information of NSA personnel as part of the Section 6(c) process." Id. at 17. Again, this claim overlooks that if the defendant has not met his burden at the CIPA Section 6(a) stage of demonstrating the use, relevance and admissibility of the information at issue, it need not be addressed at the 6(c) stage. Accordingly, because the defendant has failed to meet its burden with respect to this information, the government's Section 6(a) Motion seeking to preclude the public disclosure of this information should be granted.

(U) III. Conclusion

(U) For all of the foregoing reasons, the United States respectfully requests that where the defendant has not addressed the specific information contained in the government's objections, and has not offered even a general theory for its relevance and admissibility, the Court deem that the defendant has conceded the objections and that no further argument is needed to sustain the government's objections. For the objections that the defendant has addressed by offering some

[redacted]

[redacted]

showing of the relevance and admissibility for the specific items of classified information at issue, the United States respectfully requests that upon a hearing in this matter, the Court sustain its objections to the admission of the classified information at issue in the government's Section 6(a) Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 16th day of December, 2013, I caused a true and correct copy of the foregoing filing to be served on counsel of record through the Classified Information Security Officer.

G. Michael Harvey
Assistant United States Attorney

[redacted]

[redacted]

Leave to file
Chief Judge CKK
1/30/14

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed with Classified Information Security Officer
CISO
Date 12/6/13

UNITED STATES OF AMERICA,

v.

STEPHEN JIN-WOO KIM,

Defendant.

Criminal No. ~~10-255~~ 10-225 (CKK)

ORDER
(December 6, 2013)

For the reasons stated in the accompanying Memorandum Opinion, it is, this 5th day of December, 2013 hereby

ORDERED that the Defendant's [177] Fifth Motion to Compel Discovery is **DENIED IN PART** and **HELD IN ABEYANCE IN PART** as set forth in the accompanying Memorandum Opinion

IT IS FURTHER ORDERED that by no later than 12:00 PM on December 9, 2013 the Government shall provide supplemental briefing addressing (1) whether the Court is correct in presuming that the [redacted] was prepared by individuals with access to the [redacted] Report, and (2) why a list of anyone who drafted this document prior to the cut-off time should not be disclosed to Defendant as relevant and helpful in identifying additional individuals with access to the intelligence at issue.

SO ORDERED.

/s/
COLLEEN KOLLAR-KOTELLY
UNITED STATES DISTRICT JUDGE

[redacted]

[redacted]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

v.

STEPHEN JIN-WOO KIM

Defendant

Criminal No. 10-255 (CKK)

MEMORANDUM OPINION
(December 6, 2013)

Defendant Stephen Jin-Woo Kim is charged by indictment with one count of unauthorized disclosure of national defense information in violation of 18 U.S.C. § 793(d), and one count of making false statements in violation of 18 U.S.C. § 1001(a)(2). Presently before the Court is the Defendant's [177] Sixth Motion to Compel.[1] Upon consideration of the pleadings, the relevant legal authorities, and the record as a whole, the Defendant's Sixth Motion to Compel is **DENIED IN PART** and **HELD IN ABEYANCE IN PART**, as set forth below.

I. BACKGROUND

The Court presumes familiarity with the factual background set forth in the Memorandum Opinions regarding the Defendant's First, Second, Third, Fourth, and Fifth Motions to Compel.[2] In its opinion ruling on the Defendant's Fifth Motion to Compel Discovery, the Court reserved ruling on two items raised for the first time in Defendant's reply brief: (1) a [redacted] on

[1] Def.'s Sixth Mot. to Compel ("Def.'s Mot."), ECF No. [177]; Gov't's Opp'n, ECF No. [186]; Gov't's Ex Parte, In Camera Classified Addendum to its Opp'n, ECF No. [187], Def.'s Reply, ECF No. [191]; Gov't's Sur-Reply, ECF No. [212]; Addendum to the Gov't's Opp'n, ECF No. [221].

[2] Redacted versions of the Memorandum Opinions are available on the public docket as docket numbers [133], [135], [137], [139], and [200]. Unredacted copies are maintained by the Court.

[redacted]

[redacted]

the intelligence report at issue and (2) proposed revisions to the [redacted] Mem. Op. re Defs.' Mot. to Compel, ECF No. [200] at 12-13. The Court instructed the parties "to meet and confer regarding these materials and seek further relief through the Defendant's sixth motion to compel." *Id.* at 13. Pursuant to the Court's Order, on October 18, 2013, the parties met and conferred regarding the [redacted] and proposed revisions to the [redacted] Def.'s Mot. at 2. The Government denied the Defense's requests for these materials. *Id.* Subsequently, Defendant filed the present motion seeking to compel the production of these materials as well as additional discovery materials. This motion also requested clarification regarding two issues addressed by the parties at the closed hearing held in this matter on September 27, 2013. *Id.* at 1. However, the subsequent Opposition filed by the Government substantially narrowed the scope of this motion. As Defendant stated in his Reply, the Government's Opposition addressed all but one of the concerns raised in Defendant's motion. Def.'s Reply at 2. Accordingly, the only issue pending before the Court with respect to Defendant's Sixth Motion to Compel is Defendant's request for any [redacted] on the contents of the intelligence report at issue. *Id.*

In its Opposition, the Government initially stated that it "had searched for the [redacted] for the [redacted] related to the [redacted] Report and had located no such document that pre-dates the [redacted] on June 11, 2009." Gov't's Opp'n at 4. Based on these unsuccessful searches for the document sought by Defendant, the Government contended that the Defendant's motion to compel the production of the [redacted] should be denied as moot. *Id.*

In his Reply, Defendant asserted that the Government has focused its search too narrowly, and that his motion sought "any [redacted] on the [redacted]

[redacted]

[redacted] Def.'s Reply at 2. As support for his argument that a separate [redacted] exists outside of the [redacted] searched for by the Government, Defendant pointed to an e-mail produced during classified discovery discussing a [redacted] outside the context of [redacted]. *See* Def.'s Mot., Ex. 3 (June 11, 2009 e-mail) (concerning Update on [redacted]). After reviewing this e-mail, the Court requested additional briefing from the Government as to whether this e-mail suggested the existence of a [redacted] separate and apart from the [redacted] searched for by the Government. *See* Order Requesting Sur-Reply Regarding Defendant's Sixth Motion to Compel, ECF No. [202].

In response to this Order, the Government filed a Sur-Reply stating that, after "consultation" with the [redacted], the Government had determined that the e-mail attached as Exhibit 3 to Defendant's motion did discuss a [redacted] separate and distinct from the [redacted] referenced in Exhibit 1 to Defendant's motion. Gov't's Sur-Reply at 1. The Government also stated that "[d]espite the similar names, these documents are created by different [redacted] for different purposes." *Id.* at 1. The Government further advised the Court that out of an abundance of caution it had re-reviewed the [redacted] e-mail collection for June 11, 2009 and this re-review revealed no drafts of the [redacted] referenced in Exhibit 3 to Defendant's motion. *Id.* at 1-2. However, this re-review did uncover e-mails and e-mail attachments "sent prior to the cut-off time that included proposed language for inclusion in the [redacted] referenced in Exhibit 3 to

[redacted]

[3] Defendant acknowledged in his Reply, *see* Def.'s Reply at 4 n. 2, that the document referenced in the other e-mail attached to his motion appears to have involved [redacted]. *See* Def.'s Mot., Ex. 1 (describing the [redacted] as an "item[] for which [redacted]

[redacted]

[redacted]

Defendant's motion. *Id.* at 2. At the Court's request, the Government made these e-mails and e-mail attachments available for the Court's *ex parte, in camera* review on a read and return basis.

Subsequently, the Government filed an Addendum to its Opposition to Defendant's motion, stating that "[o]n November 26, 2013, the United States learned [redacted] that an [redacted] document identified in the last week, bears the electronic file name, [redacted] Addendum to Gov't's Opp'n at 1. This document is entitled [redacted] and may be associated with the [redacted] discussed in Exhibit 1 to Defendant's motion. In its Addendum, the Government maintained that this document is not discoverable, and noted that it is marked [redacted] and was located only in [redacted] files. *Id.* at 2. Again, at the Court's request, the Government made this document available for the Court's *ex parte, in camera* review on a read and return basis.[3]

II. LEGAL STANDARD

Pursuant to Federal Rule of Criminal Procedure 16(a)(1)(E), "[u]pon a defendant's request, the government must permit the defendant to inspect and to copy" any item that is within the Government's "possession, custody, or control," and is "material to preparing the

[3] For purposes of this opinion, the Court will treat the [redacted] as the [redacted] sought by Defendant and discussed in Exhibit 1 to Defendant's motion. In addition, when discussing Defendant's request for the [redacted], the Court will refer to the e-mail's and e-mail attachments containing proposed language for inclusion in the [redacted] referenced in Exhibit 3 to Defendant's motion. The Government has represented to the Court and Defendant that it has conducted a comprehensive search of computer and e-mail records of individuals involved in the drafting and review of any [redacted] prior to the cut-off time. *See* Gov't's Sur-Reply at 1-2. As of the date of this opinion, this search has revealed the two sets of documents discussed above. Should the Government subsequently uncover additional materials relating to a [redacted] the Court presumes it will bring the existence of these documents to the attention of the Court and the Defendant.

[redacted]

[redacted]

[illegible] Fed. R. Crim. P. 16(a). The Government must disclose information sought under this rule "only if such evidence enables the defendant significantly to alter the quantum of proof in his favor." *United States v. Marshall*, 132 F.3d 63, 67 (D.C. Cir. 1998) (citation omitted).

A more stringent, three-part test applies where the Defendant seeks classified information from the Government. First, the Defendant must show that the information sought "cross[es] the low threshold of relevance." *United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989). Second, the Court "should determine if the assertion of privilege by the government is at least a colorable one." *Id.* Finally, the Defendant must show that the information sought "is at least 'helpful to the defense of [the] accused.'" *Id.* (quoting *Roviaro v. United States*, 353 U.S. 53, 60-65 (1957)). "This standard applies with equal force to partially classified documents." *Al Odah v. United States*, 559 F.3d 539, 544 (D.C. Cir. 2009) (citing *United States v. Rezaq*, 134 F.3d 1121, 1142 (D.C. Cir. 1998)).

The Defendant further moves to compel pursuant to *Brady v. Maryland*, 373 U.S. 83 (1983). "*Brady* and its progeny hold that due process requires the disclosure of information that is 'favorable to the accused, either because it is exculpatory, or because it is impeaching' of a government witness." *United States v. Mejia*, 448 F.3d 436, 456 (D.C. Cir. 2006) (quoting *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999)). "While *Brady* information is plainly subsumed within the larger category of information that is 'at least helpful' to the defendant, information can be helpful without being 'favorable' in the *Brady* sense." *Id.* Accordingly, the Defendant's request for exculpatory information under *Brady* is subsumed within the Court's analysis of whether requested information would be useful to the defense.

[redacted]

[redacted]

III. DISCUSSION

In the one remaining request from his Sixth Motion to Compel, the Defendant seeks an order compelling the Government to produce any [redacted] on the contents of the interference report at issue in this case, as well as any documents that identify the individuals who drafted, received, or otherwise accessed the [redacted] or any drafts or revisions to the [redacted] from prior to 3:16 p.m. on June 11, 2009. Although the Government initially contended that no such documents existed and that Defendant's request was moot, the Government's supplemental briefing in this case has identified two sets of documents that potentially fit this request. First, the Government has identified a [redacted] as it relates to Exhibit 1 to Defendant's motion, that is intended to accompany the [redacted] Report and is saved under the file name [redacted]. *See* Addendum to Gov't's Opp'n at 1. Second, the Government has located a set of e-mails and e-mail attachments sent prior to the cut off time that included proposed language for inclusion in the [redacted] referenced in Exhibit 3 to Defendant's motion. *See* Gov't's Sur-Reply at 1. In light of this supplemental briefing providing evidence of the [redacted] sought by Defendant, the Court reads Defendant's motion as a request to compel production of these two sets of documents.

In his briefing, Defendant argues that materials relating to the [redacted] would be relevant and helpful to the preparation of his defense for three reasons. *See* Def.'s Mot. at 2-3; Def.'s Reply at 3. First, he contends that these documents provide further evidence of who accessed the intelligence information at issue, and when they accessed it, prior to the "cut-off" time for publication of Mr. Rosen's article on June 11, 2009. [redacted]

[redacted]

Def.'s Mot. at 2. He argues that in order to have prepared a [redacted] on the intelligence report at issue "a person must have accessed the report itself or otherwise become aware of its contents." *Id.* Accordingly, he contends that the [redacted] a list of anyone who drafted received, or otherwise accessed the [redacted], or any drafts of it that were created prior to [redacted] on June 13, 2009, would be relevant and helpful "in identifying those individuals who were [redacted] intelligence information at issue prior to the cut-off time." *Id.*

Second, Defendant focuses on the fact that an e-mail, attached as Exhibit 1 to Defendant's motion describing the [redacted] indicates that it was [redacted] Defendant argues that obtaining the [redacted] will show what information was likely [redacted] providing relevant information for Defendant's theory that the leak at issue originated from [redacted] *Id.* at 2-3 (citing Ex. 1). Further, because Mr. Rosen's article reported [redacted] Defendant argues that the [redacted] is useful for determining the content of any [redacted] and whether individuals involved in the drafting and dissemination of the [redacted] had reason to believe that the information contained in the intelligence report was being or had already been transmitted to [redacted] *Id.* at 3.

Finally, Defendant argues that the [redacted] could prove "relevant and helpful to the defense in demonstrating that [redacted] and that 'someone in Mr. Kim's position would not reasonably have believed that disclosure of the information would damage

[5] Throughout discovery in this matter, the Government has provided the Defense with a running list of individuals who may have accessed the [redacted] report, referred to as the "Access list." *See generally* Mem. Op. re Fourth Mot. to Compel, ECF No. [139] at 4.

[redacted]

[redacted]

the United States or help a foreign nation." Def.'s Reply at 3 (quoting Def.'s Mot. at 3). This argument is based on the fact that an e-mail regarding the [redacted] attached as Exhibit C to Defendant's motion, asked for [redacted] Def.'s Mot. at 3 (citing Ex. 3). If the [redacted] contains information suggesting that North Korea [redacted] Defendant contends, it would support his theory that someone in his position would not reasonably believe that disclosure of the information would damage the United States or help a foreign nation. *Id.* The Court addresses each of these arguments with respect to both the [redacted] and the e-mails and e-mail attachments relating to the [redacted]

A. The [redacted]

Having reviewed the [redacted] on a read and return basis, the Court concludes that this document itself is not relevant and helpful to Defendant for any of the reasons asserted in his motion. Accordingly, the Court denies Defendant's request to compel production of the [redacted] itself – the [redacted] as well a list of those who accessed or received the document. However, a list of individuals who drafted this document may prove relevant and helpful to the Defendant, as it may identify additional individuals who received the [redacted] Report at issue in order to write it. The Court holds this limited issue in abeyance in order to allow for supplemental briefing from the Government.

Defendant argues that the [redacted] is relevant and helpful because it may identify additional individuals who accessed the intelligence information at issue prior to the "cut-off" date for publication of Mr. Rosen's article on June 11, 2009. Def.'s Mot. at 2. Having reviewed the [redacted] the Court notes that the document appears as though it was

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[redacted]

intended to accompany the [redacted] Report, matching the Government's description of the document. *See* Addendum to Gov't's Opp'n at 1. However, although the document relates to the [redacted] report, it does not discuss the substance of the intelligence contained in the [redacted] report. Accordingly, because the document does not address the substance of the intelligence report, anyone who accessed or received the [redacted] would not inevitably have had access to the intelligence at issue. On this point, the Government is correct when it notes that [redacted] is not a potential source document for the alleged unauthorized disclosure as it does not contain any of the intelligence information in the [redacted] Report." *Id.* at 2. Consequently, neither the [redacted] itself nor a list of individuals who accessed or received the [redacted] would be relevant or helpful to Defendant in identifying additional individuals who accessed the intelligence information at issue prior to the cut-off time.

At the same time, given that it appears intended to accompany the [redacted] Report, the [redacted] does seem to have been prepared by an individual or individuals with access to the [redacted] report. In light of this, a list of individuals who drafted the document may be potentially relevant and helpful to the Defendant in identifying individuals who accessed the [redacted] report prior to the cut-off time. Because the Government's Opposition does not address this issue, having been filed before the Government learned of the existence of this document, the Court requests additional briefing from the Government as to (1) whether the Court is correct in presuming that this document was prepared by an individual or individuals with access to the [redacted] Report, and (2) why a list of anyone who drafted this document prior to the cut-off time should not be disclosed to Defendant as relevant and helpful in identifying additional individuals with access to the intelligence at

[redacted]

[redacted]

ORDERED: This supplemental briefing should be filed by no later than 12:00 PM on December 9, 2013. Pending receipt of this additional briefing, the Court holds in abeyance Defendant's request to compel production of a list of individuals who drafted the [redacted] at issue, the [redacted]

Defendant's remaining arguments, however, do not support production of the [redacted] or a list of individuals who accessed or received the document. First, Defendant argues that since an e-mail produced during classified discovery refers to the [redacted] access to the [redacted] – the [redacted] for purposes of this opinion – will help him show what information was likely shared with [redacted] on June 11, 2009. Def.'s Mot. at 2-3 (citing Ex. 1). The [redacted] he contends, will thus provide relevant information for Defendant's theory that the leak at issue originated from [redacted] Relatedly, since Mr. Rosen's article [redacted] Defendant argues that the [redacted] is useful for determining the content of any [redacted] and whether individuals involved in the drafting and dissemination of the [redacted] had reason to believe that the information contained in the intelligence report was being or had already been [redacted] *Id.* at 3. However, these arguments are unavailing. As discussed, a review of the [redacted] reveals that it does not discuss the substance of the intelligence information in the [redacted] report. Accordingly, none of the information contained in the document is relevant to Defendant's theory that the leak at issue originated from [redacted] Similarly, because the [redacted] does not discuss the

Moreover, as the Government notes, and Defendant concedes, there was no [redacted] regarding the [redacted] for which the [redacted] was being prepared on either June 11 or June 12, 2009. Gov't's Opp'n at 5 (citing Def.'s Mot. at 3).

[redacted]

[redacted]

substance of the intelligence information in the [redacted] report, its contents do not shed light on whether individuals involved in the drafting and dissemination of the [redacted] had reason to believe that the information contained in the intelligence report was being or had already been [redacted] In light of these considerations, the document need not be produced on the grounds advocated by Defendant.

Also unavailing is Defendant's argument that the [redacted] here the [redacted] is useful for showing that someone in Defendant's position would not reasonably have believed that disclosure of the information would damage the United States or help a foreign nation. The Court notes that this argument relates primarily to the [redacted] referenced in Exhibit 3, but will address it in the context of the [redacted] for the sake of completeness. After a review of the document itself, the Court concludes that the [redacted] contains no information to suggest that the [redacted] The document is thus not relevant or helpful in showing that 'someone in Mr. Kim's position would not reasonably have believed that disclosure of the information would damage the United States or help a foreign nation.' Def.'s Reply at 3 (quoting Def.'s Mot. at 3). Accordingly, Defendant is not entitled to the [redacted] on these grounds.

B. E-mails and E-mail Attachments Containing Language for [redacted]

Similarly, the Court will not order production of the e-mails and e-mail attachments containing proposed language for the [redacted] referenced in Exhibit 3 to Defendant's motion. A review of these e-mails and e-mail attachments reveals that these documents are not relevant or helpful to Defendant for any of the reasons asserted.

[redacted]

[redacted]

First, these e-mails and e-mail attachments do not relate to the substance of the [redacted] report and thus those who drafted, received, and accessed these documents are not inevitably individuals with access to the intelligence information at issue. Accordingly Defendant's first argument for compelling the production of these documents is rejected.

Defendant's next set of arguments for production are largely directed at the [redacted] which was discussed in an e-mail as [redacted] *See* Def.'s Mot. at 2-3 (citing Ex. D). However, in the interests of comprehensively addressing Defendant's arguments, the Court considers this argument in the context of the e-mails relating to the [redacted] discussed in Exhibit 3 to Defendant's motion. As with the [redacted] these arguments are unavailing. The e-mails and e-mail attachments relating to the [redacted] discussed in Exhibit 3 do not discuss the substance of the Intelligence Report at issue. Accordingly, none of the information contained in these documents is relevant to Defendant's theory that the leak at issue originated from [redacted] For the same reason, these e-mails do not address whether individuals involved in the drafting and dissemination of the [redacted] referenced in Exhibit 3 had reason to believe that the information contained in the intelligence report was being or had already been [redacted] Accordingly, the e-mails and e-mail attachments relating to the [redacted] referenced in Exhibit 3 to Defendant's motion need not be produced on these grounds.

Finally, the Court rejects Defendant's argument that these e-mails and e-mail attachments would help demonstrate that [redacted] and that 'someone in Mr. Kim's position would not reasonably have believed that disclosure of the information would damage the United States or help a foreign nation.'" Def.'s Reply at 3 (quoting Def.'s Mot. at 3). The e-mails and e-mail

[redacted]

[redacted] attachments relating to the [redacted] discussed in Exhibit 3 to Defendant's motion contain no information suggesting that North Korea [redacted] Accordingly, in the absence of any discussion of whether [redacted] these e-mails and e-mail attachments prepared by the [redacted] provide no support for Defendant's argument that [redacted] and that someone in his position would reasonably have believed that disclosure of this information would damage the United States or help a foreign nation.

IV. CONCLUSION

For the foregoing reasons, Defendant's [177] Sixth Motion to Compel Discovery is DENIED IN PART and HELD IN ABEYANCE IN PART. Specifically, Defendant's motion is DENIED with respect to production of the [redacted] for purposes of this opinion, the [redacted] referenced in Exhibit 1 to Defendant's motion, and the list of individuals who accessed or received this document. Defendant's motion is similarly DENIED with respect to the e-mails and e-mail attachments containing proposed language for [redacted] referenced in Exhibit 3 to Defendant's motion. However, Defendant's motion is HELD IN ABEYANCE as to production of a list of individuals involved in the drafting of the [redacted] By no later than **12:00 PM** on **December 9, 2013**, the Government shall file a supplemental brief addressing (1) whether the Court is correct in presuming that the [redacted] was prepared by individuals with access to the [redacted] Report, and (2) why a list of anyone who drafted this document prior to the cut-off date should not be disclosed to Defendant as relevant and helpful in identifying additional

[redacted]

[redacted]

individuals with access to the intelligence at issue. An appropriate Order accompanies this Memorandum Opinion.

COLLEEN KOLLAR-KOTELLY
UNITED STATES DISTRICT JUDGE

[redacted]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

vs.

STEPHEN JIN-WOO KIM,

Defendant.

Criminal No. ~~10-255~~ 10-225 (CKK)

Leave to File Granted
Judge CKK
1/30/14

ORDER
(December 9, 2013)

In its December 6, 2013 Order, this Court denied in part and held in abeyance in part Defendant's Sixth Motion to Compel. This Order further requested that the Government file a supplemental brief addressing (1) whether the Court was correct in presuming that the [redacted] was prepared by individuals with access to the [redacted] Report, and (2) why a list of anyone who drafted this document prior to the cut-off time should not be disclosed to Defendant as relevant and helpful in identifying additional individuals with access to the intelligence at issue.

The Government has now filed this supplemental brief addressing these two issues. On the first question, the Government informs the Court that after consultation with [redacted], it has determined that the Court is correct in presuming that the [redacted] was prepared by individuals with access to the [redacted] Report.

As to the second question of why a list of anyone who drafted this document prior to the cut-off time should not be disclosed to Defendant, the Government further informs the Court that based on usual practice, the intelligence report officers who worked on the [redacted] Report would have prepared the [redacted]. In this case, this would imply that [redacted] worked on the [redacted]

[redacted]. Here, the electronic record associated with the document confirms that [redacted] was one of its drafters, although there is no record associating [redacted] with the document. The Government has stated there is no electronic record of this document's dissemination that would imply additional drafters. Further, as the Government points out, and the Court can confirm from its review of the document on a read and return basis, the [redacted] does not identify any additional – or for that matter, any – drafters of the document on its face. Consequently, in light of the fact that [redacted] are already on the Access List, the information sought by Defendant in the remaining portion of his Sixth Motion to Compel has already been provided to him Accordingly, it is, this 9th day of December, 2013, hereby

ORDERED that the portion of Defendant's Sixth Motion to Compel concerning a list of individuals who drafted the [redacted] prior to the cut-off time, which was held in abeyance in the Court's December 6, 2013 Order, is **DENIED AS MOOT.**

SO ORDERED.

/s/
COLLEEN KOLLAR KOTELLY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	Criminal No. 10-225 (CKK)
	)	
v.	)	
	)	
STEPHEN JIN-WOO KIM,	)	
	)	
Defendant.	)	

DEFENDANT STEPHEN KIM'S SEVENTH MOTION TO COMPEL DISCOVERY

Pursuant to the Court's January 7, 2014, Order, defendant Stephen Kim, by and through undersigned counsel, hereby moves this Honorable Court for an order directing the government to produce the following discovery items. This motion is made pursuant to Rule 16 of the Federal Rules of Criminal Procedure as well as Mr. Kim's right to exculpatory information as set forth in Brady and its progeny. See Brady v. Maryland, 373 U.S. 83 (1963).

INTRODUCTION

As the Court is aware, on December 13, 2013, the defense provided the government with a letter setting forth ten discovery requests. See Dkt. 242, Ex. 1. On December 20, 2013, the parties met and conferred regarding those requests. On January 7, 2014, the government responded by letter and agreed to provide additional discovery as to some of the requested items. See Dkt. 242, Ex. 2. Through the meet-and-confer process and exchange of letters, the parties were able to resolve six of the ten requests made by the defense, in whole or in part.[1] The remaining items are the subject of the instant motion to compel discovery.

[1] More specifically, the parties have resolved Items 1, 4, 6, 9, and 10 from defendant's December 13th letter. Item 5 may be resolved, although the government's response (regarding [redacted] records) is ambiguous. See Section E below. Items 2, 3, 7, and 8 remain outstanding and are the subject of the instant motion.

I. LEGAL STANDARD

The legal standards applicable to the instant motion are addressed in detail in defendant's prior motions to compel discovery. See, e.g., First Mot. at 4-6. The defense incorporates that earlier discussion by reference. The defense notes, in particular, that under the law of this Circuit, information is discoverable if it helps the defense ascertain the strengths and weaknesses of the government's case or aids the defense's efforts to conduct an investigation to discredit the government's evidence. See United States v. Marshall, 132 F.3d 63, 67 (D.C. Cir. 1998). Discoverable information may also include inculpatory evidence, as "such evidence may 'alter the quantum of proof in [defendant's] favor' in several ways: by preparing a strategy to confront the damaging evidence at trial; by conducting an investigation to attempt to discredit that evidence; or by not presenting a defense which is undercut by such evidence." Id. at 68.

II. SPECIFIC ITEMS REQUESTED

A. Unauthorized Disclosure to [redacted] (Item #2)

On July 2, 2013, the government produced seven pages of material related to a separate unauthorized disclosure of classified information [redacted]. See Dkt. 118, Ex. 17, at 3; CLASS_3232-38. These materials were apparently produced as a result of the Court's ruling on the government's first set of ex parte CIPA § 4 motions, which required the government to "produce the FBI 302 and related materials discussed in Section III.C.6 of the Memorandum Opinion resolving the Government's motions." See Sealed Order of June 4, 2013; see also Dkt. 118, Ex. 17, at 3. The materials describe [redacted], claiming that "one of his colleagues was told by a

senior administration official that the Intelligence Community [redacted]." The seven pages produced by the government are attached as Exhibit 1.

Based on its review of those materials, the defense requested further information regarding: "(a) the source of the disclosure to [redacted]; (b) any overlap between those individuals who accessed the information disclosed to [redacted] and those individuals included on the Access List in this case; (c) the government's response to [redacted] regarding the disclosure, including whether the government requested that [redacted] withhold such information from publication or otherwise alter its reporting; and (d) a copy of any story run by [redacted] regarding the information allegedly disclosed." Dkt. 242, Ex. 1, Item 2. The government denied this request, claiming that it "calls for the production of material to which the defense is not entitled." Dkt. 242, Ex. 2, at 2. The defense now moves to compel the production of the requested materials.

The government's claim that the defense is "not entitled" to additional information regarding the unauthorized disclosure to [redacted] is puzzling, in light of the Court's earlier ruling. Given the ex parte nature of the earlier proceedings, the defense remains unaware of the basis for the Court's Order directing the government to produce materials related to the unauthorized disclosure to [redacted].[2] The Court must have concluded, however, that the disclosure to [redacted] is relevant and helpful to Mr. Kim's defense; otherwise, the Court would not have ordered the government to produce materials related to that disclosure. If the

[2] The defense notes for the record that it continues to object to the ex parte proceedings that have taken place in this case. During discovery, the government has filed at least five ex parte motions to withhold information from the defense. The government has also been permitted to submit ex parte briefs challenging the use, relevance, and admissibility of certain evidence under CIPA § 6. These ex parte proceedings have deprived the defense of its ability to test the various representations made by the government regarding the documents it has refused to produce during classified discovery in this case.

disclosure to [redacted] is relevant and helpful to Mr. Kim's defense, the same is also true of specific information relating that disclosure to the charges at issue in this case – such as whether there is "any overlap between those individuals who accessed the information disclosed to [redacted] and those individuals included on the Access List in this case." Dkt. 242, Ex. 1, Item 2. The government has thus far failed to explain how the FBI 302 and "related materials" could be discoverable, but the specific information requested by the defense linking the same disclosure to the charged disclosure is not discoverable.

The government's refusal to provide additional discovery regarding the [redacted] disclosure is particularly unpersuasive given the targeted nature of the requests made in defendant's December 13th letter. Rather than requesting all information in the government's possession, custody, or control regarding the disclosure to [redacted], the defense made a series of requests narrowly focused on any relationship between the disclosure to [redacted] and the charged disclosure, and the manner in which the two "leaks" were handled.

Subpart (a) requested any information regarding "the source of the disclosure to [redacted]." Dkt. 242, Ex. 1, Item 2. This information is relevant and helpful to Mr. Kim's defense because it would identify a government official actively leaking [redacted] within days of the charged disclosure. The defense cannot investigate whether that person was also the source of the alleged leak to Fox News without learning that person's identity.[3] Moreover, what little information has been provided to the defense to date indicates that the

[3] If this person accessed the charged intelligence report, he or she may or may not be on the government's "Access List" in this case. As the Court is aware from prior briefing, the government has been unable to comprehensively determine which individuals accessed the charged intelligence report on June 11, 2009. While electronic audits and document access records have identified dozens of individuals who accessed the intelligence report electronically, many individuals have also been added to the "Access List" because they received the information by word-of-mouth, hard copy, formal briefing, etc.

source of the disclosure to [redacted] was likely a "high-level" person or a "senior administration official." See Ex. 1 (CLASS_3232). If true, such information also supports the defense's theory that the alleged disclosure to Fox News emanated from senior officials at the National Security Council or the White House, and not from a lower level employee like Mr. Kim.

Subpart (b) requested information regarding "any overlap between those individuals who accessed the information disclosed to [redacted] and those individuals included on the Access List in this case." Dkt. 242, Ex. 1, Item 2. The relevance and helpfulness of this information to the defense should be obvious: any "overlap" would consist of those individuals who accessed – and therefore may have disclosed – both pieces of classified information [redacted] that were allegedly leaked to the media [redacted]. Such information would be critical to the defense's efforts to demonstrate that someone other than Mr. Kim was the source of the alleged disclosure to Mr. Rosen on June 11, 2009.[4]

Subpart (c) requested any information regarding "the government's response to [redacted] regarding the disclosure, including whether the government requested that [redacted] withhold [the leaked] information from publication or otherwise alter its reporting." Dkt. 242, Ex. 1, Item 2. This information is relevant and helpful to Mr. Kim's defense for several reasons. First, as the Court will recall from prior briefing, the government apparently did not request that Mr. Rosen or Fox News withhold the information at issue from publication or remove it from its website (despite multiple phone calls between Mr. Rosen and government public affairs officials on the afternoon of June 11, 2009). See Third Mot. to Compel at 7-9; Def.'s Reply to Omnibus

[4] To reiterate, if evidence of the disclosure to [redacted] is relevant and helpful to the defense per this Court's prior Ex Parte Order, then a fortiori any evidence indicating that the information disclosed to [redacted] was accessed by an individual who also accessed the charged intelligence report is also relevant and helpful to the defense.

Opp. to Mots. to Compel at 26. Any information demonstrating that the government did make such a request with respect to the [redacted] disclosure would tend to support the defense's theory that the information at issue in this case, which was not the subject of a similar request by the government, was not particularly sensitive or closely held (and thus not "national defense information"), and that Mr. Kim did not have "reason to believe [that the information] could be used to the injury of the United States or to the advantage of any foreign nation." 18 U.S.C. § 793(d).

Second, information regarding the government's response to the disclosure to [redacted] is also helpful to the defense in refuting the government's apparent belief that as-yet-unidentified NSC officials merely "declined to comment" on the alleged disclosure when they spoke with Mr. Rosen for several minutes on the afternoon of June 11, 2009. See Dkt. 94 at 3. The disclosure to [redacted] took place [redacted] the charged disclosure. According to the discovery provided to date, the call from [redacted] precipitated a process whereby a public affairs official [redacted] documented the inquiry from [redacted], informed the reporter that he would get back to him, and then sought guidance from senior officials as to [redacted] would respond to the apparent disclosure. See Ex. 1. That process stands in stark contrast to the communications between Mr. Rosen and the NSC on June 11, 2009, which apparently went undocumented. Information regarding the government's response to the disclosure to [redacted] is thus helpful to the defense in demonstrating the manner in which government officials responded to similar inquiries during the same time period. The fact that NSC officials who communicated with Mr. Rosen on June 11, 2009, did not follow a similar process casts doubts on the government's assertion that Mr. Rosen contacted the NSC merely to seek comment on the information allegedly disclosed to him.

Subpart (d) requested "a copy of any story run by [redacted] regarding the information allegedly disclosed." Dkt. 242, Ex. 1, Item 2. This information is relevant and helpful to the defense for many of the same reasons described above, namely to help the defense determine (1) whether the intelligence information allegedly disclosed to [redacted] was disclosed to the public in a news story without authorization; (2) how the purported sources of the allegedly disclosed information were described in any such reporting; and (3) whether the government responded to the disclosure, and in what manner.[5] The Court has already held that an FBI 302 describing the apparent disclosure is discoverable. The government has offered no principled reason to find that an open source news article describing the same information is not discoverable. Consistent with its prior ruling, the Court should therefore compel the production of the requested materials.

B. Past Investigations for the Unauthorized Disclosure of Classified Information (Item #3)

As the defense explained in its fifth motion to compel discovery, a recently declassified report indicates that the Office of the Inspector General of the Intelligence Community ("OIG/IC") – and not the FBI – handles a large number of "leak investigations." See Fifth Motion at 17-18. According to the report, OIG/IC implemented "a program to lead IC-wide administrative investigations into unauthorized disclosures of classified information (i.e., 'leak') matters." Fifth Mot. to Compel, Ex. 4, at ii. The OIG/IC Investigations Division "reviewed hundreds of closed cases from across the IC," and "will engage in gap mitigation for those cases where an agency does not have the authority to investigate (multiple agencies or programs) or

[5] A search by defense counsel for [redacted] report would not resolve this. Even if the defense were to locate a report on its own, the defense's own search cannot confirm that whatever news report it may find was the subject of the FBI 302 and related materials produced by the government. The defense should not be required to guess which [redacted] report was the subject of the apparent disclosure.

where DOJ declined criminal prosecution." Id. at 10. As of June 30, 2012, OIG/IC was in the process of "reviewing 375 unauthorized disclosure case files," all of which would have fallen outside of defendant's prior requests because they had not been referred to DOJ. Id. at 16. The information contained in the declassified report differs markedly from the parties' prior understanding during the meet-and-confer process that all such leak investigations were handled by the FBI. See Fifth Mot. to Compel at 17-18.

Based on its review of the declassified report, the defense requested information regarding "any OIG/IC investigation of any individual on the Access List for (a) the unauthorized disclosure of classified information related to North Korea between January 1, 2009, and December 31, 2009; or (b) the unauthorized disclosure of classified information to Fox News." Dkt. 242, Ex. 1, Item 3. The defense also requested the same information regarding any OIG/IC investigations of John Brennan, Mark Lippert, Denis McDonough, and John Herzberg.[6] Id. The government denied this request, asserting that "OIG/IC has not been involved in the investigation or prosecution of the defendant, and that any records in the possession of the Office of the Inspector General of the Intelligence Community are not within the prosecution team's possession, custody, or control." Dkt. 242, Ex. 2, at 2. This response is unavailing, for several reasons.

First, contrary to the government's assertions, OIG/IC records are plainly within the government's "possession, custody, or control" for discovery purposes. Courts within this Circuit have repeatedly held that "documents maintained by other components of the government

[6] The defense requested information regarding Messrs. Brennan, Lippert, and McDonough based on the Court's ruling on defendant's second motion to compel discovery. See Op. on Second Mot. at 11-15 (holding that it is "more than reasonable to presume" that these individuals learned of the contents of the charged intelligence report on June 11, 2009). The defense requested information regarding John Herzberg based on his extensive contacts with Mr. Rosen and his access to intelligence reporting on North Korea. See id. at 13-15.

which are 'closely aligned with the prosecution' must be produced." United States v. Libby, 429 F. Supp. 2d 1, 6 (D.D.C. 2006) (quoting United States v. Brooks, 966 F.2d 1500, 1503 (D.C. Cir. 1992)); see also United States v. Poindexter, 727 F. Supp. 1470, 1477-78 (D.D.C. 1989). In this case, the government cannot seriously dispute that the intelligence community is "closely aligned" with the prosecution. The case began with a formal request from the intelligence community for a criminal investigation of the alleged disclosure to Fox News. The intelligence community provided the government with most of the evidence at issue in the case, including copies of the intelligence report allegedly disclosed to Mr. Rosen, documents reflecting the drafting and dissemination of that report, and electronic document access records identifying those individuals who accessed the report on the date in question. Numerous members of the intelligence community were made available for interviews with investigators, and will likely be called as witnesses for the government at trial. The prosecutors themselves commonly refer to the intelligence community as the "equity holders" in the case, and have requested additional time from the Court to consult with the IC any time the defense has made discovery requests.[7] These factors are more than sufficient to warrant a finding that the intelligence community is "closely aligned" with the prosecution in this case. See Libby, 429 F. Supp. 2d at 9-11 (holding that the Office of the Vice President and the CIA were "closely aligned" with the prosecution based on similar factors).

[7] See, e.g., Transcript of Status Hearing on June 4, 2013, Dkt. 110, at 4 (Mr. Harvey, requesting four weeks time after defendant's discovery requests before the Court holds a status conference: "... what the government would do prior to the status is to coordinate with the intelligence community regarding any new discovery requests...."); Transcript of Status Hearing on July 9, 2013, Dkt. 147, at 28 (Mr. Harvey, requesting ten days additional time for the government on a motion to compel schedule: "I would just tell the Court that, this is not the typical case. These are not typical motions. It involves lots of coordination with the intelligence community.").

The government attempts to avoid this result by distinguishing between the "intelligence community" and the "Office of the Inspector General of the Intelligence Community." The government asserts that because the "OIG/IC has not been involved in the investigation or prosecution of the defendant," its records are not within the government's possession, custody, or control. Dkt. 242, Ex. 2, at 2 (emphasis added). The government cites no authority for the proposition that a sub-component of a government agency (OIG/IC) should be treated as a separate entity for discovery purposes, and the weight of authority runs contrary to any such rule. See Libby, 429 F. Supp. 2d at 6 (holding that the "bureaucratic boundary between agencies is too weak to limit the duty to disclose"); Brooks, 966 F.2d at 1502 (holding that a prosecutor's office cannot avoid disclosure "'by keeping itself in ignorance, or compartmentalizing information about different aspects of a case'" (quoting Carey v. Duckworth, 738 F.2d 875, 878 (7th Cir. 1984))); United States v. Marshall, 132 F.3d 63, 69 (D.C. Cir. 1998) ("[A] prosecutor may not sandbag a defendant by the simple expedient of leaving relevant evidence to repose in the hands of another agency while utilizing his access to it in preparing his case for trial."); Poindexter, 727 F. Supp. at 1477 (noting that "the government cannot be compartmentalized for purposes of Rule 16 as readily as the [prosecutor] suggests"). Given the "close working relationship" between the government and the intelligence community in this case, see Brooks, 966 F.2d at 1503, permitting the government to avoid disclosing records from a sub-component of the IC "would clearly conflict with the purpose and spirit of the rules governing discovery in criminal cases," as it would permit the government rely on a "plethora" of documents from the IC to build its own case while at the same time denying the defendant access to documents from within the same agency that are "purportedly beyond [the prosecution's] reach." Libby, 429 F. Supp. 2d at 11.

Even if the government were correct to view OIG/IC as a separate entity for discovery purposes, however, the fact that OIG/IC "has not been involved in the investigation or prosecution of the defendant" is not a legally sufficient reason to deny discovery. The duty to disclose is not limited "to only those files of agencies that participated in the investigation," but rather "'turns on the extent to which the prosecutor has knowledge of and access to the documents.'" Libby, 429 F. Supp. 2d at 6 (quoting United States v. Santiago, 46 F.3d 885, 894 (9th Cir. 1995)). The government's January 7th letter does not deny that prosecutors are aware of the OIG/IC records requested by the defendant, nor does it claim that the prosecutors (and their intelligence community liaisons) have been denied access to those documents. See Dkt. 242, Ex. 2, at 2. The January 7th letter thus fails to provide any valid reason why the requested records fall outside the government's possession, custody, or control for discovery purposes.

Second, the requested materials are also relevant and helpful to the preparation of Mr. Kim's defense. As the Court noted in ruling on defendant's second motion to compel discovery, see Op. on Second Mot. at 6-14, the defense "logically" seeks to refute the government's case against Mr. Kim by obtaining evidence indicating that other individuals were leaking classified information during the same time period. Consistent with the Court's prior rulings, defendant's requests have been narrowed to address only investigations for the unauthorized disclosure of classified information related to North Korea, and the unauthorized disclosure of classified information to Fox News. See Dkt. 242, Ex. 1, Item 3. If the government were to discover, for example, that one of the individuals on its Access List has been separately investigated and sanctioned by the OIG/IC for leaking classified information regarding North Korea to James Rosen, such information would be exculpatory and should be produced to the defense. The

Court should therefore order the government to search for and produce the requested materials from the intelligence community.

C. [redacted] Email (Item #7)

In its Memorandum Opinion on defendant's first motion to compel discovery, the Court ordered the government to produce a copy of an [redacted], email from [redacted]. See Op. on First Mot. at 12. In response to the Court's Order, on July 2, 2013, the government produced a copy of the [redacted] email containing no classification markings. See Dkt. 118, Ex. 17, at 1. That email is attached as Exhibit 2. On August 16, 2013, the government produced a "new version" of the [redacted] email "with classification markings." See Dkt. 153, Ex. 6, at 1. This "new version" is attached as Exhibit 3. Given the multiple versions of the [redacted] email produced by the government, the defense requested any information regarding "whether that email was sent over a classified system and whether that email was marked 'classified' at the time that it was sent." Dkt. 242, Ex. 1, Item 7. The government denied this request, stating that it "calls for the production of material to which the defense is not entitled." Dkt. 242, Ex. 2, at 2.

The government's refusal to provide discovery regarding the original classification status of the [redacted] email cannot be squared with the Court's prior Order. The Court directed – and the defense is entitled to receive – a copy of the email as it existed in [redacted], indicating whether it was sent over a secure system. The Court did not direct the government to produce a copy of the email with classification markings that had been added four years later.

As the Court recognized in its Opinion on defendant's first motion to compel, the government has already conceded that "wide distribution" of the [redacted] email – which details "[redacted]" – "is helpful to the defense's claim that the Defendant did not have reason to believe that the

disclosure to Rosen of [redacted] could be used to the injury of the United States or to the advantage of a foreign nation." Op. on First Mot. at 13. The original classification status of the [redacted] email goes directly to whether that email was "widely distributed," and is therefore discoverable. The fact that high-ranking State Department officials circulated reports of [redacted]" over unclassified email systems is helpful to the defense that the information contained in the charged intelligence report was not "closely held," and that defendant did not have "reason to believe [that the information] could be used to the injury of the United States or to the advantage of a foreign nation." In light of the government's prior concession, there is no basis for the government's continued refusal to produce information regarding the original classification status of the [redacted] email.

D. Inaccuracy of [redacted] (Item #8)

In its Memorandum Opinion denying defendant's motion for reconsideration of the Court's definition of "information relating to the national defense," the Court observed that, "at no point has Defendant Kim suggested to the Court that he intends to argue the information at issue here was inaccurate, [redacted]." Op. at 9. As the defense explained at the January 7th Status Hearing, the defense does intend to demonstrate at trial that the information contained in [redacted] was not accurate (i.e., that it was not genuine "intelligence" and that [redacted] in the report). The defense therefore requested additional discovery regarding the inaccuracy of the charged intelligence report in light of [redacted]. See Dkt. 242, Ex. 1, Item 8. The government denied this request, stating that it "calls for the production of material to which the defense is not entitled." Dkt. 242, Ex. 2, at 2.

The fact that [redacted] was inaccurate is no longer in dispute. At the January 7th Status Hearing, after repeated questioning from the Court, the government reluctantly conceded that the information contained in [redacted] was inconsistent with [redacted]. As the government is aware, [redacted] reported that [redacted]:

- [redacted]
- [redacted]."
- [redacted]
- [redacted].

Exhibit 4 (CLASS_011). The report also contained various caveats and qualifications regarding its contents. The [redacted]," for example, expressly noted that the information contained in the report could be nothing more than "[redacted]" (i.e., newspapers), rather than "[redacted]." Id.

The purported intelligence contained in [redacted] differs markedly from [redacted]. Contrary to [redacted]:

- [redacted]

- [redacted]

- [redacted]

Exhibit 5 (CLASS_2685-86). [redacted]

For that reason, the defense has requested additional information regarding these inconsistencies between the content of [redacted]. Such documents would include any documents describing or acknowledging these inconsistencies, any documents analyzing the differences between [redacted], any intelligence reports or other documents addressing [redacted], and any documents regarding the origin [redacted]

[redacted] of the inaccurate reporting contained in [redacted]. The requested information is relevant and helpful to Mr. Kim's defense, for several reasons.

First, as the district court held in United States v. Abu-Jihaad, 600 F. Supp. 2d 362 (D. Conn. 2009), a rational jury is entitled to find that "completely inaccurate information" does not satisfy the Espionage Act's requirement that the information at issue "relat[es] to the national defense." Id. at 385-86. In that case, defendant was charged with disclosing "three specific pieces of information" regarding the planned movements and deployment of a U.S. naval fleet. Id. at 384. Defendant argued that one of those three pieces of information - the date upon which the fleet planned to transit the Strait of Hormuz - was not accurate. (The date of transit in the leaked document was April 29th, whereas the fleet actually planned to transit the Strait on May 2nd). Id. at 386. On that basis, defendant argued that the information "could not possibly relate to our national defense" because it was "flat wrong." Id. at 384.

The Court accepted this premise, holding that, "[t]o be sure, completely inaccurate information regarding the battlegroup may well not relate to the national defense." Id. at 386. As the Court explained, "[h]ad there been a large discrepancy between the actual date of transiting and the date set forth in the [leaked document], the Court would agree with [the defendant]" that the inaccurate information was not "national defense information." Id. Given the "proximity" of the leaked date and the actual date of transit, however, the Court held that "the jury was entitled to conclude beyond a reasonable doubt that this information related to the national defense." Id. at 386.

Like the defendant in Abu-Jihaad, Mr. Kim intends to argue at trial that the information contained in [redacted] was not national defense information because it was not accurate. Mr. Kim's defense is substantially stronger than Mr. Abu-Jihaad's, as the discrepancies between [redacted]

~~Treat as Classified~~ [redacted]; ~~Contents Subject to CIPA Protective Order~~

[redacted] were not minor inaccuracies, as they were in Abu-Jihaad. [redacted] did not mention [redacted] described [redacted]. Any documents acknowledging or confirming the inconsistencies between [redacted] are relevant and helpful to Mr. Kim's defense, as they tend to support his view that the information contained in [redacted] does not "relate to the national defense" because it is not accurate. The defense is entitled to present such evidence to the jury so that it may decide whether the information at issue falls within the scope of the Espionage Act.[8] See Gorin v. United States, 312 U.S. 19, 31-32 (1941) (holding that "the connection of the information with national defense" is a jury question); Abu-Jihaad, 600 F. Supp. 2d at 385-86 (same).

Second, the requested materials are also relevant and helpful to the defense in demonstrating that the information contained in [redacted] was not "information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation." 18 U.S.C. § 793(d). As the defense has repeatedly pointed out, [redacted] contains information calling into question the accuracy and provenance of the purported "intelligence." The inconsistencies between [redacted] and [redacted]

[8] The defense also notes for the record that information regarding the inaccuracy of [redacted] would plainly be discoverable under the definition of "national defense information" advanced by the defendant and applied in other Circuits (but rejected by this Court), which requires the government to prove, inter alia, that the information "is 'closely held' and that its disclosure 'would be potentially damaging to the United States or might be useful to an enemy of the United States.'" United States v. Kiriakou, 898 F. Supp. 2d 921, 923 (E.D. Va. 2012); see also Op. on Third Mot. to Compel at 6-10; Op. on Mot. for Reconsideration at 3-9. Under the defendant's proposed standard, information regarding the inaccuracy of [redacted] would go directly to whether the information allegedly disclosed by Mr. Kim was potentially damaging to the United States or helpful to a foreign nation.

[redacted] tend to support the defense's view that a seasoned analyst in Mr. Kim's position would have been quite skeptical of [redacted], as it appeared to contain nothing more than speculation and guesswork. The documents requested by the defense would help corroborate this view by confirming that, in fact, the information contained in [redacted] was wrong.

E. [redacted] Records (Item #5)

On August 22, 2013, the government produced substituted [redacted] records reflecting [redacted] on June 10-11, 2009. See Dkt. 153 Ex. 7, at 1. These records, however, are virtually meaningless in the form created by the government. In addition to using substitutions for [redacted], the government also replaced [redacted][9] See Exhibit 6 (CLASS 3699-3749). These substitutions render it impossible for the defense to determine [redacted] on June 10-11, 2009, the very point of the original request. The defense therefore requested "copies of these [redacted] records without substitutions for [redacted] on June 10-11, 2009." Dkt. 242, Ex. 1, Item 5. The defense also requested an unredacted copy of one page of records related to [redacted] which employed the same generic substitution. Id.

The government responded to this request by stating, "We believe that your request calls for the production of material to which the defense is not entitled. Nevertheless, to avoid unnecessary litigation, with respect to the second part of your request, we will re-produce to the

[9] [redacted]

defense a copy of [redacted]." Dkt. 242, Ex. 2, at 2. As of the date of this motion, the defense still has not received the discovery promised by the government, and it is unclear from the government's response whether it intends to produce the [redacted] records without substitutions.[10] To the extent the government has denied the request for unsubstituted versions of the [redacted] records, however, the defense moves to compel the production of those materials.[11]

This Court addressed the discoverability of [redacted] records of [redacted] when it ruled on defendant's fifth motion to compel discovery (and, specifically, on defendant's request for [redacted] records and a filter team process). See Op. on Fifth Mot. at 9. The Court held that "[t]he [redacted] records are certainly material to the preparation of the defense in that the records would assist the Defendant in determining whether [redacted] might have conveyed the contents of the [redacted] report to Mr. Rosen, or to a third party who then conveyed the information to Mr. Rosen, meaning the records are discoverable under Rule 16." Id. In light of the Court's ruling, the government cannot seriously dispute that the [redacted] records for [redacted] – which would also "assist the Defendant in determining whether [redacted] might have conveyed the contents of the [redacted] report to Mr. Rosen, or to a third party" – are discoverable.

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[10] As of the date of this motion, the defense also has not received the discovery promised in response to Items 4 and 9 of defendant's December 13th letter. In light of this delay, the defense reserves its right to seek additional relief if the government's production does not adequately address these requests.

[11] At the January 7th Status Hearing, defense counsel agreed with the Court that four issues from defendant's December 13th discovery letter remained outstanding. Defense counsel only received the government's response on the morning of January 7th, and regrettably did not recognize the ambiguity contained therein with respect to Item #5.

The only issue remaining before the Court is therefore the form in which the [redacted] records have been produced by the government. To assist the Court in its determination, the [redacted] records in their present form are attached as Exhibit 6. As the Court will see, these records are essentially meaningless in their present form, as they do not permit the defense to determine [redacted]. The records do not assist the defense in determining whether [redacted] "might have conveyed the information to a third party who then conveyed the information to Mr. Rosen," because the [redacted] have been not only excised from the records, but replaced with the same, generic substitution. The defense thus moves to compel the production of unsubstituted copies of the [redacted] records without further delay.

F. The Government's January 10th Production of Surveillance Materials from 2009-2010

During the January 7th Status Hearing, the Court queried the parties regarding the status of discovery and whether further motions to compel discovery would be necessary. Defense counsel advised the Court that it believed it had received all the discovery the government was going to provide (with the exception of the items addressed in the instant motion and any expert or Jencks materials). The government did not add anything to this exchange. Accordingly, defense counsel informed the Court that it did not foresee any additional motions to compel discovery.

Three days later, on January 10, 2014, the government unexpectedly produced approximately 120 new pages of discovery, as well as a video recording of the defendant. See Exhibit 7 (Jan. 10, 2014, letter from T. Bednar to A. Lowell). This discovery consists of surveillance logs, photographs, and video of the defendant (under the code name "LEMON SHARK") dating back to 2009 and 2010 – including surveillance photographs of the defendant

meeting with his prior attorney. See, e.g., Exhibit 8 (sample surveillance log and photograph). Although these materials have apparently been in the government's possession for years (and were declassified in November 2013), the government did not produce them to the defense or acknowledge their existence until January 10, 2014 – three days after the colloquy with the Court. The government's cover letter offers no explanation for this delay.

On January 16, 2014, defense counsel sent the government a letter seeking additional information regarding this production and requesting any related materials that have not yet been produced. See Exhibit 9. The defense also requested further information regarding steps taken by the government to avoid intruding upon defendant's attorney-client relationship during this surveillance. See id. at 2. The defense awaits the government's response.

Defense counsel is cognizant of the Court's Scheduling Order, and thus brings this issue to the Court's attention in the instant motion. The defendant expressly reserves his right to seek additional discovery regarding the government's belated production of the surveillance materials. Assuming the government responds to the defense's letter in a timely fashion, the defense anticipates addressing this issue no later than the January 28th Status Report.

WHEREFORE, for the reasons set forth above and any others appearing to the Court, the defendant seeks an Order compelling the government to produce the materials requested in Items 2, 3, 5, 7, and 8 of defendant's December 13th discovery letter and described herein.

Respectfully submitted,

DATED: January 17, 2014

/s/ Abbe David Lowell

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[redacted]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA)	Criminal No.: 10-225 (CKK)
)	
v.)	Filed In Camera and
)	Under Seal with the Classified
STEPHEN JIN-WOO KIM,)	Information Security Officer
also known as Stephen Jin Kim,)	
also known as Stephen Kim,)	
also known as Leo Grace,)	
)	
Defendant.)	

Leave to file granted
Judge CKK
1/30/14

GOVERNMENT'S IN CAMERA, UNDER SEAL SUR-REPLY IN SUPPORT OF ITS OPPOSITION TO THE DEFENDANT'S SIXTH MOTION TO COMPEL DISCOVERY

[redacted] On November 15, 2013, the Court entered an Order directing the United States to file a short Sur-Reply addressing the extent to which emails cited in the defendant's reply in support of his Sixth Motion to Compel "suggest the existence of a [redacted] outside the [redacted] already searched for." Order (November 15, 2013) at 4. Pursuant to that Order, the United States respectfully submits this Sur-Reply.

[redacted] Following consultation with [redacted] and further review of [redacted] email from June 11, 2009 related to the drafting of the [redacted] documents at issue, the United States advises the Court that the [redacted] referenced in the 11:33 a.m. email, attached as Exhibit 3 to the defendant's Sixth Motion to Compel, is a different type of document than the [redacted] referenced in the 2:54 p.m. email attached as Exhibit 1 to the defendant's motion. Despite the similar names, these documents are created by different [redacted] for different purposes.

[redacted] The United States further advises the Court that since receiving the

[redacted]

[redacted]

Court's Order, and out of an abundance of caution, the government re-reviewed the [redacted] email collection for June 11, 2009. See Government's In Camera, Under Seal Response to the Court's Order (May 30, 2013) at 5. That re-review disclosed no drafts of either the [redacted] or the [redacted] related to the [redacted] report at issue that were disseminated prior to the 3:16 p.m. cut-off time. However, that re-review identified emails and/or email attachments sent prior to the cut-off time that included proposed language for inclusion in the [redacted] (No such emails or email attachments were identified for the [redacted] Based on this Court's prior rulings, these emails and/or email attachments are not potential source documents or otherwise discoverable. Further, all but one of the senders or recipients of these emails have already been accounted for on the Access List.[1] Upon request, the United States will make all of these emails and email attachments available for the Court's ex parte, in camera review on a read and return basis.

Respectfully submitted,

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[1] [redacted] At 3:15 p.m. on June 11, 2009, a person on the Access List sent an email to a person not on the Access List, requesting assistance related to the [redacted] That request did not itself reveal any of the classified information in the [redacted] report. While this email transmission appears to have occurred one minute prior to the cut-off time, the recipient would not be added to the Access List because there is no indication that he or she was privy to the classified information at issue before that time.

[redacted]

[redacted]

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Date: November 19, 2013

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 19th day of November, 2013, I caused a true and correct copy of the foregoing filing to be served on counsel of record through the Classified Information Security Officer.

G. Michael Harvey
Assistant United States Attorney

[redacted]

[redacted]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	Criminal No.: 10-225 (CKK)
v.	Filed In Camera, and Under Seal with the Classified Information Security Officer
STEPHEN JIN-WOO KIM, also known as Stephen Jin Kim, also known as Stephen Kim, also known as Leo Grace,	
Defendant.	

Granted
Leave to file
C K Kollar-Kotelly
Judge
1/30/14

(U) GOVERNMENT'S REPLY IN SUPPORT OF ITS OBJECTIONS TO DEFENDANT'S SECOND CIPA SECTION 5 NOTICE

(U) On October 24, 2013, the United States submitted its objections ("Gov. Obj.") to the adequacy of the defendant's second notice under Section 5 of the Classified Information Procedures Act, 18 U.S.C. App. 3 ("CIPA") ("Second CIPA Section 5 Notice" or "Notice"). On November 12, 2013, the defendant filed his response to the government's objections ("Defendant's Response"). In responding to these objections, the defendant has added clarity and definition to some of the items in his original Notice. The Notice, however, is still deficient in many aspects, and the defendant's response demonstrates a misconstruction of his full obligation at the CIPA Section 5(a) stage, especially with regard to his obligation for noticing classified testimony. In order to "limit the issues and make the procedures under Section 6 to the point and manageable," United States v. Collins, 720 F.2d 1195, 1200 (11th Cir. 1983), the United States respectfully asks this Court to order the defendant to provide a particularized notice setting forth the specific classified information that he expects or desires to disclose at trial — whether through documents or testimony — or preclude the disclosure of any classified information for which the defendant has failed to provide the requisite particularity and specificity.

[redacted]

[redacted]

(U) **I. CIPA Section 5 Requires Particularized Notice of Specific Classified Information Defendant Seeks to Disclose Publicly**

(U) At the outset, the defendant's response minimizes what is required in a CIPA Section 5(a) notice by characterizing CIPA as "only requir[ing]" that the notice contain a "brief description of the classified information" at issue, paying little to no heed to the purpose of Section 5(a). Defendant's Response at 2 (emphasis added); see also id. at 3 ("Section Five requires the defendant to provide only a 'brief description . . . .'") (emphasis added). Just as the Court said in Collins, the defendant's characterization "overlooks that the 'brief description' is to be of *the classified information* expected to be disclosed. 'A brief description' is not to be translated as 'a vague description'; 'of the classified information' may not be interpreted as 'of the areas of activity concerning which classified information may be revealed.'" Collins, 720 F.2d at 1199 (emphasis in original).

(U) After displaying a misapprehension of the meaning of "brief description," the defendant accuses the United States of inventing the requirement that a CIPA Section 5(a) notice be "particularized" and contain "exactly" the information the defendant seeks to disclose. Defendant's Response at 2. But, this "particularized," "exact" description is precisely what the law requires from a CIPA Section 5(a) notice. See United States v. Badia, 827 F.2d 1458, 1465 (11th Cir. 1987) ("[T]he objective of CIPA is to provide the government with . . . a particularized description of the classified information prior to trial.") (emphasis in original); Collins, 720 F.2d at 1199 ("A Section 5(a) notice must be particularized, setting forth specifically the classified information . . . .") (emphasis added); see also id. ("The Section 5(a) notice requires that the defendant state, with particularity, which items of classified information entrusted to him he reasonably expects will be revealed . . . .") (emphasis added); United States v. North, 708 F. Supp.

[redacted]

[redacted]

389, 393 (D.D.C. 1988) (explaining defendant's CIPA notice "was rejected because it blatantly lacked any attempt at particularization") (emphasis added); see also United States v. Rewald, 889 F.2d 836, 855 (9th Cir. 1989) (explaining that the Court in United States v. Miller, 874 F.2d 1255, 1276 (9th Cir. 1989), interpreted a CIPA Section 5 notice to be adequate if it "informs '[t]he government . . . exactly to which documents [the defendant] was referring, and [to] what information was contained in them.'") (emphasis added).

(U) Similarly, the defendant's citations to case law inappropriately diminish the specificity required in a CIPA Section 5(a) notice, a finding which necessarily involves a case-specific fact-bound analysis. Initially, the defendant is correct that the Ninth Circuit found the list of documents in defendant Miller's notice adequate under Section 5.[1] Miller, 874 F.2d at 1276. A close analysis of the circumstances of the Miller case demonstrates, however, that while a CIPA Section 5(a) notice that consists "simply of a list indicating the length and title of each document," Miller, 874 F.2d at 1276, may be adequate under some circumstances (such as Miller's, and even some of the lists provided by the defendant in this case[2]), some of the mere lists provided by the defendant in his Second Section 5 Notice simply are not adequate.[3] Miller noticed all of the classified

[1] (U) The United States did not mean to imply otherwise in its objections when it quoted from a portion of the Miller case in which Miller was required to describe with more particularity the relevance of the classified information he sought to introduce at the CIPA Section 6 stage, rather than in the CIPA Section 5(a) notice itself. See Gov. Obj. at 4.

[2] (U) The United States notes that it lodged no objections to the defendant's First Section 5 Notice, which consisted of lists of documents, and did not object to the first, second, third, fourth, and sixth list of items in his Second Section 5 Notice.

[3] (U) Moreover, as will be explained in Section II., infra, and unlike in Miller, the defendant's Notice is not simply a list of documents that he may seek to introduce, but also contains general topics, non-exhaustive lists, and disguised discovery demands. The defendant's notice, therefore, is inadequate not only because of the confusion generated

[redacted]

[redacted]

information in "each document found" in his possession. Id. (emphasis added). Miller did so because of his proffered defense theory, in which he asserted that he collected classified documents because he was a "pack-rat"—not because he sought to pass the classified documents to the Soviet Union. Id. Because Miller was noticing all documents found in his possession in their entirety, "[t]he government knew exactly to which documents Miller was referring [in his Section 5 notice], and it knew what information was contained in them." Id. The Miller court did not say that simply listing the length and titles of each document in a CIPA Section 5(a) notice is sufficient in every case. Notably, the defendant has not identified any cases that relied on Miller in endorsing a similar "list-based" notice — let alone any case supporting the proposition that such a list is always sufficient. In fact, the Ninth Circuit later cited to Miller for the proposition that a CIPA Section 5(a) notice must inform the United States exactly to which documents the defense is referring. Rewald, 889 F.2d at 855. Although a list was sufficient for those purposes in Miller for the factual and contextual reasons set forth above, the lists provided by the defendant here, to which the United States objects, do not satisfy that test.[4]

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by his lists of documents, but for other reasons as well.

[4] (U) The defendant's response to the government's objections added a very significant item missing from the original Notice: the defendant's claim that he expects to disclose all of the classified information in each of the documents he noticed. As will be explained in Part II., infra, that assertion strains credulity when considering all of the varied information in those documents and still leaves the United States guessing as to what information the defendant actually intends to disclose. In essence, it strains credulity that the defendant actually desires to disclose each word of classified information on the disparate topics covered in each of the documents listed in his Notice. This is not a case like Miller, where the defendant wanted to use every line of every document to show that he hoarded classified documents, without regard to what any of the documents said. If the defendant is not required to be more specific, then, in the absence of a proffered Miller-type defense, the United States is forced to chase down each piece of information, consult with the varying Intelligence Community equity holders, determine whether it will be invoking the classified information privilege as to

[redacted]

[redacted]

(U) On the other hand, the principal cases relied upon by the United States in its Objections are instructive in determining the adequacy of the defendant's Notice. The defendant claims that these cases are "easily distinguishable," Defendant's Response at 4, but the defendant's argument on this point is based on the flawed premise that precedent cannot be instructive unless a court actually passed specific judgment on the adequacy of a CIPA Section 5 notice. The defendant then goes further to suggest that if a notice discussed in a case was more egregiously inadequate than the defendant's, the case cannot be useful here. Id. at 4-5. In so doing, the defendant ignores that each of these cases sets forth a consistent standard for the specificity and particularization required in a CIPA Section 5 notice that is equally applicable to him. For example, although the notice in Collins was even more broad, vague, and undefined than the defendant's, that does not render the defendant's notice adequate. Nor does it render inapplicable the standards of general applicability enunciated in Collins, which have been followed by numerous other courts. The Collins standard, as well as examples of courts that have followed it, were provided in the government's Objections, see Gov. Obj. at 4-7, and above. That standard addresses "how much specificity" is required in a CIPA Section 5 notice, see Defendant's Response at 5; in short, it must allow the United States to determine the precise classified information that may be revealed by the defense.

[redacted] Finally, at the last hearing on October 28, 2013, the Court suggested that some of the noticed items appeared vague, and the defense conceded as much in the hearing and now in its filing. The defendant attempts to justify that vagueness now by

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each piece of information, and then prepare materials for the Court justifying that privilege. This burden would be enormous, the attempted imposition of which appears to be nothing short of process graymail. Further, the Court would have to review all of this material, even for items of information the defendant may not actually expect to use. This is an improper burden to impose where it does not appear that the defendant seriously expects to use each and every item of classified information he has noticed.

[redacted]

essentially arguing that a lower specificity standard should apply to classified information that he seeks to disclose through testimony. As explained in the government's initial objections, the defendant's Notice lists a number of items that do not proffer what classified information may be revealed at trial, but instead pose an open-ended inquiry to the United States. See, e.g., Item 7(c) ("Sources of information relied upon by [redacted] for the statement in his 8:51 a.m. email on June 11, 2009, that he was aware that [redacted] 'should be out in minutes.'"). For the first time in his Response to the government's Objections, the defendant suggests that the classified information in these types of noticed items will be revealed through testimony, presumably at trial. Also for the first time, the defendant explains that the phrase "including but not limited to" was used because additional details about documents could be revealed through witnesses. The defendant seeks to invoke a lower specificity standard and attempts to justify this lower standard by baldly claiming that he cannot know how a witness will respond to questions at trial. Yet the defendant surely has some area of classified testimony that he expects or hopes to elicit at trial, or else he would not be noticing these items. The defendant can, and must, in order to permit for an efficient and complete CIPA Section 6(a) hearing, set forth what classified information he believes he will elicit from a witness, or hopes he will elicit.

(U) The defendant fails to recognize that the lower specificity standard he seeks to invoke is plainly at odds with the case law, which does not provide for it under any circumstances, including anticipated testimony.[5] Breaking down the Notice by topics is

[5] (U) Other cases also suggest measures taken to comply with CIPA Section 5's requirements when noticing testimony. Undersigned counsel has reviewed the Second CIPA Section 5 Notice in the case of United States v. I. Lewis "Scooter" Libby, in which defendant Libby, in addition to listing documents from which he reasonably expected to disclose the classified information (by Bates Number, in which the documents never exceeded eight pages, and were most often identified by only a single page number),

[redacted]

inadequate. See United States v. Smith, 780 F.2d 1102, 1105 (4th Cir. 1985) (en banc) (citing Collins, 720 F.2d at 1199)). So is providing non-exclusive lists of what information may be disclosed. By merely providing examples of the types of classified information that will be disclosed, instead of a complete list, the United States cannot possibly know exactly what information the defendant intends to rely on, contrary to Miller, as interpreted in Rewald, and Collins.

(U) The defendant also overlooks that a CIPA Section 5 notice is filed after the defense has received discovery, and engaged in whatever independent investigation it chooses, in order to allow the defendant to provide "a complete CIPA § 5 proffer of the classified evidence he hope[s] to offer at trial." United States v. Giffen, 473 F.3d 30, 36 (2d Cir. 2006). By using his CIPA Section 5 notice to pose questions, as will be further explained below, the defendant impermissibly shifts the burden to the United States to identify witnesses who could answer the questions posed and to identify what classified information those witnesses might possess, inexorably setting up the United States for graymail. See Collins, 720 F.2d at 1200. It is difficult to see how the CIPA Section 6(a) proceedings could occur, and the United States could argue that the classified information the defendant seeks to introduce is not relevant, without the United States being forced to undertake burdensome open-ended inquiries posed by the defendant's questions on the defendant's behalf. As a result of this process, the United States could be forced to disclose classified information obtained during the course of its inquiries that would not otherwise be discoverable, or even information that the United States was authorized to withhold from discovery earlier in the litigation under Section 4 of CIPA. This time-consuming undertaking could delay this trial indefinitely.

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offered an approximately five-and-a-half page narrative summary of the classified information he reasonably expected to disclose through trial testimony.

[redacted]

[redacted]

(U) At minimum, the defendant should be ordered to produce narrative summaries instead of inquiries in his CIPA Section 5 Notice that would identify the witnesses from whom he intends to elicit potentially classified information, the questions he would pose to those witnesses, and the potentially classified answers that he seeks that would be relevant and helpful to his defense. Similar narrative summaries were produced by defendant Libby at the CIPA Section 5 stage. See United States v. Libby, 467 F. Supp. 2d 1, 4, 14-15 (D.D.C. 2006). Providing such summaries is a means for the defendant to adequately notice classified information, see Defendant's Response at 8 (complaining that the United States offered complaints but no solutions), and would allow the Court to conduct a proper CIPA Section 6(a) hearing, while recognizing that the burden of demonstrating the relevance and admissibility of the noticed classified information rests with the defendant, see Miller, 874 F.2d at 1277.[6]

(U) **II. The Specific Items Noticed by Defendant**

(U) The specific items noticed by the defendant are discussed below, grouped as in the Defendant's Response, while separately addressing the subparts of Items 7 through 12 at the end.

A. Item 5 (FBI 302s)

[redacted] As the defendant notes in his Response, Item 5 consists of "FBI 302s reflecting interviews of [redacted] on the 'List of 118' who accessed the intelligence

[6] (U) It is within the district court's discretion to order a defendant to provide pre-trial disclosures to the United States, including disclosures pertaining to trial witnesses, and to exclude defense evidence when the defense does not abide by the court's order. See United States v. Combs, 267 F.3d 1167, 1178-80 (10th Cir. 2001) (citing United States v. Russell, 109 F.3d 1503, 1510-12) (10th Cir. 1997)). This exercise of discretion is particularly appropriate and may be mandated in a classified information case, where CIPA—which was enacted to provide procedures for alerting the United States to the classified information that may be compromised by a prosecution, and specifically provides for the exclusion of evidence where a defendant does not comply with its notice procedures—applies. See Badia, 827 F.2d at 1464-66.

[redacted]

[redacted]

report at issue." As discussed above, unlike the list in Miller, which – *under the facts of that case* informed the United States exactly what information the defendant intended to notice, the defendant's list here is insufficient because it does not allow the United States to know precisely what classified information defendant reasonably expects to reveal. The defendant claims for the first time in his Response that he "obviously intends to notice the classified, portion-marked information in these three to four page [302s], which take no more than a few minutes to review" (i.e. all classified information within every listed FBI 302). But the amount of time to review the FBI 302s does not determine whether the United States can know which information defendant intends to use. The reality is that these FBI 302s cover a number of diverse classified topics within a single interview. For example, an interview may cover whether the individual saw the intelligence report at issue on the day of the unauthorized disclosure; whether the report was viewed electronically or in hard copy; whether the interviewee recalled the details of the intelligence report; what specific time the intelligence report was prepared; to whom the report would likely have been disseminated; the dissemination process; follow-up questions related to a pre-interview questionnaire; sources of intelligence relied upon for the intelligence report; and [redacted] among other classified topics. See, e.g., CLASS_2839-54.[7] This example of a single noticed document contains at least thirty-three classified paragraphs. The defendant's noticing of all of this diverse classified information causes the United States to doubt whether he reasonably expects to elicit all of the noticed information at trial.

(U) To adequately notice the FBI 302s in Item 5, the defendant should be required to specify the particular classified information within the FBI 302s that the defendant

[7] (U) These Bates numbers refer to documents produced to the defense in classified discovery. .

[redacted]

[redacted] expects to disclose publicly at trial. The defendant could do so either by specifying the paragraphs within the documents that he reasonably expects to disclose, or by at least providing a list of the topics in the interview reports for which he reasonably expects to disclose classified information, along the lines of the topic list provided above.

B. Items 7 to 12

(U) For each of Items 7 through 12, the defendant sets forth a topic at the beginning, and then provides a non-exhaustive list of examples of information he may disclose pertaining to the topic. It is undisputable that the United States cannot know exactly what information the defendant reasonably expects to disclose if it does not provide an exhaustive list. Moreover, the Court cannot know whether all of the areas of potentially classified trial testimony have been appropriately dealt with through CIPA in advance of trial. Because of the vague and non-exhaustive nature of the Notice, it will be unnecessarily difficult for the Court to rule on any objection(s) that the defendant is precluded from eliciting certain information at trial because it was not included in his Section 5 Notice. This Court should order the defendant to provide an exhaustive list, with the understanding that if the defendant is using the non-exhaustive language to preserve its ability to elicit testimony about certain documents, see Defendant's Response at 10, the defendant should properly notice the testimony according to the guidelines set forth above (identifying witnesses, questions, and the potentially classified answers that he desires to elicit).

C. Items 13 and 14

[redacted] In Item 13, the defendant notices "[t]he 'Eleven Questions' document relating to the alleged disclosure." This document provides the response of the relevant [redacted] to eleven questions posed to it concerning the June 11, 2009 unauthorized

[redacted]

[redacted] disclosure. The questions and/or answers to four out of these eleven questions are classified, and these four questions/answers (like all eleven) are distinct from each other. The defendant's noticing of this entire document again emphasizes why his claim that he reasonably expects to use all classified information in the noticed documents cannot be accepted at face value. In noticing the entire document, the defendant has included [redacted] information contained under Question 2 on page CLASS_28. This information pertains to [redacted] and the course of this litigation has made clear that the parties are not going to put this information at issue in trial. This inclusion is evidence that the defendant does not actually expect to disclose every item of classified information in every document he has noticed, as he claims in his Response. The defendant should be required to specify which of the questions noticed in Item 13, and which of the answers, he actually anticipates disclosing at trial, including addressing [redacted] information.

[redacted] In Item 14, the defendant notices [redacted] correspondence relating to the alleged disclosure dated June 12, 2009, June 18, 2009, and November 12, 2009." As an initial matter, because of the use of the phrase "relating to," the defendant should be asked to clarify whether the list of Bates Numbers provided with Item 14 is intended to be exhaustive. Like many of the other items, Item 14 contains many varied pieces of classified information. The noticed [redacted] letters commented on a range of different topics, such as: the accuracy and classification of the disclosed information in the Fox News article; [redacted] resulting from the disclosure; highlighted specific relevant language from the Fox News article; the intelligence report that formed the basis of the Fox News article; the distribution of the intelligence report; and the impact of the disclosure on our

[redacted]

national defense, among other classified topics. The defendant should be required to specify which of this classified information he reasonably expects to disclose.

D. Items 15 and 16

Item Numbers 15 and 16 assert that the defendant intends to disclose:

> 15. Information relating to the systems and procedures for the classification and declassification of documents and information in each government agency relevant to this case, including but not limited to
>
> 16. Information relating to the practices and procedures by which an agency of the United States government (such as the State Department) prepares a public or media statement that is derived from or relates to classified information, or otherwise communicates or discusses information with the media that is derived from classified information.

(U) From these requests, the United States cannot even begin to understand or appreciate the classified information that the defendant reasonably expects to disclose. The defendant begins both items with the incredibly broad language "[i]nformation relating to," with no indication of how broadly this is meant to sweep. For instance, neither Item specifies a time period. Regarding Item 15, "the systems and procedures for the classification and declassification of documents and information" in all of the government agencies "relevant to this case" could cover potentially limitless information. The defendant leaves the United States guessing as to what even constitutes an agency "relevant to this case." The defendant is asking the United States to engage in the burdensome process of identifying all of the individuals who may have knowledge of such topics and all of the agencies' documents relating to such procedures, and then to inform the defense of all this information by way of objection. Moreover, the defendant does not specify whether he intends "systems and procedures" to include computer programs, communications methods, and the like, and whether he intends to include

every component of "each government agency relevant to this case," or only those components "relevant to this case," whatever that means. Further, the defendant does not specify whether he intends to introduce evidence or elicit testimony related to specific examples of documents or information being classified or declassified. If he does intend to elicit such information, the defendant surely must include that with specificity in his notice. At trial, he should not be heard to say that such testimony was fairly included in this broad, vague, and almost meaningless Item noticed.

(U) The same is true of Item 16, which relates to all government contact with the media relating to classified information. The defendant does not even limit this item to agencies "relevant to this case," so it seems that the defendant is asking the United States to track down this information with respect to every government agency. The defendant also does not specify whether "[i]nformation relating to" the "practices" at these myriad agencies includes examples of specific instances in which federal agencies dealt with media inquiries related to classified information. It is not clear from Item 16 whether the defendant intends to elicit classified information at trial about other instances of unauthorized disclosures to the media. And, no time period is specified for either Item 15 or 16.

(U) In sum, distilled to their essence, Item Number 15 is a notice that the defendant seeks to elicit information about how any government agency classifies or declassifies information on any topic or has ever done so, and Item Number 16 is a notice that the defendant seeks to elicit information about how any government agency deals with the media on any issue involving classified information, or has ever done so. This does nothing to enable the United States or the Court to fulfill their roles in the important pre-trial processes set forth by CIPA. As with the other topics where the defendant does not even purport to identify the classified information which he reasonably expects to

[redacted]

disclose, the defendant should be ordered to identify the witnesses from whom he intends to elicit potentially classified information, the questions he would pose to defendants, and the potentially classified answers that he seeks that would be relevant and helpful to his defense.

E. Subparts of Items 7 to 12

[redacted] Some of the subparts of Items 7 through 12 are objectionable for additional reasons. In Items 7(c), 7(d), 7(e), 7(f), 7(g), 8(b), 9(b), 10(d), and 10(e), the defendant does not even purport to identify the classified information which he reasonably expects to disclose. For the reasons stated above, the defendant should be ordered to produce narrative summaries, in which he identifies the witnesses from whom he intends to elicit potentially classified information, the questions he would pose to witnesses, and the potentially classified answers that he seeks that would be relevant and helpful to his defense. In addition, regarding Item 7(g), the United States has also objected on the ground that the very wording of the item is vague; the United States is unsure what defendant means by "[t]he intended . . . distribution of the [redacted] In Item 7(a), the defendant notices "[t]he drafts of [redacted] provided in discovery and email correspondence relating to the drafting of [redacted] With this item, defendant notices forty-three pages of classified discovery (CLASS_3085-3125, 3205-18).[8] These pages discuss possible responses to the intelligence report; include a [redacted] internal correspondence about preparing other briefs based on the intelligence report; and inter-agency correspondence related to the intelligence report, among other classified topics. The defendant should be ordered to specify which of these topics he reasonably expects to

[8] (U) There are fifty-four pages contained in this range, but eleven are blank.

[redacted]

[redacted] disclose. In Item 7(b), the defendant notices [redacted] classified statements to the FBI on July 12, 2012." [redacted] classified statements in this document range from discussing whether he received an advance copy of documents on the date of the charged disclosure; answering questions on emails containing a [redacted] addressing a publication on [redacted] and explaining why [redacted] never materialized, among other classified topics. Again, the defendant should be ordered to specify which of these statements he reasonably expects to disclose.[9]

[redacted] In Items 10(b), 11(g), 11(h), 11(k), and 11(m), the defendant notices classified statements in FBI interviews of Daniel Russel, Darlene Bartley, Charles Lutes, Matthew Spence, and Thomas Donilon, respectively. The interview reports of these five individuals -- which often include multiple interviews of the same individual -- each cover numerous distinct classified topics. For example, Russel's classified statements include him discussing [redacted] North Korea; comparing the similarity of information in the Fox News article to the intelligence report; Russel's request of a U.S. government employee to conduct an intelligence assessment of the information contained in the Fox News article; the results of that assessment; and speculation regarding the identity of the leaker, among other classified statements. As another example, Lutes's classified statements cover several distinct topics, including his past access to several types of compartmented programs; access and review of the intelligence report; correspondence with Bartley on the date of the charged disclosure; discussions with other colleagues about the intelligence reports; Lutes's

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[9] [redacted] At the top of page 10 of the Government's Objections, there is an example provided from defendant's Notice. See Gov. Obj. at 10 ("For example, in Item Number 7 the defendant states that he intends to elicit '[i]nformation relating to the distribution of copies of [redacted] to persons within the White House . . . ."). This quotation actually appears in defendant's Item 11, not Item 7.

[redacted]

[redacted] assessment of the information contained in the intelligence report; explanation that he received daily briefings from [redacted] press contacts; assessment of information contained in the Fox News article; comparison of Fox News to other news organizations, and in particular that Lutes found Fox News's mention of [redacted] North Korea particularly concerning; information about other unauthorized disclosures; and statements regarding possible arrests related to this charged unauthorized disclosure. For all of these interviews, the defendant should be ordered to specify which statements he reasonably expects to disclose, or at least provide a list of the topics in the interview reports for which defendant reasonably expects to disclose classified information.

(U) III. Conclusion

(U) As the Eleventh Circuit said in Collins, "[t]he Section 5(a) notice is the central document in CIPA." Collins, 720 F.2d at 1199. It is the central document because it frames the discussion for all future CIPA proceedings. Because defendant has not adequately set forth the classified information he reasonably expects to reveal at trial in his CIPA Section 5(a) Notice, he has not properly framed or limited the classified information involved in this case in a meaningful way. In order to streamline the CIPA Section 6(a) proceedings, this Court should order the defense to identify more precisely at this stage exactly what classified information it intends to use, or preclude the disclosure of any classified information for which the defendant has failed to provide the requisite particularity and specificity. See id. at 1199-1200.

[redacted]

[redacted]

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on this 19th day of November, 2013, I caused a true and correct copy of the foregoing filing to be served on counsel of record through the Classified Information Security Officer.

G. Michael Harvey
Assistant United States Attorney

[redacted]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	Criminal No. 10-225 (CKK)
v.	)	
STEPHEN JIN-WOO KIM,	)	
Defendant.	)	

Leave to File Granted
Judge CKollar-Kotelly
1/30/14

DEFENDANT STEPHEN KIM'S RESPONSE TO THE GOVERNMENT'S OBJECTIONS TO HIS SECOND CIPA SECTION 5 NOTICE

Defendant Stephen Kim, by and through undersigned counsel, respectfully submits the following response to the government's objections to the adequacy of his second CIPA § 5 notice. The government's objections are based on an unduly narrow reading of CIPA that finds no support in the text of the Act itself or the case law interpreting its provisions. The government's claim that defendant should be required to provide even greater specificity than has already been provided in his second Section Five notice ignores the level of detail in the notice that he has provided and overlooks the fact that, in many instances, evidence at trial will consist of not only classified documents, but also the testimony of government witnesses regarding those documents. The government's approach elevates form over substance and, if accepted by the Court, would bring CIPA proceedings in this case to a grinding halt as the defense attempts to itemize and re-type every sentence of classified information contained in the discovery that the defense reasonably expects to disclose at trial.

I. THE PROPER STANDARD UNDER CIPA SECTION FIVE

On October 15, 2013, defendant filed his second notice under CIPA § 5. Section Five requires a defendant to "notify the attorney for the United States and the court in writing" if he

"reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with any trial or pretrial proceeding." 18 U.S.C. App. 3 § 5(a). The Act only requires that such notice "shall include a brief description of the classified information" at issue. Id.

Section Five's requirements are designed to make "the government . . . aware, prior to trial, of the classified information, if any, which will be compromised by the prosecution." United States v. Collins, 720 F.2d 1195, 1197 (11th Cir. 1983). "To that end, the defendant who reasonably expects that his or her defense will result in the disclosure of classified information is required . . . to give the court and the government prior notice of the classified information deemed involved. [T]his may be thought of as the 'price' the defendant asserts the government will have to pay if the prosecution continues." Id. Once the defendant has filed a Section Five notice, the government is then given "an opportunity . . . to try to minimize the cost" by moving for a hearing on relevance, use, and admissibility under CIPA Section 6(a). Id.

Although, by its plain terms, Section Five requires the defendant to provide only "a brief description of the classified information" at issue, see 18 U.S.C. App. 3 § 5(a), the government urges this Court to go much further and require the defendant to provide a more "particularized" notice that identifies "'exactly' what information in [the classified documents contained in the notice] the defendant seeks to disclose." Govt. Br. at 7, 11 (emphasis added). This argument is unavailing for several reasons.

First, the government's assertion that the defendant must provide a "particularized" notice identifying "exactly" what information within classified documents he reasonably expects may be disclosed at trial is inconsistent with the text and structure of CIPA. Although CIPA Section Six requires the government to notify the defendant of "the specific classified

information at issue" when it moves for a hearing on use, relevance, and admissibility. Section Five is bereft of any such language. Compare 18 U.S.C. App. 3 § 6(b)(1) with 18 U.S.C. App. 3 § 5. Rather, as noted above, Section Five requires the defendant to provide only a "brief description" of the classified information at issue. See 18 U.S.C. App. 3 § 5(a). The government's interpretation fails to take this difference into account, and improperly places the burden on the defendant to begin crafting the government's own Section Six motion.

The Ninth Circuit addressed precisely this issue in United States v. Miller, 874 F.2d 1255 (9th Cir. 1989), a case the government mischaracterizes in its brief. See Govt. Br. at 4. In Miller, the defendant notified the government that he intended to introduce a series of classified documents found at his home and work desk as part of his defense. Id. at 1276. His Section Five notice "consisted simply of a list indicating the length and title of each document found." Id. The district court found his Section Five notice inadequate on the same ground urged by the government in this case, namely that the notice failed to set forth, inter alia, "the particular contents of each document." Id.

The Ninth Circuit, however, disagreed, holding that the list of documents provided by the defendant was "fully adequate under § 5 of CIPA." Id. As the Court explained, "[t]he only language in § 5 concerning the form and content of the required notice is the statement that 'such notice shall include a brief description of the classified information.'" Id. (quoting 18 U.S.C. App. 3 § 5(a)). The list of documents provided by the defendant "satisfied the purpose of this requirement" because it "fully alerted the government as to what classified information [defendant] sought to introduce. The government knew exactly to which documents [defendant] was referring, and it knew what information was contained in them." Id. Contrary to the assertions in the government's brief, see Govt. Br. at 4, Miller thus rejected the government's

exists that a defendant must identify the specific classified contents of each document, ruling instead that a list of the classified documents produced by the government during discovery was "fully adequate under § 5 of CIPA."[3] Id.

Second, the principal cases relied upon by the government are easily distinguishable, as they involved defendants who either refused to identify the specific documents they intended to present as part of the defense or refused to file any Section Five notice at all. In United States v. Collins, 720 F.2d 1195 (11th Cir. 1983), for example, defendant noticed his intent to reveal "activities of the U.S. Government with respect to joint Intelligence/Military operations" as well as "the utilization of secret overseas bank accounts to finance such operations." Id. at 1200. The Eleventh Circuit observed that defendant's notice failed to specify a single classified "activity" or item of classified information that he expected to reveal, and was so vague as to conceivably include "any sensitive government intelligence and military operation from the creation of the nation until now, conducted anywhere in the world." Id. at 1199-1200. On that basis, the Court held defendant's Section Five notice inadequate. Id. at 1200-01.

In United States v. Badia, 827 F.2d 1458 (11th Cir. 1987), the defendant failed to file any Section Five notice identifying the specific classified information he intended to use in support of his unique "CIA involvement" defense. Id. at 1464-65. Because he "failed to comply with the explicit provision of CIPA and has demonstrated no reason to justify his noncompliance," the

[3] The Miller Court went on to hold that the defendant failed to satisfy his burden of demonstrating that the documents contained in his notice were relevant to his defense under CIPA § 6(a). See Miller, 874 F.2d at 1276-77. The Court made clear, however, that this ruling was based on CIPA § 6(a), not § 5. Id. The government describes Miller as "upholding district court order requiring defendant 'to specify with greater particularity which documents or portions of documents were relevant'" in his Section Five notice. See Govt. Br. at 4, but that is simply wrong. Miller expressly held "that [defendant's] notice was sufficient under § 5," but that he failed to carry his burden at the next stage of proceedings under CIPA § 6. 874 F.2d at 1276-77.

Court precluded him from introducing classified evidence as part of his defense. Id. at 1466. Badia thus concerned the failure to file a CIPA § 5 notice, not the level of specificity required under that provision.

Neither Collins nor Badia addressed a case, such as this one, in which the defendant has complied with CIPA's procedural requirements and identified the classified materials he reasonably expects to disclose at trial, often by page number.[2] Rather, Collins and Badia addressed situations in which the government was unable to determine what information the defendant expected to disclose at trial, either because defendant's Section Five notice was so vague as to include almost any covert "activity," or because defendant failed to provide any Section Five notice at all. Collins and Badia are therefore of limited use in this case, as neither addressed the crucial question of how much specificity is required to put the government on notice of the classified information that may be disclosed as part of the defense.[3] The Ninth

[2] The same is also true of the other cases relied upon by the government. See Govt. Br. at 4-7. United States v. Poindexter, 698 F. Supp. 316 (D.D.C. 1988), addressed CIPA's structure and procedural requirements before any Section Five notice had been filed. Id. at 319-21. The Court went out of its way to emphasize the unique circumstances of that case, explaining that the charges at issue were sui generis and fell outside "the precise strictures of CIPA." Id. at 319-20. United States v. North, 708 F. Supp. 389 (D.D.C. 1988), addressed the defendant's persistent refusal to comply with the Court's procedural orders in the same prosecution as Poindexter. The defendant in that case filed a Section Five notice that "was nearly 500 pages long" and included "masses of classified material which under no conceivable version of a defense could have utility whatsoever." Id. at 395. The Court found such notice inadequate because it exhibited "a deliberate disregard" for the Court's prior orders and ensured "confusion, delay, and uncertainty" during pretrial proceeding. Id. United States v. Rewald, 889 F.2d 836 (9th Cir. 1989), did not address the adequacy of a Section Five notice, but rather discussed whether a defendant must present arguments regarding relevance and admissibility in such a notice. Id. at 855.

[3] Moreover, the line of Eleventh Circuit cases relied upon heavily in the government's brief is the same line of cases that soundly rejected the government's proposed "balancing" of interests at the CIPA Section 6(a) stage. See Collins, 720 F.2d at 1199 ("CIPA appears premised upon the assumption that, if material to the defense and not otherwise avoidable, such information shall be admissible."); United States v. Baptista-Rodriguez, 17 F.3d 1354, 1364 (11th Cir. 1994) ("The district court may not take into account the fact that evidence is classified when determining its use, relevance, or admissibility," as "the relevance of classified information in a given case is

Circuit's decision in Miller, by contrast, squarely addressed this issue, holding that a list of classified documents produced by the government during classified discovery that the defendant intended to use at trial was sufficient to put the government on notice under CIPA § 5. See Miller, 874 F.2d at 1276.

Third, the government's position on the level of detail required in a CIPA § 5 notice also ignores the realities of trial practice. Section Five "is intended to cover not only information that the defendant plans to introduce into evidence, or to state in open court, but also information which will be elicited from witnesses and all information which may be made public through defendant's efforts." S. Rep. No. 823, 96th Cong., 2d Sess., at 7. Before trial, the defense obviously cannot be expected to predict precisely how government witnesses will respond to cross-examination, or whether their answers will reveal classified information. Yet CIPA expressly requires the defendant to provide some notice of any classified information that may be disclosed on direct or cross-examination of witnesses in some manner, or risk a court order precluding "the examination by the defendant of any witness with respect to any such information." 18 U.S.C. App. 3 § 5(b).

To preserve the defense's ability to effectively examine and cross-examine witnesses, a defendant in a CIPA case must therefore notice topics potentially implicating classified information in his Section Five notices. Such a notice cannot incorporate the level of precision

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governed solely by the well-established standards set forth in the Federal Rules of Evidence." (citing Collins); United States v. Juan, 776 F.2d 256, 258 (11th Cir. 1985) (same); see also Poindexter, 698 F. Supp. at 320 ("[Congress] emphasized that the Court should not undertake to 'balance the national security interests of the government against the rights of the defendant, but rather that in the end remedies and sanctions against the government must be designed to make the defendant whole again.'"). Less than four weeks ago, the government urged this Court to reject these Eleventh Circuit cases (as well as Judge Walton's decision in United States v. Libby, 453 F. Supp. 2d 35 (D.D.C. 2006)), arguing that they misinterpret CIPA's provisions. See Govt CIPA 6 Reply at 19 n.8. The government's view of Fourth and Eleventh Circuit precedent shifts with each successive motion, and is transparently results-oriented.

demanded by the government in this case, as the defense simply cannot know how a witness will respond under oath at trial – particularly when the defense does not have access to the witness or any pertinent statements that may exist. For that reason, several items in defendant's second CIPA § 5 notice consist of a specific, defined topic, followed by the phrase "including but not limited to" and several examples of documents or factual details the defense expects to rely upon at trial. Item 8 in defendant's notice, for example, states that the defendant reasonably expects to disclose "information relating to the [redacted] concerning North Korean [redacted] (i.e., a classified topic), "including but not limited to (a) an [redacted] email from [redacted] describing North Korean [redacted] CLASS_1368-09" (i.e., a specific classified document) and the "sources of information relied upon by [redacted] for the assertions in the [redacted] email" (i.e., a factual detail known by [redacted]). Depending on [redacted] testimony, the defense may also have additional questions about the [redacted] email, and the information relied upon by [redacted] which could touch upon classified information. The language contained in Item 8 preserves the defendant's ability to ask such questions at trial, without drawing an objection from the government that the defendant failed to notice any of the specific information that may be disclosed by [redacted] answers.

The government criticizes this approach, claiming that it lacks "specificity" and "any definiteness whatsoever," and is exactly "what the Eleventh Circuit condemned in Collins." Gov't Br. at 39. But, as noted above, Collins addressed a Section Five notice that was far less specific than defendant's notice in this case. See 720 F.2d at 1200 (noting that defendant's notice conceivably encompassed "any sensitive government intelligence and military operation

from the creation of the action until now, conducted anywhere in the world"). Coulins therefore does not suggest any inadequacy in Mr. Kim's second CIPA § 5 notice.[4]

Moreover, for all of its complaints, the government fails to explain how the defense could adequately notice any classified information that may be disclosed during the cross-examination of witnesses like [redacted] whose testimony will be required to authenticate and explain several of the key documents in the case. The government argues that more "definiteness" is required, but fails to explain how such a requirement would operate in practice when the witness has not yet begun to testify. If the defendant were instructed to provide a more "particularized" notice of the information he reasonably expects to elicit from [redacted] for example, what more could be said than what is already included in his notice? The government's brief offers no guidance on this issue. Its objections elevate form over substance without any discernable benefit to the parties or the Court, and should be rejected.

II THE SPECIFIC ITEMS NOTICED BY DEFENDANT

Defendant's second CIPA § 5 notice listed sixteen categories of information the defense reasonably expects to disclose at trial. The government does not object to categories 1, 2, 3, 4, and 6, see Govt. Br. at 2 n.1, so those items are not in dispute. As to the remaining items, the government fails to discuss these categories individually, but rather asserts four blanket objections. Id. at 8-11.

In the absence of any discussion of the actual items noticed by the defendant, it is difficult to discern what, exactly, the government finds lacking in defendant's notice. Several of the items described by the government as "impermissibly vague" or "lacking any definiteness" are, in fact, described in great detail. The defense thus urges the Court to consider the actual

[4] The defense also notes that as to testimonial evidence, this is exactly how counsel provided its Section 5 notice in the AIPAC case (United States v. Rosen & Weissman).

language of defendant's notice, which is far more specific than the government suggests. The substance of the government's categorical objections is addressed below.

A. Item 5 (FBI 302s)

Item 5 in defendant's notice consists of "FBI 302s reflecting interviews of [redacted] & the 'List of 118' who accessed the intelligence report at issue," followed by a list of specific Bates pages from classified discovery at which these 302s can be found. Relying in part on the Ninth Circuit's decision in Miller, the government claims that such notice "is inadequate because it does not grant the United States to 'exactly' what information in these particular documents the defendant seeks to disclose." Govt. Br. at 11.

This objection is meritless. As noted above, the government misreads Miller, which held that "a list indicating the length and title" of each classified document provided by the government was "fully adequate under § 5 of CIPA." Miller, 874 F.2d at 1276. The Court expressly rejected the argument made by the government, holding that the defendant was not required to "set forth the particular contents of each document." Id.

Moreover, the government's complaint that the 302s are "lengthy" and that it should not be required to "sift through the entire document" to determine "exactly" what information is at issue borders on the frivolous. The actual notice provided by the defendant includes Bates ranges that consist, on average, of three to four pages, which are already portion-marked. Defendant obviously intends to notice the classified, portion-marked information in these three to four page documents, which take no more than a few minutes to review.

B. Items 7 to 12

Items 7 through 12 in defendant's notice consist of categories of information related to the [redacted] certain emails from Daniel Russel and [redacted] the distribution of copies of the

intelligence report to people within the White House, and apparent contacts between White House National Security Council staff and Fox News on June 11, 2009. The government asserts two blanket objections to these categories of information. First, the government argues that these items contain "non-exhaustive lists within broad categories" of information. Govt. Br. at 9-10. Second, the government asserts that certain of these items are "new discovery demands disguised as a CIPA Section 5 Notice." Id. at 10-11. The government also complains that the defense has "failed to specify the classified information" within certain items. Id. at 11.

The government's "non-exhaustive list" objection stems from the defense's use of the phrase "including, but not limited to," which is addressed in Part I above. Although the government complains that this phrase lacks specificity and "definiteness," it overlooks the fact that the phrase modifies the specific topic directly preceding it. Item 8, for example, is limited to information regarding a specific document, "the [redacted] email concerning North Korean [redacted]." Item 8 therefore puts the government on notice that the defense reasonably expects to disclose information relating to the [redacted] email at trial. As explained above, the "including but not limited to" language is necessary to preserve the defendant's right to examine and cross-examine witnesses regarding this document which may cause the disclosure of additional classified information.

Like Item 8, items 7 through 12 each focus on a specific document or topic, and provide examples (with Bates numbers) of specific information already in the defendant's possession which he may disclose at trial. Even a cursory examination of these items shows that they do not reflect "broad categories" as the government suggests, nor do these items fail to provide the government with notice of the information that may be disclosed at trial. Items 7 through 12 are

in fact, far more detailed than the Section Five notices at issue in the cases relied upon by the government.

The government also argues that certain sub-categories contained in Items 7 through 10 are actually "new discovery demands disguised as a CIPA Section 5 Notice." Govt. Br. at 10-11. The legal basis for this objection is unclear, as Collins – the only case cited by the government for this proposition – does not discuss, let alone recognize, such an objection.

Defendant's notice does not request any additional discovery from the government. It does what CIPA requires – it provides the government with notice of the specific information the defense reasonably expects to elicit from government witnesses at trial. If the government intends to object to the defense asking [redacted] how he knew that the intelligence report at issue "should be out in minutes" as of 8:51 a.m. on the morning of June 11 (Item 7(c)), for example, the government may move for a hearing on relevance, use, and admissibility under CIPA Section 6(a). The fact that the government has not yet produced a classified document containing this information is not a basis for a CIPA Section Five objection. Section Five requires the defendant to provide a notice; the government will have its opportunity to object at the Section Six stage. The same is also true of other items to which the government objects on these grounds.

[redacted]

[1] In the single paragraph of its brief explaining this "disguised discovery" objection, the government states: "CIPA does not countenance such an attempt at 'suddenly shifting the burden . . . to the government to anticipate and state what it fears from 'greymail.' Collins, 720 F.2d at 1199." Govt. Br. at 11. This quotation from Collins is misleading, as the cited passage (actually appearing on page 1200) addresses the government's obligations under CIPA Section 6, not the defendant's burden under Section 5. See 720 F.2d at 1200. Collins did not hold that defendant's Section Five notice was inadequate because it contained "new discovery demands disguised as a CIPA Section 5 Notice," nor did it consider such a theory. Rather, as noted above, the Court held that defendant's notice was insufficient because it failed to specify a single item of classified information and "conceivably" included "any sensitive government intelligence and military operation from the creation of the nation until now." 720 F.2d at 1199-1200.

Finally, the government complains that Items 7(a), 7(b), 10(b), 11(g), 11(h), 11(k), and 11(m) are "lengthy documents" that it should not have to "sift through" to identify "exactly" what information is at issue. Id. at 11. As noted above with respect to FBI 302s, the government's argument mischaracterizes the Ninth Circuit's decision in Miller, which expressly held that a list of classified documents produced during discovery is "fully adequate" for Section 5 purposes. Miller, 874 F.2d at 1276. The defense also notes that the documents at issue are portion-marked to identify the classified information involved. The defense reasonably expects to disclose the classified information contained in these portion-marked documents.

C. Items 13 and 14

Items 13 and 14 in defendant's notice are documents generated by [redacted] law enforcement officials discussing the alleged disclosure at issue in this case. Item 13 is four pages long. Item 14 is nine pages long. The government complains that these are "lengthy documents" that it should not have to "sift through" to identify "exactly" what information is at issue. Gov't Br. at 11. This argument cannot be taken seriously.

Like the FBI 302s and Items 7 to 12, the defendant's notice is more than adequate under Miller, as it identifies the specific classified documents the defense reasonably expects to disclose at trial by Bates number. See Miller, 874 F.2d at 1276. The applicable pages are already portion-marked and should take the government no more than a few minutes to review. Defendant reasonably expects to disclose the portion-marked sections containing classified information at trial.

D. Items 15 and 16

Items 15 and 16 in defendant's notice are categories of information regarding the government's procedures for classifying and declassifying documents and preparing media

statement based on classified documents. The government objects to these items on the grounds that they are "broadly worded" and "impermissibly vague." Govt. Br. at 8-9.

As noted above, the purpose of a Section Five notice is to make the government aware of any classified information that may reasonably be disclosed as part of the defense. Collins, 720 F.2d at 1197. Items 15 and 16 satisfy that goal, by providing notice of defendant's intent to elicit testimony regarding the government's procedures for classifying and declassifying information and preparing media statements on classified topics. The government fails to explain exactly what it finds "vague" or "non-particularized" about these topics.

Moreover, it should come as no surprise to the government that the defense will seek to elicit testimony on these topics to rebut the government's continued reliance on the classified nature of the intelligence report at issue as proof that Mr. Kim had reason to believe that disclosure of the information could be damaging to the United States or helpful to a foreign nation. The government complains that defendant's notice is "impermissibly vague," but fails to address how Mr. Kim would otherwise notice his intent to elicit testimony on these crucial issues.

III. CONCLUSION

For the reasons set forth above, the government's objections should be denied. The defense has provided the government with a notice that is "fully adequate under CIPA § 5," as it "fully alert[s] the government as to what classified information" the defendant reasonably expects to disclose at trial. See Miller, 874 F.2d at 1276. However, if the Court agrees with any part of the government's objections, the remedy is to require the defense to file an amended notice. The government asserts that the Court should either "order the defendant to file a new Section 5 Notice" or "preclude the disclosure of any classified information falling into the

objectionable categories in the defendant's Notice." Govt. Br. at 11-12. The government cites no authority for the latter proposition, which would plainly violate the defendant's constitutional right to present a defense. Indeed, the cases relied upon by the government demonstrate that if a Section Five notice is found inadequate, the proper remedy is to require the defendant to file an amended notice. See, e.g., Collins, 720 F.2d at 1201.

WHEREFORE for the reasons set forth above and any others appearing to the Court, the government's objections to defendant's second CIPA § 5 notice should be denied.

Respectfully submitted,

DATED: November 12, 2013

/s/ Abbe David Lowell
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	Criminal No. 10-225 (CKK)
v.	)	
STEPHEN JIN-WOO KIM,	)	
Defendant.	)	

Leave to File Granted
Judge C Kollar-Kotelly
1/30/14

DEFENDANT STEPHEN KIM'S REPLY TO THE GOVERNMENT'S OPPOSITION TO HIS SIXTH MOTION TO COMPEL DISCOVERY

In its Opposition to Defendant's Sixth Motion to Compel Discovery and Request for Clarification of the Court's October 9, 2013, Order, the government agrees to satisfy, or states that it has already satisfied, five of the six discovery or clarification requests made by the defense. Specifically, the government represents that:

- The government has already searched for and produced all revisions to the [redacted] that were created prior to 3:16 p.m. on June 11, 2009. See Opp. at 9-10.
- The government has now searched for all intelligence reports accessed by the defendant between June 1, 2008, and June 11, 2009, that were attributed to or derived from [redacted] as the intelligence report at issue in this case, and will include any such reports in the review process ordered by the Court. See Opp. at 11.
- The government has now searched for "any North Korean intelligence information attached to, or contained within, emails sent or received by the defendant between May 1, 2009, and June 11, 2009," and will include these materials in the review process ordered by the Court. See Opp. at 11-12.

- The government has now searched for "any information concerning the [redacted] contained in defendant's classified electronic media and email from May 1, 2009, to June 11, 2009, and found none." See Opp. at 12.
- The government will review all intelligence reports accessed by the defendant between June 1, 2008 and June 11, 2009, for any information regarding the [redacted] relied upon in the intelligence report at issue, and will produce any responsive materials. See Opp. at 12.

The government's representations leave only one item from defendant's motion pending before the Court: defendant's request for any [redacted] on the contents of the intelligence report at issue. See Motion at 2-3 (Item I-A-1). For the reasons set forth in defendant's motion and below, defendant's request should be granted.

I. [redacted] on the Intelligence Report Is Discoverable

Defendant's motion seeks to compel the production of any [redacted] on the intelligence report at issue, as well as documents identifying those individuals who drafted, received, or otherwise accessed the requested materials prior to 3:16 p.m. on June 11, 2009. See Mot. at 2, Proposed Order at 1. As the defense explained in its motion, see Mot. at 2-3 & Ex. 3, certain [redacted] requested assistance with [redacted] at 11:33 a.m. on June 11, 2009. This [redacted] apparently addressed not only the [redacted] See Mot. at 3 & Ex. 3 (describing a request for "some language on [redacted]

Defendant's motion identified three separate reasons why the [redacted] was relevant and helpful to the preparation of Mr. Kim's defense. First, because one must obviously access the relevant intelligence in order to prepare [redacted] on its contents, the [redacted] and a list of individuals who accessed that document before 3:16 p.m. on June 11 are "relevant and helpful to the defense in identifying those individuals who accessed the intelligence information at issue prior to the cut-off time."[1] See Mot. at 2. Second, because one of the [redacted] its contents are relevant and helpful to the defense in demonstrating what information [redacted] an issue directly relevant to the charged article). See Mot. at 2-3. Third, based on the request for "language" contained in the 11:33 a.m. email, [redacted] is relevant and helpful to the defense in demonstrating that [redacted] and that "someone in Mr. Kim's position would not reasonably have believed that disclosure of the information would damage the United States or help a foreign nation." See Mot. at 3.

The government challenges each of these rationales in its opposition. See Opp. at 4-9. The government's arguments are unavailing.

[1] The government appears to be confused on this point, as it also responds to the defendant's supposed "assertion" that "he is entitled to the discovery of individuals involved in the drafting and dissemination of [redacted] – presumably following the 3:16 p.m. cut-off time – because they would have had [redacted] Opp. at 5 (emphasis added). This is not accurate. The defendant's motion and proposed order states quite clearly that defendant is seeking "document(s) that identify the individuals who drafted, received, or otherwise accessed that document ... prior to 3:16 p.m. on June 11, 2009." Proposed Order at 1 (emphasis added).

A. The Government's Representations Regarding the [redacted]

With respect to the first and second rationales described above (access prior to the cut-off time and the [redacted], the government states that it has "searched for the [redacted] and "has not identified any version or draft of [redacted] that pre-dates the 3:16 p.m. cut-off time." Opp. at 4. If the government is representing to the Court and to the defense that it has conducted a comprehensive search of computer and email records of those individuals involved in the drafting and review of any [redacted] and has not identified any such document created before 3:16 p.m. on June 11, 2009, this representation adequately addresses the first two arguments made in defendant's motion. It is unclear, however, whether the government is actually making such a representation, for two reasons.

First, the government's discussion of this issue in its opposition is limited to something it calls [redacted] See Opp. at 4-9. But that was not the subject of defendant's motion to compel, which does not once use the phrase [redacted] To the contrary, defendant's motion sought to compel the production of any [redacted] on the intelligence report at issue, based on emails produced during classified discovery that variously referred to a [redacted] See Mot. at

[2] Only one of those documents [redacted] - appears to have involved the [redacted] described in the 11:33 a.m. email was assigned to [redacted] See Mot., Ex. 3. Moreover, in light of the government's heavy redactions to [redacted] the defense cannot determine what other [redacted] may have been requested on June 11, 2009. What is clear, however, is that at least two such documents were openly discussed in email correspondence provided to the defense.

2-3 & Ex. 1, 3; Proposed Order at 1. It is therefore unclear to the defense whether the government's reference to a specific document was inadvertent, or whether it was designed to somehow limit the request actually made by the defendant.

The government's choice of verbiage appears to confirm the existence of at least one [redacted]. The government does not indicate whether that is the only [redacted] that exists, or whether there are also additional [redacted] referred to in the emails described in defendant's motion. See Mot., Ex. 1, 3. To be clear, however, the defense's request was not limited to [redacted]. If there are additional documents that refer to something other than [redacted] see Mot., Ex. 1, 3), defendant's request for those documents remains outstanding.

Second, the government's representations with respect to [redacted] are inconsistent with materials provided to the defense during classified discovery. The government claims that the email relied upon in defendant's motion indicates that [redacted] was nothing more than "an anticipated 'action' item associated with [redacted] and [it] provides no proof "that the document had in fact been created prior to the cut-off time." Opp. at 4. In fact, the emails in question demonstrate just the opposite. The 2:54 p.m. email described in defendant's motion, see Mot. at 2-3 & Ex. 1, expressly states, [redacted] Id. (emphasis added). The use of the past tense indicates that the "action" item had been completed. The 11:33 a.m. email described in defendant's motion, see Mot. at 3 & Ex. 3, similarly states that [redacted]

[redacted] Id. (emphasis added). The most natural reading of the email is that, as of 11:33 a.m., [redacted] not that those responsible for drafting the note had yet to put pen to paper almost four hours after sending the email.[3]

The Court should be reluctant to accept blanket representations from the government regarding the scope and efficacy of its search for relevant documents in this case, particularly when those representations are inconsistent with the discovery already provided to the defense. To accept the government's representations in this case, one would have to believe that, as of 7:30 p.m. on the afternoon before [redacted] no one had started working on [redacted] and had been described as early as 11:33 a.m. that morning. Similar representations regarding the supposed non-existence of any [redacted] addressing the intelligence report at issue have already proven to be completely unfounded. See Defendant's First Motion to Compel at 17-18.

In this instance, the representations made by the government fail to squarely address defendant's request for any [redacted] on the intelligence report at issue. The representations are also inconsistent with the discovery cited in defendant's motion. Rather than relying on those representations, the Court should order the government to conduct a

[3] The government also argues that [redacted] cannot be relevant and helpful to the defense if it was created after the cut-off time. See Opp. at 5. This Court previously rejected a similar argument regarding any damage assessments that post-dated the alleged disclosure. See Opinion on Third Motion at 14. As the Court explained, "logically, a damage assessment drafted shortly after a purportedly unauthorized disclosure of information would be based primarily on facts known prior to the disclosure. . . . A damage assessment is not necessarily irrelevant to the reasonableness of the Defendant's belief merely because it was drafted after the allegedly unauthorized disclosure." Id. The government's argument that [redacted] is not discoverable if it was created after the cut-off time is similarly meritless.

comprehensive search for any [redacted] and to produce any responsive materials.

B. **The Government's Previously-Rejected Request for a "Substantive Showing of What the Defendant Knew"**

In response to defendant's third rationale above – that any [redacted] is relevant and helpful in demonstrating that "someone in Mr. Kim's position would not reasonably have believed that disclosure of the information would damage the United States or help a foreign nation" – the government presents a series of arguments that this Court has already rejected.

The government claims that the [redacted] "could have no bearing on [defendant's] state of mind on June 11, 2009," because "the defendant never had access to, or authority to access, [redacted]" Opp. at 6. But that argument has already been rejected by this Court. In its October 9th Order regarding damage [redacted] assessments, the Court noted its prior ruling "that the Defendant was entitled to receive damage [redacted] assessments based on information known to the Defendant at the time of the alleged leak, even if the Defendant did not have access to the damage [redacted] assessments themselves." Order of October 9, 2013, at 1 (emphasis added). The Court-ordered review process currently underway with respect to those documents demonstrates that whether defendant had access to the particular document is not determinative of whether the document is discoverable. The government's argument that the [redacted] is not discoverable because "the defendant never had access to, or authority to access [it]," is therefore unavailing.[4]

[4] As to the underlying factual information contained in any [redacted] the government does not dispute that Mr. Kim likely "knew" or "accessed" any information addressing [redacted] Mr. Kim was one of

The government also argues that the defense's "speculation as to what [redacted] may contain is insufficient to satisfy [the] 'heavy burden' required to pierce the government's classified information privilege," and that "the defendant's assertion that [redacted] may corroborate other evidence in his case is also inadequate to overcome the government's privilege." Opp. at 7. But the government fails to link these assertions to the actual substance of defendant's motion. See id. As noted above, the motion is not based on "speculation," but rather sets out in some detail the factual basis for the request. The motion cites emails discussing [redacted] 15630-09," the same intelligence report that defendant is accused of disclosing to Mr. Rosen, as well as an 11:33 a.m. email indicating that the [redacted] See Mot. at 2-3 & Ex. 1, 3. The government fails to explain why these details are insufficient to trigger disclosure under Yunis.[3]

Moreover, the government's assertion that evidence that "may corroborate" Mr. Kim's state of mind regarding the intelligence report at issue is "inadequate to overcome the government's privilege," see Opp. at 7, has also been rejected by this Court. In ruling on defendant's third motion to compel, this Court held:

> What is helpful to the Defendant is evidence regarding whether another member of the intelligence community, relying on

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the State Department's leading North Korea analysts, and reviewed intelligence reporting on that country on a daily basis. It is highly unlikely that Mr. Kim did not know or have access to any [redacted] information related to the intelligence report at issue.

[3] At one point, the government incorrectly asserts that the applicable standard is whether the information is "essential" or "necessary" to the defense, citing the Fourth Circuit's decision in United States v. Abu Ali, 528 F.3d 210, 248 (4th Cir. 2008). See Opp. at 7. As this Court has held on at least five separate occasions, the applicable standard in the D.C. Circuit is whether the information is "at least helpful to the defense of the accused." See United States v. Yunis, 867 F.2d 617, 623 (D.C. Cir. 1989); Opinion on First Motion at 5; Opinion on Second Motion at 5; Opinion on Third Motion at 5; Opinion on Fourth Motion at 6; Opinion on Fifth Motion at 3.

> information known to the Defendant at the time of the release, believed the disclosure could cause injury to the United States or could be used to the advantage of a foreign nation. This type of third-party analysis, if it existed, could potentially be relevant to show whether objectively the Defendant should have had reason to believe disclosure of the information could be used to the injury of the United States or to the advantage of a foreign nation.

Opinion on Third Motion at 14-15. The same is true of any [redacted] on the intelligence report, which (based on the 10:33 a.m. email) appears to contain information regarding whether North Korea [redacted]

Finally, the government returns to its previously-rejected "proffer" argument, urging the Court to require the defendant to "make a substantive showing of what the defendant knew at the time of the charged unauthorized disclosure" in order to obtain discovery.[6] Opp. at 8. The government argues that this would not impose an undue burden on the defendant because:

> It was surely memorable for the defendant to provide covertly the contents of a [TS/SCI] intelligence report [redacted] to a national news reporter and then see that same intelligence information broadcast to the world only a few hours later. During the pendency of these criminal proceedings, the defendant has never claimed that he has forgotten this event.

Opp. at 8-9. It is nothing short of remarkable that attorneys for the United States could present an argument so squarely at odds with the most basic tenets of our criminal justice system. Mr.

[6] The government once again accuses the defendant of seeking classified discovery "so that he and his attorneys can conform or construct post hoc in late 2013, what he purportedly believed on June 11, 2009." Opp. at 7. But despite the government's ad hominem hyperbole, this Court has previously recognized that "both parties are forced to rely on circumstantial evidence to establish what Mr. Kim did or did not believe on June 11," and that "it is up to the jury to decide whether [the defendant's claim] is simply a post-hoc justification." Opinion on Fifth Motion at 7. The government has no basis to assert that the defendant is trying to use discovery to "conform or construct" what he believed in 2009, and the Court should reject this as a rationale for denying discovery.

Kim pleaded not guilty to the charged crime. He therefore claims not to have "forgotten" about the alleged event, he claims that it never happened. To argue, as the government does, that Mr. Kim must surely remember providing the contents of [redacted] to Mr. Rosen assumes the defendant's guilt as a basis for denying discovery. Such tactics not only violate the presumption of innocence, but also reflect a complete misunderstanding of, or indifference to, a defendant's constitutional right to present a defense to a jury of his peers. The government's parochial assertion that committing the alleged crime "was surely memorable" to the defendant is not a grounds for anything – let alone to excuse the government from its discovery obligations. This window into the government's mindset regarding discovery should give the Court pause as to whether the government has satisfied its constitutional obligation to search for and produce evidence that contradicts the government's own theory of the case.

The government is well aware that Mr. Kim had access to a substantial number of intelligence reports regarding North Korea, that he had been "read in" to various classified compartments regarding North Korea, and that he reviewed intelligence reporting on North Korea on a daily basis. It is unclear what more the government could possibly require to determine whether a North Korea analyst like Mr. Kim knew or accessed information similar to the contents of the requested documents. The government's request for a "substantive showing of what the defendant knew" rings particularly hollow in light of the fact that the government has repeatedly denied defendant's requests for production of a list of intelligence reports actually accessed by Mr. Kim during the relevant time period.

WHEREFORE, for the reasons set forth above and any others appearing to the Court, the defendant's sixth motion to compel discovery should be granted

Respectfully submitted.

DATED: November 12, 2013

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

vs.

STEPHEN JIN-WOO KIM,

Defendant.

Criminal No. ~~10-255~~ 10-225 (CKK)

Leave to file granted
Judge CKollar-Kotelly
1/30/14

MEMORANDUM OPINION
(December 9, 2013)

Defendant Stephen Jin-Woo Kim is charged by indictment with one count of unauthorized disclosure of national defense information in violation of 18 U.S.C. § 793(d), and one count of making false statements in violation of 18 U.S.C. § 1001(a)(2). Presently before the Court is the Defendant's [172] Second CIPA Section 5 Notice. The Government has filed [180] Objections to the Adequacy of this Notice. Upon consideration of the pleadings,[1] the relevant legal authorities, and the record as a whole, the Court concludes that the Government's Objections to the Adequacy of Defendant's Second CIPA Section 5 Notice are **SUSTAINED IN PART** and **OVERRULED IN PART.** Defendant shall submit a revised notice as to Items 7 through 12 generally, Item 13, and Items 15 and 16. In addition, Defendant shall submit a revised notice as to Items 7(c), 7(d), 7(e), 7(f), 8(b), 9(b), 10(d). No revised notice is required at this point for Item 5, Item 14, and Items 7(a), 7(b), 7(g), 10(b), 11(g), 11(h), 11(k), and 11(m).

[1] Def.'s Second CIPA Section 5 Notice ("Def.'s Notice."), ECF No. [172]; Gov't's Obj. to Adequacy of Def.'s Notice, ECF No. [180] ("Gov't's Obj."); Def.'s Resp. to Gov't's Obj. to Def.'s Notice, ECF No. [190] ("Def.'s Resp."); Gov't's Reply in Supp. of its Obj. to Def.'s Notice, ECF No. [211] ("Gov't's Reply").

I. BACKGROUND

The Court presumes familiarity with the factual background set forth in the Memorandum Opinions regarding the Defendant's First, Second, Third, Fourth, and Fifth Motions to Compel.[2] On October 15, 2013, Defendant filed his [172] Second CIPA Section 5 Notice, pursuant to Section 5 of the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. 3 § 5. This notice identifies classified documents and information that Defendant reasonably expects to disclose at trial as part of his defense. On October 24, 2013, the Government filed its [180] Objections to the Adequacy of this Notice. Although the Government concedes in this filing that Defendant's descriptions of a number of the 49 categories or sub-categories relating to classified information that Defendant seeks to disclose at trial are sufficient for CIPA Section 5 purposes, it contends that many are not. For these remaining items, the Government requests the Court order Defendant to provide a more particularized notice setting forth the specific classified information that he expects to disclose at trial. Defendant subsequently filed his [190] Response to the Government's Objections, which contends that the descriptions provided are adequate under the standard of review applicable to CIPA Section 5 notices. The Government then filed its [211] Reply in Support of its Objections to Defendant's Notice. Accordingly, the Government's objections are now ripe for the Court's review.

II. LEGAL STANDARD

"CIPA was enacted by Congress in an effort to combat the growing problem of graymail, a practice whereby a criminal defendant threatens to reveal classified information during the course of his trial in the hope of forcing the government to drop the criminal charge against

[2] Redacted versions of the Memorandum Opinions are available on the public docket as docket numbers [133], [135], [137], [139], and [200]. Unredacted copies are maintained by the Court.

him." *United States v. Smith*, 780 F.2d 1102, 1105 (4th Cir. 1985) (en banc). CIPA Section 5(a) provides that if the defendant "reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with any trial or pretrial proceeding involving the criminal prosecution of such defendant, the defendant shall . . . notify the attorney for the United States and the court in writing." 18 U.S.C. App. 3 § 5(a). "Such notice shall include a brief description of the classified information." *Id.* If the Government objects to the disclosure, it may ask the Court to conduct a hearing under CIPA Section 6(a) regarding "the use, relevance, or admissibility" of the classified information. 18 U.S.C. App. 3 § 6(a). If the Court determines at this hearing that disclosure of the classified information identified by the defendant is warranted, the government may file a motion to permit "a statement admitting relevant facts that the specific classified information would tend to prove" or "a summary of the specific classified information" as a substitute for disclosure of the information. 18 U.S.C. App. 3 § 6(c).

The CIPA Section 5(a) Notice has been identified as "the central document in CIPA." *United States v. Collins*, 720 F.2d 1195, 1199 (11th Cir. 1983). "The vague threat that prosecution will result in disclosure of classified information is dealt with by requiring the defendant to file a Section 5(a) notice." *Id.* Thus, because it frames the discussion for all subsequent CIPA proceedings, "[a] Section 5(a) notice must be particularized, setting forth specifically the classified information which the defendant reasonably believes to be necessary to his defense." *Id.* Although the statute demands only a "brief description of the classified information", courts have held that "'[a] brief description' is not to be translated as 'a vague description' [and] 'of the classified information' may not be interpreted as 'of the areas of activity concerning which classified information may be revealed.'" *Id.* "After the CIPA procedures have been followed, the government should not be surprised at any criminal trial

when the defense discloses, or causes to be disclosed, any item of classified information. The court, the government, and the defendant should be able to repair to the Section 5(a) notice and determine, reliably, whether the evidence consisting of classified information was contained in it." *Id.*

The CIPA Section 5(a) notice is intended to clarify the scope of the subsequent CIPA Section 6 proceedings because "[o]bviously, without sufficient notice that sets forth with specificity the classified information that the defendant reasonably believes necessary to his defense the government is unable to weigh the costs of, or consider alternatives, to disclosure." *United States v. Badia*, 827 F.2d 1458, 1465 (11th Cir. 1987). "[T]he objective of CIPA is to provide the government with both notice of the defendant's intent to introduce sensitive information at trial, *and a particularized description of the classified information prior to trial.*" *Id.* (emphasis in original). In order to serve this goal, "[t]he [CIPA Section 5(a)] notice must specifically set out the classified information the defendant believes he will rely upon in his defense. A general statement of the areas the evidence will cover is insufficient." *Smith*, 780 F.2d at 1105. *See also United States v. North*, 708 F.Supp. 389, 394 (D.D.C. 1988) ("CIPA is designed to let the government know, with some precision, what the costs of prosecution would be . . . ."); *United States v. Poindexter*, 698 F.Supp. 316, 321 (D.D.C. 1988) (adopting *Collins* standard); *United States v. Ivy*, No. 91-cr-602-04, 1993 WL 316215, at *1 (E.D. Pa. Aug. 12, 1993) ("The section 5(a) notice must be specific and state with particularity which items of classified information the defendant reasonably expects to be disclosed by his defense."); *United States v. Bin Laden*, No. S(7)-98-cr-1023, 2001 WL 66393, at *6 (S.D.N.Y. Jan. 25, 2001) (adopting *Collins* standard).

United States v. Miller, 874 F.2d 1255 (9th Cir. 1989), relied on heavily by the Defendant, *see* Def.'s Resp. at 3-4, does not establish a more relaxed standard, or limit the specificity required in the CIPA Section 5(a) notice. In *Miller*, the defendant notified the Government that he intended to introduce a series of classified documents found during searches of his home as part of his defense. *Id.* at 1275-76. Because the defendant was noticing all the documents found in his possession in their entirety, he provided the Government with a Section 5(a) notice that "consisted simply of a list indicating the length and title of each document found." *Id.* at 1276. The Ninth Circuit concluded that this notice "satisfied the purpose of" CIPA Section 5(a) because it "fully alerted the government as to what classified information [defendant] sought to introduce." *Id.* Accordingly, *Miller* stands for the proposition that the CIPA Section 5(a) Notice must place the Government on notice of specifically what classified information the Defendant intends to use. *See United States v. Rewald*, 889 F.2d 836, 855 (9th Cir. 1989) (explaining that *Miller* interpreted the requirement that "defendant . . . provide a 'brief description of the classified information' in his notice" "to be satisfied where the description informs '[t]he government . . . exactly to which documents [the defendant] was referring, and [to] what information was contained in them.'") (quoting *Miller*, 874 F.2d at 1276). The case does not establish that a list of classified documents indicating the length and title of each document is *always* sufficient to meet the notice requirements of Section 5(a). Rather, under the specific facts of *Miller*, the notice provided by the defendant served the purpose of alerting the Government as to the specific body of classified information the defendant planned to introduce. Accordingly, despite Defendant's claims, *Miller* does not set out a lower standard for the adequacy of notice required by CIPA Section 5(a). Rather, as various courts to consider the

issue have held, Defendant's notice must specifically and fully alert the Government as to the classified information Defendant reasonably expects to disclose or cause to be disclosed at trial. This standard, as recognized in *Miller* and all the cases cited by the parties, must be applied with careful consideration of the circumstances of each case, such that, under these specific circumstances, the Court and the Government are "fully alerted . . . as to what classified information [a defendant] s[eeks] to introduce." 874 F.2d at 1276.

III. DISCUSSION

The Defendant's second CIPA Section 5 Notice contains 49 categories or sub-categories relating to classified information that the defendant seeks to disclose at his trial. *See generally* Def.'s Notice. The Government does not object to the adequacy of the notice for a number of these categories, specifically Item Numbers 1, 2, 3, 4, and 6. *See* Gov't's Obj. at 2. However, the Government contends that the remaining categories lack the specificity required by CIPA and requests that the Court order Defendant to provide a revised notice setting forth the specific classified information that he expects to disclose or cause to be disclosed at trial. *Id.* The Court addresses each of these objections below.

A. Item 5

In his Second CIPA Section 5 Notice, Defendant alerts the Court and the Government that he reasonably expects to disclose or cause to be disclosed the following information:

> FBI 302s reflecting interviews of [redacted] on the 'List of 118' who accessed the intelligence report at issue. (CLASS_370-74A, 577-79, 601-03, 608A-11, 618-20, 633-35, 1377-84, 1388-93, 2839-54, 2869-77, 2882-83, 2910-11, 2912-17).

Def.'s Notice at 3. The Government objects to this notice as inadequate, arguing that the FBI 302s are lengthy, and contain a variety of classified information on multiple topics. Gov't's Obj. at 11. Defendant's notice, the Government contends, does not point it to "exactly" what

information in these particular documents the defendant seeks to disclose. *Id.* "In order for the United States to evaluate meaningfully whether the defendant seeks to elicit information that is classified and objectionable," the Government states, it "needs to know what aspect of these documents the defendant seeks to adduce at trial, rather than having to sift through the entire document and object to every single item of classified information." *Id.*

Defendant counters that this objection is meritless. Objecting to the Government's claim that these documents are lengthy, Defendant notes that the Bates ranges provided by Defendant average three to four pages, and are portion marked for classification level. Def.'s Resp. at 9. Defendant states that he "obviously intends to notice the classified, portion-marked information in these three to four page documents, which take no more than a few minutes to review." *Id*

The Government responds to Defendant's arguments with skepticism, noting that the Bates ranges noticed by Defendant contain a diverse set of classified information. Gov't's Reply at 8-10. Indeed, the Government points out that a single document noticed by Defendant, CLASS_2839-54, contains at least thirty-three classified paragraphs. *Id.* at 9. As the Government notes, "[t]he defendant's noticing of all of this diverse classified information causes the United States to doubt whether he reasonably expects to elicit all of the noticed information at trial." *Id.*

At this point, on the current record, the Court will not require Defendant to submit a revised notice as to Item 5. Certainly, a defendant in CIPA proceedings must provide "*a particularized description of the classified information prior to trial.*" *Badia*, 827 F.2d at 1465 (emphasis in original). Indeed, as noted, "[a] Section 5(a) notice must be particularized, setting forth specifically the classified information which the defendant reasonably believes to be necessary to his defense." *Collins*, 720 F.2d at 1199. However, here Defendant *has* identified

particularly what information he "reasonably expects" to disclose or cause to be disclosed at trial. While neither CIPA Section 5 nor the case law in this area define the term "reasonably expects to disclose", the Court understands it to mean that the Defendant has the present intention, based on the information currently available to him, to present this information at trial, with no expectation of later narrowing the information. Accordingly with Item 5, the Court understands Defendant to be saying at this point that he intends to use *all* the classified, portion-marked information in the Bates ranges set out in his notice. Defendant is not saying he intends to use some, unspecified portion of the broad category of classified information contained in these documents – a notice that would certainly be lacking in specificity and particularity. Rather, he is representing to the Court and the Government that he reasonably believes at this point that *all* the classified information noticed in these Bates ranges is necessary to his defense.

The Court notes that if Defendant is imprecise in this representation – and has not carefully reviewed and selected the classified information he reasonably expects to disclose – he will be imposing an enormous time and resource burden on both the Government and the Court. *See* Gov't's Reply at 4-5 n. 4. The purpose of the CIPA Section 5(a) notice, in at least one respect, is to narrow the issues for the CIPA Section 6(a) hearing by focusing the Court and the Government's attention on the subset of classified information that the Defendant reasonably expects to disclose at trial. The Court has no desire to consider all the classified information in these documents based on Defendant's current representations, only to have this chore prove irrelevant when Defendant decides on more careful reflection that he *actually* only reasonably expects to disclose a narrow subset of the noticed information. However, at this point, based on the statements in his filing, Defendant is representing to the Court that he has every intention to present at trial all the classified information contained in portions of the FBI 302s he has noticed.

Although the classified information in these portions is extensive, and the Government is deeply skeptical of Defendant's representation, the Court must take Defendant's statement at face value, having no evidence in the parties' filings to suggest that his representation is untrue or inaccurate.

If the Court misunderstands Defendant on this point or he subsequently reevaluates in light of this opinion his representation that he expects to use all classified information in the Bates ranges noticed, he should use the opportunity already provided to submit a revised CIPA Section 5(a) Notice – for the reasons set out in other sections of this opinion – as a chance to provide greater specificity with respect to Item 5. If Defendant chooses this option upon greater reflection as to whether he reasonably expects to disclose *all* the classified information contained in these documents, he should either specify the paragraphs within these documents that he reasonably expects to disclose, or at least provide the Court and the Government with a list of the topics in the interview reports for which he reasonably expects to disclose classified information. However, while the Court highly recommends Defendant take this path, it does not order it at this time.

B. Items 7 to 12

Items 7 through 12 in Defendant's notice consist of categories of information related to the [redacted], certain e-mails [redacted], the distribution of copies of the intelligence report to people within the White House, and apparent contacts between White House/National Security Council staff and Fox News on June 11, 2009. *See* Def.'s Notice at 3-6. The Government asserts a blanket objection to the notices provided by Defendant, arguing that these items contain "non-exhaustive lists within broad categories" of information. Gov't's Obj. at 9-10. The Government notes that for each of these items, "the defendant sets forth a topic at

the beginning, and then provides a *non-exhaustive* list of examples of information that he may disclose pertaining to the topic." Gov't's Reply at 10. For example, in Item 7, Defendant notices: "Information relating to the existence and contents of [redacted] being drafted on June 11, 2009, including . . ." Def.'s Notice at 3. Similarly in Item 8, Defendant notices, "Information relating to the [redacted] email concerning North Korean [redacted], including but not limited to . . ." *Id* at 4. The Government objects to the use of the phrases "relating to", "including", and "including but not limited to" in these requests, noting that in light of this non-exhaustive language, it cannot know specifically what information Defendant reasonably expects to disclose. Gov't's Obj. at 9-10.

In his brief, Defendant explains that this non-exhaustive language should be read in light of the text that comes before it, which provides context to the request. Def.'s Resp. at 10. Defendant further states that this non-exhaustive language is necessary to preserve the Defendant's right to examine and cross-examine witnesses regarding the documents identified in these items, which may cause the disclosure of additional classified information. *Id*

The Court concludes that Defendant's use of this non-exhaustive language in these items constitutes inadequate notice. While the Court recognizes Defendant's need to notice classified information that may be elicited through testimony, the current language, even limited by context, leaves the description merely a vague description of the general area of classified information Defendant reasonably expects to disclose. *See Collins*, 720 F.2d at 1199 ("'A brief description' is not to be translated as 'a vague description'; 'of the classified information' may not be interpreted as 'of the areas of activity concerning which classified information may be revealed.'"). Consequently, the Court looks to a solution proposed by the Government to remedy this concern. *See* Gov't's Reply at 10. Defendant shall provide an exhaustive list of all

information within these categories that it reasonably expects to disclose or cause to be disclosed at trial outside of the context of unknown testimony and state that this list is exhaustive at this point. Once this exhaustive list is provided, Defendant may use the non-exhaustive language in order to explicitly preserve its ability to elicit testimony regarding certain documents. This revision recognizes Defendant's concern that it cannot know for certain how a witness may respond at trial. *See* Def.'s Resp. at 7.

The Government also proposes that in order to clarify the classified information that may emerge through examination and cross-examination of witnesses, that Defendant file a revised notice as to these items containing narrative summaries identifying (1) the witnesses from whom he intends to elicit potentially classified information, (2) the questions he would pose to those witnesses, and (3) the potentially classified answers that he seeks that would be relevant and helpful to his defense. Gov't's Reply at 10. The Court is concerned with this potential solution for a number of reasons. First, Defendant is under no obligation to explain how the potentially classified information he notices would be relevant and helpful to his defense. *See Rewald*, 889 F.2d at 855 (9th Cir. 1989) ("CIPA section five does not require a defendant to provide detailed argument in support of the relevance of particular noticed documents in the notice itself."). Second, the Government's solution could require Defendant to identify whether he will testify and what he will testify about. These would appear to burden Defendant's Fifth Amendment rights to remain silent and/or testify in his own defense. *See United States v. Poindexter*, 725 F.Supp. 13, 33 (D.D.C. 1989) ("defendant need *not* reveal what he will testify about or whether he will testify at all.") (emphasis in original)[3]; *United States v. Hitselberger*, No. 12-cr-231, 2013

[3] The Court notes that the opinion in *Poindexter* also states that CIPA "requires merely a general disclosure as to what classified information the defense expects to use at the trial, regardless of the witness or the document through which that information is to be revealed."

WL 5933655, at *3 (D.D.C. Nov. 6, 2013) ("Sections 5 and 6 of CIPA do not require a defendant to specify what he will testify about or even whether he will testify"); *United States v. Drake*, 818 F.Supp.2d 909, 914 (D.Md. 2011) ("Under CIPA, [defendant] does not have to reveal whether he will testify"). Third, the Government's proposal appears to interfere with Defendant's rights under the Sixth Amendment to confront and cross-examine witnesses. *See United States v. Lee*, 90 F.Supp.2d 1324, 1328 (D.N.M. 2000) ("CIPA also does not require that the defendant reveal what questions his counsel will ask in which order, and to which witnesses. Likewise, the defendant need not attribute the information to any particular witness."); *Drake*, 818 F.Supp.2d at 914 ("CIPA does not mandate that [the defendant] reveal his trial strategy, but only that he identify whatever classified information he plans to use."); *Hitselberger*, 2013 WL 5933655, at *5 (citing these cases).

The Government cites to *United States v. Libby*, 467 F.Supp.2d 1, 4, 14-15 (D.D.C. 2006), for the proposition that courts have previously utilized the sorts of narrative summaries identifying the details of testimony it proposes here. Gov't's Reply at 8. Further, the Government notes it has reviewed the narrative summaries provided to the court in that case and describes "an approximately five-and-a-half page narrative summary of the classified information [defendant] reasonably expected to disclose through trial testimony. *Id.* at 6-7 n. 5. The Court notes that the Government does not specify that these narrative summaries followed

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Poindexter, 725 F.Supp. at 33. This statement is fully consistent with the standard for the CIPA Section 5(a) Notice set out in the cases discussed, *supra*, including *Poindexter*, *see* 698 F.Supp. at 321, requiring specificity and particularity as to the classified information to be disclosed. The Court reads the *Poindexter* opinion as stating that a defendant must disclose all classified information he expects to use at trial, *regardless* of the witness or document though which this information is disclosed. *See* 18 U.S.C. App. 3 § 5(a) (requiring notice if "defendant reasonably expects to disclose or to cause the disclosure of classified information *in any manner*") (emphasis added). However, in making this disclosure, "defendant need *not* reveal what he will testify about or whether he will testify at all." *Poindexter*, 725 F.Supp. at 33 (emphasis in original).

the exact format it has suggested, which would require Defendant to disclose the potential questions he plans to ask and the answers he hopes to elicit. Nor does the Court's review of the opinion in *Libby* cited by the Government reveal that these narrative summaries took the form proposed by the Government. Furthermore, even if they did, the Court notes significant differences between this case and *Libby*. In *Libby*, it appears that the defendant was far more open with the court and the Government regarding his trial strategy, including the contents of his own testimony. *See, e.g.*, 467 F.Supp.2d at 15 n. 25 (noting that the narrative along with the documents submitted "provide[d] the basis for the defendant's testimony.") Here, it is not apparent that Defendant has similarly waived, or at least shown a willingness to burden, his Fifth and Sixth Amendment rights. In light of the factual differences between these cases, even if the Government is correct that the *Libby* court adopted the solution it has proposed here for noticing classified information contained in trial testimony, the Court is reluctant to apply wholesale the solutions adapted to the specific circumstances of another case.

Accordingly, in order to address these concerns, the Court adopts a modified version of the Government's proposal in order to place the Government on notice of classified information that may be elicited during trial testimony. In his revised notice, Defendant shall, to the extent he has not already done so, notice with specificity the identifiable classified information he reasonably expects at this point to elicit or cause to be elicited via trial testimony, rather than simply providing a general description of the area the trial testimony is expected to cover. Such information may be disclosed in narrative form. Without this additional information, it would appear doubtful that at trial "[t]he [C]ourt, the government and the defendant [will] be able to repair to the Section 5(a) notice and determine, reliably, whether the evidence consisting of classified information was contained in it." *Collins*, 720 F.2d at 1199.

However, this revised notice need not go as far as the Government proposes. In this revised notice, Defendant need not explain how this classified information is relevant or helpful to his defense. In addition, Defendant need not tie this classified information to a specific witness or line of questioning. In this way, Defendant will avoid identifying whether he will testify and what he will testify about, reducing any burden on his Fifth Amendment rights. Similarly, by rejecting the Government's proposal that the Defendant be required to reveal what questions his counsel will ask to which witnesses, or even be required to attribute information to any particular witness, this solution mitigates the burden on Defendant's Sixth Amendment rights. Admittedly, these "disclosures [will] make the defense's cross-examination less effective because the [Government] will have advance access" to the set of classified information Defendant plans to use to construct his defense. *Hitselberger*, 2013 WL 5933655, at *5. Yet, courts have held that "[t]his is not sufficient to constitute a constitutional violation." *Id.* As noted, "CIPA does not mandate that [the defendant] reveal his trial strategy, but only that he identify whatever classified information he plans to use." *Drake*, 818 F.Supp.2d at 914. "This merely amounts to a 'tactical disadvantage', not an infringement of [Defendant's] Confrontation Clause rights." *Hitselberger*, 2013 WL 5933655, at *5.

The Court recognizes that because the Government proposed its constitutionally infirm solution for the first time in its Reply Brief, *see* Gov't's Reply at 10, Defendant has not had an opportunity to comment on these concerns. Accordingly, if it becomes apparent after this opinion that it is impossible for Defendant to comply with these revisions without suffering a substantial burden on these rights, the Court remains willing to hear additional argument from the parties regarding an alternative solution for specifically noticing classified information that will be disclosed via trial testimony. Conversely, if Defendant finds it can submit a revised

notice for these items pursuant to the terms specified in this opinion, the Court will address whether the additional information contained adequately addresses the Government's concerns and provides sufficient information for the Court to conduct a CIPA Section 6(a) hearing.

C. Items 13 and 14

The Government also objects to Defendant's notice with respect to Items 13 and 14. These items notice documents generated by [redacted] law enforcement officials discussing the alleged disclosure at issue in this case. Def.'s Notice at 6.

In Item 13 of his Notice, Defendant alerts the Court and the Government that he reasonably expects to disclose or cause to be disclosed the following information: "The "Eleven Questions" document relating to the alleged disclosure. (CLASS_27-30)." *Id.* This document provides the response of [redacted] to eleven questions posed to it concerning the June 11, 2009 unauthorized disclosure. Gov't's Reply at 10-11. The questions and/or answers to four of these questions are classified, and these four questions and/or answers are distinct from each other. *Id.*

As with Item 5, the Government objects to Defendant's failure to specify what classified information in this document he reasonably expects to disclose or cause to be disclosed at trial. Gov't's Obj. at 11. In response, as with Item 5, Defendant states that his notice is adequate, because the applicable pages of the document are portion-marked, and Defendant reasonably expects to disclose the portion-marked sections containing classified information at trial. Def.'s Resp. at 12.

In response, the Government notes its skepticism that Defendant actually intends to use all the classified information contained in the document. Gov't's Reply at 11. However, in contrast to Item 5, where the Government provided no evidence beyond its skepticism, with

respect to Item 13, the Government notes that by noticing all classified information in the document, Defendant has included "information that pertains to an uncharged disclosure, and the course of this litigation has made clear that the parties are not going to put this information at issue at trial." *Id.* The Government has thus provided evidence that Defendant has noticed information that he does not reasonably expect to disclose at trial. Accordingly, in contrast to Item 5, the Court cannot take at face value Defendant's claim that he reasonably expects to disclose or cause to be disclosed all classified information contained in the "Eleven Questions" document at trial. In light of this, Defendant's does not "set[] forth specifically the classified information which [he] reasonably believes to be necessary to his defense." *Collins*, 720 F.2d at 1199. Rather, Defendant appears to have painted too broadly with this request. It is not enough for Defendant to identify the specific classified documents that he expects to disclose at trial. Rather, Defendant must specify the specific classified *information* he reasonably expects to disclose at trial. *See* 18 U.S.C. App. 3 § 5(a) (specifying that notice "shall include a brief description of the classified *information*" and not simply classified documents) (emphasis added); *See also Miller*, 874 F.2d at 1276 (noting that defendant's "notice satisfied the purpose of [section 5's requirement for a brief description of the classified information to be disclosed] inasmuch as it fully alerted the government as to what classified *information* [defendant] sought to introduce.") (emphasis added). Accordingly, Defendant shall submit a revised notice as to Item 13, which specifies which of the questions and answers noticed in Item 13 he actually anticipates disclosing at trial.

In Item 14 of his notice, Defendant notices the following information: [redacted] relating to the alleged disclosure dated June 12, 2009, June 18, 2009, and November 12, 2009. (CLASS_31-39)." Def.'s Notice at 6. As with Item 5, the Government

objects to Defendant's failure to specify what classified information in this document he reasonably expects to disclose or cause to be disclosed at trial. Gov't's Obj. at 11. Defendant argues that his notice is more than adequate, as it identifies the specific classified information that the defense reasonably expects to disclose at trial by Bates number. Def.'s Resp. at 12. Defendant states that he reasonably expects to disclose at trial the portion-marked sections containing classified information. *Id.* The Government again notes its skepticism that Defendant reasonably expects to disclose or cause to be disclosed all classified information in this document. Gov't's Reply at 11-12. However, as with Item 5 and in contrast to Item 13, the Government provides no evidence to undercut this claim. *Id.*

Accordingly, at this point, the Court will adopt its conclusion with request to Item 5, and not require Defendant to submit a revised notice as to Item 14. Again, the Court understands Defendant to be saying that he intends to use *all* the classified, portion-marked information in the Bates ranges set out in his notice. Although the classified information in these portions is extensive and varied, and the Government is deeply skeptical of Defendant's representation, the Court must take Defendant's statement at face value, having no evidence in the parties' filings to suggest that his representation is untrue or inaccurate.

As with Item 5, if the Court misunderstands Defendant on this point or he subsequently reevaluates in light of this opinion his representation that he expects to use all classified information in the Bates ranges noticed, he should use the opportunity already provided to submit a revised CIPA Section 5(a) Notice – for the reasons set out in other sections of this opinion – as a chance to provide greater specificity with respect to Item 14. If Defendant chooses this option upon greater reflection as to whether he reasonably expects to disclose *all* the classified information contained in these documents, he should either specify the paragraphs

within these documents that he reasonably expects to disclose, or at least provide the Court and the Government with a list of the topics in this correspondence for which he reasonably expects to disclose classified information. However, while the Court highly recommends Defendant take this path, it does not order it at this time.

D. Items 15 and 16

In Items 15 and 16, Defendant states his intention to disclose:

> 15. Information relating to the systems and procedures for the classification and declassification of documents and information in each government agency relevant to this case, including but not limited to [redacted]
>
> 16. Information relating to the practices and procedures by which an agency of the United States government (such as the State Department) prepares a public or media statement that is derived from or relates to classified information, or otherwise communicates or discusses information with the media that is derived from classified information.

Def.'s Notice at 6-7. The Government contends that these two requests are exceptionally vague and require further clarification. Gov't's Obj. at 8-9. This vagueness, the Government argues,, is compounded by Defendant's use of the nebulous phrase "[i]nformation relating to" in both requests without clarification as to the scope of this phrase. Gov't's Reply at 12. As currently stated, Item Number 15 represents a notice that the Defendant expects to disclose or cause to be disclosed information about how any government agency relevant to this case – a category left undefined – classifies or declassifies information on any topic. *Id.* at 12-13. Similarly, Item Number 16 can be read even more broadly as notice that Defendant seeks to elicit information about how *any* government agency deals with the media on any issue involving classified information. *Id.* In addition, as the Government notes, these requests are not bounded in time, meaning that this notice could potentially refer to how these agencies dealt with these issues at any time in the past. *Id.* Furthermore, Defendant leaves the term "systems and procedures" in

Item 15 undefined. *Id.* As the Government notes, it is unclear whether Defendant intends to include computer programs, communications methods, and similar systems and procedures, or is referring simply to written procedures and internal systems for addressing these issues. *Id.* Finally, with respect to Item 15, Defendant does not specify whether he intends to disclose these procedures for all components of any agency "relevant to this case" or simply those components "relevant to this case." *Id.* at 13.

Defendant argues that Items 15 and 16 provide notice to the Government of Defendant's intent to elicit testimony regarding the Government's procedures for classifying and declassifying information and preparing media statements on classified topics, respectively. Def.'s Resp. at 12-13. Defendant argues that the Government is aware that the Defendant will seek to elicit testimony on these topics to rebut the Government's continued reliance on the classified nature of the intelligence report at issue as proof the Mr. Kim had reason to believe that disclosure of the information could be damaging to the United States or helpful to a foreign nation. *Id.* at 13.

The Court agrees with the Government that Defendant's notices with respect to Items 15 and 16 are inadequate. As currently constituted, these items appear to provide "notice of nothing more than the general areas of activity to be revealed in defense." *Collins*, 720 F.2d at 1199. Such "general statement[s] of the areas the evidence will cover [are] insufficient." *Smith*, 780 F.2d at 1105. As with Items 7 through 12, the Court is cognizant of Defendant's contention that these items provide notice of its intent to elicit testimony from witnesses, and that Defendant cannot know for certain how a witness may respond at trial. Def.'s Resp. at 7. However, at this point, Defendant must still disclose the specific classified information it reasonably expects to disclose at trial.

Consequently, as with the revisions concerning Items 7 through 12, in order to clarify the classified information that may emerge through examination and cross-examination of witnesses, Defendant shall, to the extent he has not already done so, notice with specificity the identifiable classified information he reasonably expects at this point to elicit or cause to be elicited via trial testimony, rather than simply providing a general description of the area the trial testimony is expected to cover as he does now. Such information may be disclosed in narrative form. For example, if Defendant intends to introduce evidence or elicit testimony related to (a) specific examples of documents or information being classified or declassified, or (b) specific examples of communication with the media that is derived from classified information, he should specify these documents, information, and examples in his notice. In addition, the revised notice must incorporate additional information to clarify its scope. First, these items must specify a time frame for this information that relates to this case. Second, Defendant must specify exactly which agencies are at issue with respect to these notices, and if he plans to disclose or cause to be disclosed classified information relating only to certain components of these agencies. Third, with respect to Item 15, Defendant must clarify the meaning of the term "systems and procedures" to alert the Government and the Court as to exactly which systems and procedures he is referring to.

As with the revisions to Items 7 through 12, Defendant need not explain how this classified information is relevant or helpful to his defense. In addition, Defendant need not tie this classified information to a specific witness or line of questioning. In this way, Defendant will avoid identifying whether he will testify and what he will testify about, reducing any burden on his Fifth Amendment rights. Similarly, by rejecting the Government's proposal that Defendant be required to reveal what questions his counsel will ask to which witnesses, or even

required to attribute information to any particular witness, this solution mitigates the burden on Defendant's Sixth Amendment rights.

Again, as with the revisions to Items 7 through 12, if it becomes apparent after this opinion that it is impossible for Defendant to comply with these revisions without suffering a substantial burden on these rights, the Court remains willing to hear additional argument from the parties regarding an alternative solution. Conversely, if Defendant finds it can submit a revised notice for these items pursuant to the terms specified in this opinion, the Court will address whether the additional information contained adequately addresses the Government's concerns and provides sufficient information for the Court to conduct a CIPA Section 6(a) hearing.

E. Subparts of Items 7 to 12

In addition to its blanket objections to Items 7 through 12, the Government also argues that various subparts of these items are inadequate for additional reasons.

1. Items 7(c), 7(d), 7(e), 7(f), 7(g), 8(b), 9(b), 10(d), and 10(e)

First, the Government objects to Items 7(c), 7(d), 7(e), 7(f), 8(b), 9(b), 10(d), and 10(e). Gov't's Obj. at 10-11. These subparts notice the following information:

> 7. Information relating to the existence and contents of [redacted] being drafted on June 11, 2009, including . . .
>
> > c. Sources of information relied upon by [redacted] for the statement in his 8:51 a.m. email on June 11, 2009, that he was aware that [redacted] "should be out in minutes";
> >
> > d. Sources of information relied upon by [redacted] for the statement in the email that [redacted];
> >
> > e. The identity and/or contents of any documents or other information that formed the basis for [redacted] assertions in the email;

f. The existence and contents of a "planning meeting" [redacted] at 10:30 am on June 11, during which [redacted];

8. Information relating to the [redacted] email concerning North Korean [redacted], including but not limited to . .

b. Sources of information relied upon by [redacted].

9. Information relating to the [redacted] email from [redacted] concerning North Korea's [redacted]," including but not limited to . . .

b. Sources of information relied upon by [redacted] for the assertions in the [redacted], email.

10. Information relating to Daniel Russell's June 11, 2009, email concerning [redacted], including but not limited to . . .

d. Sources of information relied upon by Russell other than [redacted]

Def.'s Notice at 3-5. In these items, Defendant notices "information" or "sources of information" related to a sub-category. The Government contends that these descriptions are vague or lack sufficient particularity as to the sources of information the defendant is noticing, as well as the specific classified information that the Defendant intends to disclose from within these unspecified sources of information. Gov't's Obj. at 10. Defendant counters that these statements provide the Government with notice of the specific information the defense reasonably expects to elicit from government witnesses at trial. Def.'s Resp. at 11. The Government counters that the Defendant should be ordered to produce narrative summaries, in which he identifies the witnesses from whom he intends to elicit potentially classified information, the questions he would pose to witnesses, and the potentially classified answers that he seeks that would be relevant and helpful to his defense. Gov't's Reply at 14.

The Court agrees with the Government that Defendant's notices with respect to these Items are inadequate. As currently constituted, these items provide "notice of nothing more than the general areas of activity to be revealed in defense." *Collins*, 720 F.2d at 1199. Such "general statement[s] of the areas the evidence will cover [are] insufficient." *Smith*, 780 F.2d at 1105. As with Items 7 through 12, the Court is cognizant of Defendant's contention that these items provide notice of its intent to elicit testimony from witnesses, and that Defendant cannot know for certain how a witness may respond at trial. Def.'s Resp. at 7. However, at this point, Defendant must still disclose the specific classified information it reasonably expects to disclose at trial.

Consequently, as with the revisions concerning Items 7 through 12, in order to clarify the classified information regarding these "sources of information" that may emerge through examination and cross-examination of witnesses, Defendant shall, to the extent he has not already done so, notice with specificity the identifiable classified information he reasonably expects at this point to elicit or cause to be elicited via trial testimony, rather than simply providing a general description of the area the trial testimony is expected to cover as he does now. Such information may be disclosed in narrative form. As with the revisions to Items 7 through 12, Defendant need not explain how this classified information is relevant or helpful to his defense. In addition, Defendant need not tie this classified information to a specific witness or line of questioning. In this way, Defendant will avoid identifying whether he will testify and what he will testify about, reducing any burden on his Fifth Amendment rights. Similarly, by rejecting the Government's proposal that Defendant be required to reveal what questions his counsel will ask to which witnesses, or even required to attribute information to any particular witness, this solution mitigates the burden on Defendant's Sixth Amendment rights.

As with the revisions to Items 7 through 12, if it becomes apparent after this opinion that it is impossible for Defendant to comply with these revisions without suffering a substantial burden on these rights, the Court remains willing to hear additional argument from the parties regarding an alternative solution. Conversely, if Defendant finds it can submit a revised notice for these items pursuant to the terms specified in this opinion, the Court will address whether the additional information contained adequately addresses the Government's concerns and provides sufficient information for the Court to conduct a CIPA Section 6(a) hearing.

Regarding Item 7(g), the Government also raises the additional objection that the wording of this item is vague. Gov't's Reply at 14. Item 7(g) notices the following information:

> 7. Information relating to the existence and contents of [redacted] being drafted on June 11, 2009, including . . .
>
> g. The intended and actual distribution of the [redacted]

Def.'s Notice at 4. The Government states that it is unsure what Defendant means by "[t]he *intended* . . . distribution of the [redacted] (emphasis added). Gov't's Obj. at 10 n. 3. Although Defendant does not respond to this objection, the Court nevertheless overrules it. In the Court's view, the term "intended . . . distribution" is fairly clear-cut, implying that Defendant expects to disclose or cause to be disclosed the specific names of the people for whom the [redacted] was being prepared and to whom it would have been sent had it not been "killed" in light of the unauthorized disclosure in this case. If Defendant is of the view that this notice is broader than the summary provided by the Court, he should use the opportunity to submit a revised notice to clarify any lingering vagueness with respect to this notice.

2. Items 7(a), 7(b), 10(b), 11(g), 11(h), 11(k) and 11(m)

Next, the Government objects to Items 7(a), 7(b), 10(b), 11(g), 11(h), 11(k), and 11(m) which identify the following information:

> 7. Information relating to the existence and contents of a [redacted] being drafted on June 11, 2009, including . . .
>
> > a. The [redacted] provided in discovery and email correspondence relating to the [redacted] (CLASS_3085-3125, 3205-18);
> >
> > b. [redacted] classified information to the FBI on July 12, 2012 (CLASS_3077-81);
>
> 10. Information relating to Daniel Russell's June 11, 2009, email concerning [redacted], including but not limited to . . .
>
> > b. Russel's classified statements to the FBI on August 10, 2009 (CLASS 1360-65).
>
> 11. Information relating to the distribution of copies of [redacted] to persons within the White House, including but not limited to.
>
> > g. Darlene Bartley's classified statements to the FBI during interviews on August 3, 2009, August 4, 2009, and February 3, 2011 (CLASS_1288-91, 1292-94, 1295-97);
> >
> > h. Charles Lutes' classified statements to the FBI during an interview on January 28, 2011 (CLASS_1324-29)
> >
> > k. Matthew Spence's classified statements to the FBI during interviews on August 19, 2009, and April 3, 2012 (CLASS_1373-74, 2891-92),
> >
> > m. Thomas Donilon's classified statements to the FBI during interviews on September 25, 2009, and August 1, 2012 (CLASS_1307-09, 3045-49);

Def.'s Notice at 3, 4-6. As with Items 5, 13, and 14, the Government objects to Defendant's failure to specify what classified information in these lengthy documents containing a variety of classified information that he reasonably expects to disclose or cause to be disclosed at trial. Gov't's Obj. at 11. Defendant argues that his notice is more than adequate, as it identifies the specific classified information that the defense reasonably expects to disclose at trial by Bates

number. Def.'s Resp. at 12. Defendant states that he reasonably expects to disclose at trial the portion-marked sections containing classified information. *Id.* As with previous items, the Government again notes its skepticism of this statement that Defendant reasonably expects to disclose or cause to be disclosed all classified information in this document. Gov't's Reply at 14-15. However, the Government provides no evidence to undercut this claim other than the length and amount of classified information contained in these documents. *Id.*

Accordingly, at this point, the Court will adopt its conclusion with request to Items 5 and 14, and not require Defendant to submit a revised notice as to Items 7(a), 7(b), 10(b), 11(g), 11(h), 11(k), and 11(m). Again, the Court understands Defendant to be saying that it is his intention at this point to disclose or cause to be disclosed *all* the classified, portion-marked information in the Bates ranges set out in his notice. Although the classified information in these portions is extensive and varied, and the Government is skeptical of Defendant's representation, the Court must take Defendant's statement at face value, having no evidence in the parties' filings to suggest that his representation is untrue or inaccurate.

As with other items, if the Court misunderstands Defendant on this point or he subsequently reevaluates in light of this opinion his representation that he expects to use all classified information in the Bates ranges noticed, he should use the opportunity already provided to submit a revised CIPA Section 5(a) Notice – for the reasons set out in other sections of this opinion – as a chance to provide greater specificity with respect to Item 13. If Defendant chooses this option upon closer review of whether he reasonably expects to disclose *all* the classified information contained in these documents, he should either specify the paragraphs within these documents that he reasonably expects to disclose, or at least provide the Court and the Government with a list of the topics in these documents for which he reasonably expects to

disclose classified information. However, while the Court highly recommends Defendant take this path, it does not order it at this time.

IV. CONCLUSION

For the foregoing reasons, the Government's [180] Objections to the Adequacy of Defendant's Second CIPA Section 5 Notice are **SUSTAINED IN PART** and **OVERRULED IN PART**. Defendant shall submit a revised notice as to Items 7 through 12 generally, Item 13, Items 15 and 16. In addition, Defendant shall submit a revised notice as to Items 7(c), 7(d), 7(e), 7(f), 8(b), 9(b), 10(d). No revised notice is required at this point for Item 5, Item 14, and Items 7(a), 7(b), 7(g), 10(b), 11(g), 11(h), 11(k), and 11(m). An appropriate Order accompanies this Memorandum Opinion.

/s/
COLLEEN KOLLAR KOTELLY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

vs.

STEPHEN JIN-WOO KIM,

Defendant.

Criminal No. ~~10-255~~ 10-225 (CKK)

Leave to File Sur-Reply Granted
Judge CK
1/30/14

ORDER
(November 15, 2013)

The Court has reviewed the pleadings regarding Defendant's [177] Sixth Motion to Compel.[1] In order to clarify an argument raised in the Defendant's Reply, the Court requests a short Sur-Reply from the Government addressing whether, based on the e-mails provided by Defendant as Exhibits in support of his Motion, any [redacted] sought by Defendant exists separate and apart from the [redacted] the Government has thus far searched for unsuccessfully.

In its Opposition to Defendant's motion to compel the production of a [redacted] prepared on June 11, 2009, the Government states that it "ha[s] searched for [redacted] for the [redacted] related to the [redacted] Report and ha[s] located no such document that pre-dates the 'cut-off time' on June 11, 2009." Gov't's Opp'n at 4. Based on these unsuccessful searches for the document sought by Defendant, the Government contends that the

[1] Def.'s Sixth Mot. to Compel ("Def.'s Mot."), ECF No. [177]; Gov't's Opp'n, ECF No. [186]; Gov't's Ex Parte, In Camera Classified Addendum to its Opp'n, ECF No. [187], Def.'s Reply, ECF No [191].

Defendant's motion to compel the production of the [redacted] should be denied as moot. *Id*

In his Reply, Defendant asserts that the Government has misunderstood his position. He is not simply seeking the [redacted] but rather "any [redacted] on the intelligence report at issue . . . ." Def.'s Reply at 2. Defendant concedes that "[i]f the government is representing to the Court and to the defense that it has conducted a comprehensive search of computer and e-mail records of those individuals involved in the drafting and review of any [redacted] and has not identified any such document created before 3:16 p.m. on June 11, 2009, this representation adequately addresses the first two arguments made in Defendant's motion." *Id.* at 4. However, relying on the Government's statements in its Reply, Defendant claims that the Government appears to have limited its search to "the [redacted] and not searched for "*any* [redacted] on the intelligence report at issue." (emphasis added). *Id* at 2, 5.

As support for his argument that a separate [redacted] exists outside of the [redacted] searched for by the Government, Defendant points the Court to two e-mails produced during classified discovery. *See* Def.'s Mot., Ex. 1 (June 11, 2009 e-mail regarding [redacted] Planning), Ex. 3 (June 11, 2009 e-mail regarding Update on [redacted] Having reviewed these e-mails, the Court concludes that additional briefing from the Government would be useful as to whether these e-mails, in particular the second e-mail contained in Exhibit 3, are discussing a [redacted] separate and apart from the [redacted] searched for by the Government. As Defendant concedes, Def.'s Reply at 4 n. 2, the document referred to in the first e-mail appears to have involved the [redacted] *See* Def.'s Mot., Ex. 1 (describing the [redacted] 03630-

09" as an "item[] for which [redacted] had an action"). However, the Court is less clear as to the circumstances surrounding the second e-mail, which does not mention [redacted] Rather, this e-mail states that [redacted] which will require "some help on the [redacted] . . ." Def.'s Mot., Ex. 3. Lacking the information available to the Government concerning the circumstances in which this e-mail was sent, the Court is uncertain as to the extent to which this e-mail suggests a [redacted] separate and apart from the [redacted] searched for by the Government. As the first argument in support of his motion to compel, Defendant has argued that the [redacted] and the list of individuals who accessed the document before the cut-off date are relevant and helpful in identifying individuals who accessed the intelligence information at issue prior to the cut-off time. Def.'s Mot. at 2. In addressing this argument – and *only this argument* – the Court considers it useful to have additional briefing as to whether the e-mails cited by Defendant actually point to the existence of a [redacted] outside of that already searched for by the Government. Indeed, before ruling on whether this document could be used to locate other individuals with access to the intelligence information at issue, the Court believes it needs additional briefing on whether this document does or does not exist.

Given these concerns, the Court requests a short Sur-Reply from the Government addressing the e-mails cited by Defendant as evidence for the existence of a [redacted] outside of the [redacted] already searched for. In particular, the Court requests argument as to why the second e-mail, contained in Exhibit 3 to Defendant's Motion, does or does not suggest the existence of a [redacted] This Sur-Reply, which shall address no other issue, shall be filed by no later than November 19, 2013.

Accordingly, for the reasons stated, it is, this 15th day of November, 2013, hereby

ORDERED that the Government shall file a brief Sur-Reply by no later than November 19, 2013 addressing the extent to which the e-mails cited by Defendant in support of his Sixth Motion to Compel do or do not suggest the existence of a [redacted] outside of the [redacted] already searched for.

SO ORDERED.

/s/
COLLEEN KOLLAR KOTELLY
UNITED STATES DISTRICT JUDGE