IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

UNITED STATES OF AMERICA	*	
	*	
v.	*	**Criminal No. 10 CR 00181 RDB**
	*	
THOMAS ANDREWS DRAKE,	*	
	*	
Defendant.	*	
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GOVERNMENT'S REPLY TO DEFENDANT'S RESPONSE TO MOTION *IN LIMINE* TO PRECLUDE EVIDENCE OF NECESSITY, JUSTIFICATION, OR ALLEGED "WHISTLE-BLOWING"

The United States of America, by and through William M. Welch II, Senior Litigation Counsel, and John P. Pearson, Trial Attorney, Public Integrity Section, Criminal Division, United States Department of Justice, respectfully files this reply to *Defendant's Response to Motion in Limine to Preclude Evidence of Necessity, Justification, or Alleged "Whistle-Blowing,"* Dkt. 75. The government's motion *in limine* should be granted because the defendant is in fact presenting a justification defense.

The entire legal premise of the defendant's argument is wrong as a matter of law. The only intent required under the statute is that the defendant retained the documents willfully, i.e., in violation of a known legal duty. There is no scienter requirement for the phrase "relating to the national defense." Instead, that phrase modifies and qualifies the tangible documents that the defendant illegally retained, and whatever intent or belief that the defendant had for the potential *use* of those documents is irrelevant. *See United States v. Aquino,* 555 F.3d 124, 131 n.13 (3rd Cir. 2009)(stating that "by the terms of the statute, [the defendant] could have been convicted of Section 793(e) whether or not he knew or had reason to know of a specified use for the

information contained therein.").

Factually, the defendant's theory of defense is nothing more than a justification defense wrapped in different sheep's clothing. The defendant admits as much. His acknowledgment that he will not claim that he "was justified – out of necessity" means little and only begs the question of what he will claim justified his actions. *See Defendant's Response*, pg. 4, Dkt. 75 (hereinafter "*Response*"). The question is whether he plans to introduce a justification defense at all, and his response makes clear that he does. *See e.g. Response*, pg. 2 (stating that his "whistleblowing efforts to reform NSA are central to this case," the defendant's "commitment to reform at NSA is essential to understand" the defendant's intent.). Evidence of the defendant's whistleblowing efforts should be excluded because both the statute and Fourth Circuit law preclude a justification defense in this case.

I. The Defendant Inaccurately Cites The Essential Elements Of A Violation Of Section 793(e) When The Underlying Offense Involves Tangible Documents.

In the defendant's continuing effort to inject an additional intent element into Section 793(e) that the statute does not require, the defendant claims that the "government must prove that Mr. Drake had `reason to believe' the information in the documents could be used to the injury of the United States or to the advantage of any foreign nation, and acted with the intent to harm his country or assist another." *See Response*, p. 5. The defendant is just flat wrong.[1]

As explained in more detail in the *Government's Response to Defendant's Motion to Dismiss Counts One Through Five of the Indictment*, pg. 8-10, Dkt. 66, the government does not

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[1]Indeed, the defense misstates what the government must prove even in a case involving only the unauthorized disclosure of national defense information as opposed to documents. No prosecution under section 793(e) (or 793(d)) would require the government to prove that the defendant intended by his or her unauthorized disclosure to harm the United States.

have to prove that defendant intended to harm the country, or that he had reason to believe that his conduct could harm the country, in a Section 793(e) prosecution involving documents. *See Aquino,* 555 F.3d at 131 n.13; *United States v. Rosen*, 445 F.Supp.2d 602, 625 (E.D.Va. 2006); *United States v. Morison,* 604 F.Supp. 655, 658 (D.Md. 1985). Instead, a defendant can be convicted of Section 793(e) in a documents retention case "whether or not he knew or had reason to know of a specified use for the information contained therein." *Aquino,* 555 F.3d at 131 n.13.

The Third Circuit's decision in *Aquino* is instructive because it directly undermines the admissibility of the defendant's theory of defense. In *Aquino*, 555 F.3d at 126, the defendant pled guilty to the illegal retention of documents in violation of Section 793(e). Although not required by the statute in a documents retention case, the defendant admitted to the higher *mens rea* required for a retention case involving intangible information. *Id*. The defendant admitted that he "had reason to believe [the documents he possessed] could be used to injure the United States or aid a foreign government." *Id*. The question for the Third Circuit was whether the defendant's admission to the higher *mens rea* warranted a higher sentence pursuant to § 2M3.2 rather than § 2M3.3 of the Sentencing Guidelines.[2] *Id*.

In deciding that § 2M3.3 applied, the Third Circuit recounted the essential elements of Section 793(e), which consisted of the following five elements:

> a defendant must (1) lack authority to possess, access, or control (2) information relating to the national defense (3) in either tangible or intangible format, and (4) willfully (5) undertake the

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[2]Notably, even the United States Sentencing Commission recognizes the different *mens rea* requirements for the willful retention of documents and the willful retention of intangible information, i.e. that only offenses involving intangible information carry the additional *mens rea* requirement. *See* U.S.S.G. § 2M3.3, cmt. background.

> . . . ''passive'' conduct (''willfully retains the [information] and fails to deliver it to the officer or employee of the United States entitled to receive it'') proscribed by the statute.

Id. at 129-130. The *Aquino* Court then determined that the defendant's admission to the additional *mens rea* was mere surplusage under the statute, noting that

> [f]or intangible information, the government must also prove *mens rea:* that ''the possessor has reason to believe [the intangible information] could be used to the injury of the United States or to the advantage of any foreign nation.'' 18 U.S.C. § 793(e); *see Rosen,* 445 F.Supp.2d at 612–13. The House Committee, in its Report on § 793(e) in connection with the 1950 revision of the Espionage Act, explained that this qualifying language addressed concerns that the category of illegally communicated intangible information was potentially overbroad. H.R.Rep. No. 647, 81st Cong., 1st Sess. (1949), at 4. The Committee left it to the courts to define this limiting phrase on a case-by-case basis, but stressed that the ''qualification [was] *not intended* to qualify the other items enumerated in the subsections.'' *Id.* (emphasis added). Accordingly, the government must address the limiting phrase only where the information at issue is intangible. *See United States v. Morison,* 604 F.Supp. 655, 658 (D.Md. 1985) (noting that the *mens rea* requirement ''is not present for the delivery or retention of photographs or documents.'').

Id. at 131 n.13. Then, most importantly, the Third Circuit stated that "[b]y the terms of the statute, he could have been convicted of § 793(e) for possessing and retaining tangible material whether or not he knew or had reason to know of a specified use for the information." *Id*.

Thus, a defendant's intent or belief about information relating to the national defense, or intent or belief about the proposed use of that information, is irrelevant under the statute. The defendant either willfully possessed or retained documents relating to the national defense or he did not. The only intent that the government must prove is that the defendant "willfully" retained documents. Put another way, the government need only prove that the defendant engaged in

"willful and knowing conduct," that is, the willful and knowing possession of the charged classified documents. *See New York Times Company v. United States*, 403 U.S. 713, 738 n.9 (1971)(White, J., concurring).[3]

The evidence of the defendant's whistleblowing efforts does not defeat that intent. If anything, his purpose for possessing the documents – to reform NSA – proves that his possession was knowing and willful. In other words, if he had a specific reason for bringing the documents home, then his possession could not have been due to accident, mistake or negligence. The phrase "relating to the national defense' modifies and qualifies the tangible documents that the defendant illegally retained, and the defendant's belief or intent regarding any use of the classified documents is irrelevant to the charged crimes. *See Aquino,* 555 F.3d at 131 n.13. *See also Morison*, 622 F. Supp. at 1010 (holding that "[i]t is irrelevant whether the defendant personally believed that the items related to the national defense). Indeed, the defendant's intent or belief that the classified documents had or could have some other proposed use *after* his crime was complete, i.e. after he willfully possessed and retained the classified documents, is equally, if not more, irrelevant. *See e.g. United States v. Abuelhawa*, 523 F3d 415, 421 (4th Cir. 2008) (citation omitted)(in discussing Title 18, United States Code, Section 843(b), stating that "[w]hat they do with the cocaine after it is distributed is irrelevant to whether they facilitated the distribution; the crime is complete long before they either use or dispose of the cocaine. defendant's] status as [a] facilitator[ ] alone gives rise to criminal liability."); *United States v.*

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[3]The defendant's attempt to inject an additional *mens rea* under the First Amendment is equally unavailing. First, it directly contradicts the plain language of the statute and its legislative history. Second, the conduct proscribed in this case does not implicate the First Amendment. *See generally Government's Response to Defendant's Motion to Dismiss Counts One Through Five of the Indictment*, Section III, pgs. 21-28, Dkt. 66.

Cardwell, 433 F.3d 378, 391 (4th Cir. 2005)(holding that "because the crime of solicitation is complete when the defendant attempts to persuade another to commit a crime, it is of no moment that Cardwell's assurances did not actually persuade Cole to go through with the Browns' murders.").

Thus, the only issue regarding the phrase "relating to the national defense" is whether the defendant objectively knew that the documents related to the national defense. Any other test would re-introduce the *mens rea* that Congress specifically excluded from this provision of the statute. Such an interpretation also defies common sense. It would allow any individual in knowing possession of classified documents to unilaterally re-define on whether certain information, determined by the President of the United States via executive order to be deserving of protection in the name of national defense, is worthy of such protection or not. *See Morison*, 604 F.Supp. at 660 (stating that the Executive Order and classification system "have the force and effect of law."). Our entire system of national security would crumble if every individual could decide on his or own what information should and should not be protected. At best, such subjective beliefs would be a mistake of law, and not a defense. *United States v. Passero*, 577 F.3d 207, 210 n.7 (4th Cir. 2009) (a mistake of law is no defense).

In the end, the only reason left for the admission of the whistleblowing evidence is to justify his knowing and willful conduct in possessing the charged, classified documents at home. While that justification may not be "out of necessity," it is still justification, and it is no less inadmissible under Fourth Circuit law. However defined, whether termed "justification," "good motive," or some other phrase, thirty-five years ago the Supreme Court explicitly rejected the idea that the element of willfulness required proof "of any motive other than intentional

violation of a known legal duty.'" *United States v. Pomponio*, 429 U.S. 10, 12 (1976). Since then, the courts of appeals, including the Fourth Circuit, have rejected the argument that good motive negates intent or is a defense to a completed crime. *United States v. Thomas*, 2003 WL 593384 at *1 (4thCir. 2003)(unpublished) (holding that the Fourth Circuit has "explicitly rejected any `good motive' defense to a Title 21 violation); *United States v. Moylan*, 417 F.2d 1002, 1004 (4th Cir. 1969) (rejecting good motive as negating intent). *See also United States v. Edwards*, 101 F.3d 17, 19 (2nd Cir. 1996)(holding that ruling was proper "because the defense was rooted in the erroneous assumption that good motive for committing a crime is inconsistent with criminal intent"); *United States v. Aaron*, 590 F.3d 405, 408 (6th Cir. 2009)(holding that a good-faith motive for willfully committing tax fraud has never constituted a proper defense); *United States v. Dack*, 987 F3d 1282, 1285 (7th Cir. 1993)(holding that "protesting government policies is not a defense even if such protest is based on a good motive"); *United States v. Washington*, 705 F2d 489, 493 (D.C. Cir. 1983) ("Proof of a good motive . . . is not probative on the issue of . . . intent."). The defendant's justification or "good motive" for his willful retention of classified documents is irrelevant and should be excluded.

II. The "Full Universe" Of DOD IG Documents Is Irrelevant and Inadmissible

The "full universe" of DOD IG related documents can be divided into two categories: emails and documents possessed by NSA, and emails and documents possessed by DOD IG. Each set of documents should be considered separately in order to properly assess their respective admissibility issues.

A. NSA Emails and Documents

The government does not object to a summary chart of the NSA emails and documents

sent to and from the defendant's NSA email account and the DOD IG investigators. As previously noted, the government produced a mirror image of the defendant's NSA email account to the defense. The defense already has identified approximately 180 potentially classified emails between the defendant and the DOD IG investigators as possible exhibits. The defendant also had attached many classified documents to those emails. For example, one email alone had 110 potentially classified documents attached to it. In addition, the defense has identified approximately 460 classified emails between the defendant and a NSA employee that the defense contends relate to the DOD IG investigation. All told, the government estimates that the defense has identified approximately 1,000 classified emails and attachments from the defendant's NSA email account as potential exhibits.[4]

The government has no objection to a summary chart prepared and admitted under Rule 1006 to prove the number, extent, and volume of contacts between the defendant and the DOD IG investigators. Of course, it will be incumbent upon the defendant to satisfy the requirements of Rule 1006 and provide the chart in a sufficiently timely manner so that the government can test its accuracy and admissibility if necessary. *See United States v. Janati*, 374 F.3d 263, 272-73 (4th Cir. 2004). To be clear, the government does not object to the metrics, i.e. date, time, to, from, etc., associated with the contacts, but does object to the admission of their content. Through the summary chart, the defendant will have admissible evidence to advance their defense of accident, mistake or negligence.

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[4]While the government has not reviewed each and every email and attachment, it is highly likely that the vast majority, if not all, of these documents will be classified. Therefore, if the substance of these documents must be admitted, the parties will need to create, review, and litigate substitutions, which the court subsequently must approve, for these documents to be admitted under CIPA.

B. DOD IG Emails and Documents

The government objects to the discovery and admission of any audit-related emails and documents possessed by the DOD IG. First, it is entirely speculative that the DOD IG possesses any emails or documents any different from those contained in the defendant's NSA email account. For example, it is pure conjecture that any hard copy documents provided by the defendant to the DOD IG investigators are different from the electronic documents found in the defendant's NSA email account. In fact, the DOD IG has stated "the DOD IG cannot segregate out hard copy documents provided by the defendant," and that "most of the hard copy documents related to the audit were destroyed before the defendant was charged, pursuant to a standard document destruction policy." *See Letter*, pg. 2, Dkt. 46. Based upon what the DOD IG reported, the evidence is that the DOD IG does not possess any responsive documents or any documents traceable to the defendant. Therefore, the basis for the defendant's request for the DOD IG documents is entirely speculative at best.

Second, the DOD IG documents are cumulative. The defendant already has approximately 1,000 emails and electronic attachments in his NSA email account that he can utilize to make his accident, mistake or negligence defense. The defendant cannot demonstrate that there exists any marginal utility in the discovery of, let alone the admission of, some entirely speculative, additional, unknown quantity of DOD IG emails and documents. The defendant has not met his burden of showing that "the information is at least essential to the defense, necessary to [the] defense, and neither merely cumulative nor corroborative, nor speculative.'" *United States v. Abu Ali,* 528 F.3d 210, 248 (4th Cir. 2007)(quoting *United States v. Smith*, 780 F.2d 1102, 1110 (4th Cir. 1985)). *See also United States v. Rosen*, 557 F.2d 192, 200 (4th Cir 2009)

(stating that information is not relevant if matter "could be proven by other means.").

III. The Substance Of The Audit-Related Emails And Documents Is Irrelevant And Excludable Under Rule 403.

Rule 403 provides that although evidence may be relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *See e.g. United States v. Iskander*, 407 F.3d 232, 238 (4th Cir. 2005) (affirming exclusion of expert's testimony as confusing to the jury and cumulative because the defendant elicited similar evidence from other sources); *United States v. Lancaster*, 96 F.3d 734, 744 (4th Cir. 1996) (affirming exclusion of witness' testimony regarding his knowledge of each disciplinary report in another witness' personnel file as unnecessarily cumulative).

The defendant argues that the jury needs to see the substance of the DOD IG audit-related documents because the substance will show "the random nature of the DOD-IG documents at issue in the Indictment."[5] *Response*, pg. 6. The defendant's logic is that if the jury can see the substance of other DOD IG audit-related documents handled by the defendant, then those documents will support a defense of accident, mistake, or negligence because the charged documents "are not the most significant of the documents that [the defendant] shared with the

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[5]The defendant's "random nature" argument seems to have two prongs. The first prong relates to *where* the charged documents were found within his residence. The government does not object to the defendant eliciting that type of testimony from the seizing agents. The government notes that the defendant continually refers to the charged documents as being located within a "vast sea" of unclassified documents. In fact, given their volume and issues of legibility, every seized document has not been reviewed for classification, and it is inaccurate to state that all of the remaining seized documents are unclassified.

DOD-IG." *Response*, pgs. 6-7. This argument does not pass the relevancy standard, and is excludable under Rule 403.[6]

A charged document either relates to the national defense or it does not. There is no gradation in a charged document's relationship to the national defense; the jury cannot convict or acquit simply because one document may be "more classified" or "less classified" than another. *See United States v. Lee*, 589 F.2d 980, 990 (9th Cir. 1979)(it "is enough that they related to the national defense). Because any difference in classification or importance between documents is irrelevant, there is no basis for a jury to compare and contrast a charged document with some other universe of classified documents solely to assess their varying levels of classification or significance.

The idea that a "less significant" classified document is more likely to be taken home accidentally than a "more significant" classified document is just ridiculous. An individual does not get to handle "less classified" or "less significant" documents more sloppily or cavalierly. The defense's argument is akin to the wolf guarding the hen house. Under the defense's theory, because the wolf chose not to eat the fatter chickens, it makes it more likely that the wolf ate the skinniest chickens by mistake, accident or negligence. Assuming for the moment the validity of the defense's theory, it is equally plausible that it was easier for the defendant to remove the "less significant" classified documents from NSA. In the end, the defense argument does not make sense, and it is purely conjectural and speculative in nature. The fact that some documents are

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[6]For the sake of simplicity, the government has not divided this section into NSA documents and DOD IG documents. Rather, the same arguments found at Section II.B. for the DOD IG documents also would apply here, and the government incorporates those arguments by reference.

"more significant" than other documents does not advance the accident, mistake or negligence defense.

Moreover, the defendant can make the same argument without the admission of the content of the DOD IG audit-related documents. For example, the defendant has retained a classification expert who presumably will be testifying that the charged documents are not classified. Based upon that testimony, the defendant can argue that the charged documents did not appear "significant" or "classified" to him, and that he did not know that he had brought documents relating to the national defense home. Similarly, he can argue that his position and access to classified information at NSA exposed him to very sensitive information, but the government only found allegedly insignificant classified documents at his home, and, therefore, he must have retained the charged documents accidentally or by mistake. Those facts alone support the defense's theory without resort to the substance of the DOD IG audit-related documents. Finally, if the charged documents are so "insignificant" as the defendant contends, then the jury should be able to make that assessment from the face of the charged documents themselves.

Thus, the content of the DOD IG audit-related emails are irrelevant and cumulative. The defendant again has not met his burden of showing that "the information is at least essential to the defense, necessary to [the] defense, and neither merely cumulative nor corroborative, nor speculative.'" *Abu Ali,* 528 F.3d at 248 (quoting *Smith*, 780 F.2d at 1110. *See also Rosen*, 557 F.2d at 200 (4th Cir 2009) (information not relevant if can be proven "by other means.").

IV. <u>The Outcome Of The DOD-IG Audit Is Irrelevant And Excludable Under Rule 403</u>.

It is difficult to respond to this portion of the defendant's motion because the scope and

extent of what the defendant means by "cooperation with the DOD IG audit" is unclear. However, as previously stated in its *Reply to Defendant's Response to Motion in Limine to Bar Reference to and Admission of Published Newspaper Articles*, pgs. 7-8, Dkt. 85, the government intends to introduce the defendant's statements to the FBI during his interviews in November and December 2007 and April 2008 about his contacts and interactions with Reporter A. Those statements as well as other evidence prove that the defendant had gathered and retained classified and unclassified documents in order to facilitate his communications with Reporter A. The statements are relevant to prove that the defendant was in possession of documents. The defendant obviously cannot destroy documents unless he had the documents in the first place.

To the extent that some of those admissions touch on the DOD IG audit, the direct examination of the interviewing FBI special agents will bring out those relevant admissions, and cross-examination can cover any of the same intent evidence that the defendant wants to highlight. However, to the extent that his admissions relate to his underlying motive to "reform NSA" or "expose waste, fraud and abuse," that evidence is irrelevant and inadmissible for the reasons cited above and in the government's initial Motion *in Limine*, Dkt. 53. Moreover, if "cooperation with the DOD IG audit" means the content and substance of all of the DOD IG emails and documents possessed by NSA and the DOD IG, then the government objects for the same reasons set forth above.

The outcome of the DOD IG audit is not relevant at all. The defendant never discussed the outcome with Reporter A, he never brought a copy of the DOD IG audit home, and he never gave a copy of the DOD IG audit to Reporter A (or least he never admitted as much to the FBI). Given those facts, he could not have destroyed the DOD IG audit as part of his attempt to

obstruct justice. As such, it is irrelevant to his intent to obstruct justice because the audit's outcome bears no relationship to his intent to destroy documents to thwart a criminal investigation.

Moreover, it is hard to envision why the outcome of the DOD IG audit is relevant to the defendant's contacts with Reporter A. If, as the defendant acknowledges, the DOD IG issued its initial audit report in 2004, and that report was favorable in the defendant's eyes, *see Response*, pg. 3, then the defendant had no reason to approach Reporter A about the DOD IG audit. The defendant had done his duty, the audit had concluded, and the audit's outcome is irrelevant to his contacts with Reporter A.

V. Conclusion

Based upon the foregoing, the United States respectfully requests that the Court grant its Motion *in Limine* and enter the order attached thereto.

Respectfully submitted this 21st day of March 2011.

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CERTIFICATE OF SERVICE

I hereby certify that I have caused an electronic copy of the foregoing motion to be served via ECF upon James Wyda and Deborah Boardman, counsel for defendant Drake.

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