

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

UNITED STATES OF AMERICA

v.

THOMAS ANDREWS DRAKE,

Defendant.

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Criminal No. 10 CR 00181 RDB

**GOVERNMENT'S RESPONSE TO
DEFENDANT'S MEMORANDUM IN SUPPORT OF DISCLOSURE OF
DEPARTMENT OF DEFENSE INSPECTOR GENERAL AUDIT DOCUMENTS**

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 response to *Defendant's Memorandum in Support of Disclosure of Department of Defense Inspector General Audit Documents*, Dkt. 76.

The defendant's memorandum should be denied because the defendant's discovery request is premised upon on the wrong essential element, and the requested information is not discoverable because it is speculative, cumulative, or irrelevant.

I. The Defendant's Mens Rea Section Cites The Wrong Intent Element For A Violation Of Section 793(e) When The Offense Involves Tangible Documents.

The government previously set forth its analysis of the requisite intent required under Section 793(e) for a documents retention case in its *Response to Defendant's Motion to Dismiss Counts One Through Five of the Indictment*, pgs. 8-10, Dkt. 66, and in its *Reply to Defendant's Response to Motion in Limine to Preclude Evidence of Necessity, Justification, or Alleged "Whistle-Blowing,"* pgs. 2-7, Dkt. 88. For the sake of judicial economy, the government incorporates

those arguments by reference herein.

II. The “Full Array” Of DOD IG Documents And Their Content Are Irrelevant and Inadmissible.

The defendant previously raised identical arguments in its *Response to Motion in Limine to Preclude Evidence of Necessity, Justification, or Alleged “Whistle-Blowing,”* pgs. 5-7, Dkt.

75. For the sake of judicial economy, the government incorporates those arguments by reference herein.

III. Internal Email, Correspondence And Memoranda Related To The DOD-IG Audit Are Irrelevant And Inadmissible Under Rule 403.

The defendant has greatly expanded the scope of his discovery request. Now, for the first time, he wants not only emails and documents shared between the defendant and the DOD IG investigators, but also all of the internal email, correspondence and memoranda relating to the DOD IG audit. In other words, for example, the defendant now wants emails, correspondence, and memorandum between the DOD IG investigators and their management, amongst the DOD IG managers, and even within the Office of General Counsel for the DOD IG, as long as those documents relate to the DOD IG audit and even if the defendant never saw or knew about the substance of any of those communications. Such a request should be denied.

First, none of these documents are relevant. What others may have thought about or wrote about the DOD IG audit has no bearing on any of the essential elements of the charged crimes, including the defendant’s intent. The defendant cannot prove his intent with documents that he never received, saw, or relied upon. *United States v. Passero*, 577 F.3d 207, 210 n.7 (4th Cir. 2009) (holding that documents that the defendant never knew about or relied upon are irrelevant). It is impossible for any of those documents to have formed, shaped, or impacted his

intent in any way.

Second, the defendant's argument that the documents are favorable is entirely speculative. The defendant must articulate some basis for this Court to believe that the information would be favorable. Here, the defendant has not proffered or established any factual basis whatsoever. If 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," then the information is not discoverable. *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. Caro*, 597 F.3d 210, 608, 619 (4th Cir. 2010)(holding that because the defendant "can only speculate as to what the requested information might reveal, he cannot satisfy *Brady's* requirement of showing that the requested evidence would be 'favorable to [the] accused.'" *Brady*, 373 U.S. at 87, 83 S.Ct. 1194; *see United States v. Agurs*, 427 U.S. 97, 109-10 (1976) ("The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense.")).

Third, this information is entirely cumulative. The defendant cannot show what audit-related internal emails, correspondence, and memoranda possessed by the DOD IG would not already be found within the defendant's NSA email account.

III. Conclusion

Based upon the foregoing, the United States respectfully requests that the Court deny the defendant's discovery request for the DOD IG audit-related documents in the possession of the DOD IG.

Respectfully submitted this 21st day of March 2011.

For the United States:

/s/ William M. Welch II
Senior Litigation Counsel
United States Department of Justice
300 State Street, Suite 230
Springfield, MA 01105
413-785-0111 (direct)
William.Welch3@usdoj.gov

John P. Pearson
Trial Attorney, Public Integrity Section
United States Department of Justice
1400 New York Avenue, NW, Suite 12100
Washington, DC 20005
202-307-2281 (direct)
John.Pearson@usdoj.gov

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.

/s/ William M. Welch II
Senior Litigation Counsel
United States Department of Justice