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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed with Classified Information Security Officer
CISO M. Mederos
Date 2/11/13

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

FILED
JUL 24 2013
Clerk, U.S. District & Bankruptcy Courts for the District of Columbia

DEFENDANT STEPHEN KIM'S THIRD MOTION TO COMPEL DISCOVERY (REGARDING "NATIONAL DEFENSE INFORMATION" AND WILLFULNESS)

Defendant Stephen Kim, by and through undersigned counsel, hereby moves[1] this Honorable Court for an order directing the government to disclose the following discovery items regarding whether the information at issue in this case is "national defense information" and whether the alleged disclosure was willful. 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).

I. Introduction and Relevant Facts

Mr. Kim is charged with one count of disclosing "national defense information" to one not entitled to receive it in violation of the Espionage Act, 18 U.S.C. § 793(d), and one count of making false statements to a federal official in violation of 18 U.S.C. § 1001(a)(2). The Indictment alleges that "in or about June 2009," Mr. Kim disclosed the contents of a classified report "concerning intelligence sources and/or methods and intelligence about the military capabilities and preparedness of a particular foreign nation" to "a reporter for a national news

[1] The defense is filing three separate motions to compel discovery corresponding to the categories of requests previously made to (and denied by) the government. This is the third of those motions. The defense is also filing a separate motion regarding the government's practice of redacting and substituting discoverable information without seeking the Court's authorization.

organization." Dkt. 3 at 1. As described in the defense's first motion to compel, the intelligence report at issue is [redacted] regarding North Korea's [redacted] The reporter at issue is James Rosen of Fox News. The government alleges that Mr. Kim disclosed the contents of [redacted] to Mr. Rosen, who published an article discussing North Korea's [redacted] around 3:16 p.m. on June 11, 2009.

To convict Mr. Kim under section 793(d) of the Espionage Act, the government must prove that the information allegedly disclosed to Mr. Rosen was "national defense information" ("NDI"). To prove that the information was NDI, the government must prove two things: first, that disclosure of the information reasonably could be damaging to the United States or helpful to an enemy; and second, that the information was "closely held," meaning that the government had not already disclosed the information and the information was not generally available to the public.[3] *United States v. Morison*, 844 F.2d 1057, 1073-74 (4th Cir. 1988). The mere fact that information is classified is not dispositive as to whether the information is NDI. *See Morison*, 844 F.2d at 1086 (Phillips, J., concurring) (explaining that the government must still prove that the disclosure of classified information "was *in fact* 'potentially damaging'" to the United States or helpful to an enemy "to avoid converting the Espionage Act into the simple Government Secrets Act which Congress has refused to enact"); *United States v. Rosen*, 599 F. Supp. 2d 690, 694-95 (E.D. Va. 2009) ("NDI, it is worth noting, is not synonymous with 'classified';

[2] As in the defense's prior motions to compel, the term [redacted] refers to both the actual intelligence report accessed by Mr. Kim and prior iterations of the same intelligence produced by the government in this case, such as the underlying [redacted] and earlier versions of the intelligence report.

[3] The government must also prove that the information "relate[s] to the national defense," meaning that it "refer[s] to the military and naval establishments and related activities of national preparedness." *Gorin v. United States*, 312 U.S. 19, 28 (1941). In this case, the parties do not dispute that the information satisfies this basic requirement.

information that is classified by the executive branch of government may or may not qualify as NDI....[E]vidence that information is classified does not, by itself, establish that the information is NDI.").[4] Rather, the question of whether the information constitutes "national defense information" is properly left for the jury. *United States v. Kim*, 808 F. Supp. 2d 44, 53 (D.D.C. 2011); *see also Gorin*, 312 U.S. at 32; *Morison*, 844 F.2d at 1073.

To defend against the allegation that the information at issue in this case was "national defense information," the defense made several discovery requests regarding whether the information was "closely held" and whether disclosure of the information was potentially damaging to the United States or helpful to a foreign nation. The specific discovery requests denied by the government are described in detail below. The defense now moves the Court to order production of the requested documents.

II. Legal Standard

This motion to compel discovery is made pursuant to both Mr. Kim's right to exculpatory information as set forth in *Brady* and its progeny and Rule 16 of the Federal Rules of Criminal Procedure.

Under *Brady*, the defense is entitled to any 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. Green*, 527 U.S. 263, 281-82 (1999)). The prosecution's *Brady* obligations include not only a duty to disclose

[4] Classification status is a particularly poor barometer of whether information qualifies as "national defense information" due to the government's well-publicized tendency to over-classify a vast amount of information. *See* Statement of Thomas Blanton to the U.S. House of Representatives Committee on the Judiciary, Hearing on the Espionage Act and the Legal and Constitutional Implications of WikiLeaks (Dec. 16, 2010) at 8 (noting experts believe that 50% to 90% of our "secrets" could in fact be made public with little or no damage to national security).

exculpatory information, but also a duty to search for such information. *See United States v. Brooks*, 966 F.2d 1500, 1502 (D.C. Cir. 1992); *United States v. Safavian*, 233 F.R.D. 12, 15 (D.D.C. 2005).

Under Rule 16, the defense is entitled to any information that is material to the preparation of the defense. *See United States v. Marshall*, 132 F.3d 63, 67 (D.C. Cir. 1998). Documents are material to the preparation of the defense if they help the defense ascertain the strengths and weaknesses of the government's case or aid the defendant's efforts to (1) prepare a strategy for confronting damaging evidence at trial, (2) conduct an investigation to discredit the government's evidence, or (3) avoid presenting a defense that would be undercut by the government's evidence. *Id.*; *see also Safavian*, 233 F.R.D. at 15. "[T]he documents need not directly relate to the defendant's guilt or innocence. Rather, they simply must play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony or assisting impeachment or rebuttal." *United States v. George*, 786 F. Supp. 11, 13 (D.D.C. 1991) (internal quotation omitted). "The language and the spirit of [Rule 16] are designed to provide to a criminal defendant, in the interest of fairness, the widest possible opportunity to inspect and receive such materials in the possession of the government as may aid him in presenting his side of the case." *United States v. Poindexter*, 727 F. Supp. 1470, 1473 (D.D.C. 1989).

Because the government's case against Mr. Kim involves classified information, the defense expects the government to assert a national security privilege as to some of the material described in this Motion. A defendant seeking classified information is entitled to any information that is both relevant and "at least 'helpful to the defense of the accused.'" *United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989) (quoting *Roviaro v. United States*, 353 U.S. 53 (1957)). To demonstrate that the information is "at least helpful" to the preparation of the

defense, the defendant must show that the information is not just theoretically relevant but also "useful to counter the government's case or to bolster a defense." *United States v. Aref*, 533 F.3d 72, 80 (2d Cir. 2008). "To be helpful or material to the defense, evidence need not rise to the level that would trigger the Government's obligation under *Brady*." *Id.*; *see also Mejia*, 448 F.3d at 456-57 ("[I]nformation can be helpful without being 'favorable' in the *Brady* sense.").

In a case such as this one involving cleared defense counsel, courts traditionally "err on the side of granting discovery to the defendant" and "resolve[] close or difficult issues in his favor," for two reasons. *Poindexter*, 727 F. Supp. at 1473. First, in light of the procedures yet to take place under the Classified Information Procedures Act ("CIPA"), the only question presently before the Court is whether the information sought by the defense should be disclosed to cleared defense counsel, not whether the information will be used at trial. "[B]ecause of the CIPA process, the Court will have an opportunity to address once again the issue of the materiality of classified documents that have been produced and their use as evidence" before trial. *Id.*; *see also George*, 786 F. Supp. at 16 n.9. Second, the Court has already entered a protective order in this case, which mitigates any concerns about the potential for any unauthorized disclosure of classified information. *See George*, 786 F. Supp. at 16 & n.7. For these reasons, any close question should be resolved in Mr. Kim's favor.

III. Specific Items Requested

A. Damage Assessment

To rebut the allegation that the information allegedly disclosed to Mr. Rosen was potentially damaging to the United States or helpful to a foreign nation, the defense requested any "damage assessment" or other document addressing the effects, if any, of the alleged disclosure on national security interests. *See* Dkt. 80, Ex. 10, at 6. This request was based on

statements by several government employees, who described the alleged disclosure of information contained in the June 11 Rosen article as "nothing extraordinary" and "off the mark." *See, e.g.*, Ex. 1 (FBI-302 for Michael McKeown). The government denied this request, stating that it "calls for the production of classified material to which the defense is not entitled." Dkt. 80, Ex. 16, at 3. The defense now moves the Court to order the production of any "damage assessment" or other document addressing the effects, if any, of the alleged disclosure on our national security interests.

The basis for the defense's request for any such documents is straight-forward. To prove that the information allegedly disclosed to Mr. Rosen was "national defense information," the government must prove that it was the type of information that Mr. Kim had "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). This will be no easy task, as the documents produced by the government to date demonstrate that [redacted] appears to restate the same [redacted] North Korea [redacted] Any document tending to show that someone in Mr. Kim's position reasonably could have believed that the disclosure of the information would not harm U.S. national security interests or aid a foreign nation is exculpatory, as it tends to prove that the information at issue was not "national defense information." Similarly, any document shedding light on whether a person in Mr. Kim's position reasonably could have believed that disclosure of the information would be harmful, one way or the other, is "relevant and helpful" to the preparation of Mr. Kim's defense, as it goes directly to whether the information was NDI. The defense thus moves the Court to order the production of any "damage assessments" or other documents addressing the effect of the alleged disclosure on U.S. national security interests.

B. Government Requests to Fox News

The defense also previously requested "any information in the government's possession, custody, or control regarding any request made by a government official to Mr. Rosen, Fox News, or any entity affiliated with Fox News to remove the June 11, 2009 Rosen article from the Internet or to withhold publication of the article and/or its contents." Dkt. 80, Ex. 10, at 3. This request was based on the fact that the government does not appear to have taken any steps to limit or prevent further dissemination of the information contained in the Rosen article, despite its apparent belief that the article contains "national defense information" warranting prosecution under the Espionage Act. [redacted]

In response, the government offered "to share with [the defense] our understanding of the facts on the condition that [the defense] not use our statements as admissions." Dkt. 80, Ex. 16, at 2. The defense declined the government's offer and now moves the Court to order production of the requested materials.

The government's response to our request leaves only two possibilities. First, the government may have documents responsive to the request, in which case the defense moves for their production. [redacted] go directly to whether the disclosure of the information contained in the article was truly "unauthorized" as the government alleges.

Moreover, any request to withhold publication of the Rosen article or to remove it from the Internet speaks directly to whether, in the government's own view, disclosure of the information was or could be harmful to the United States or helpful to a foreign nation. In either case, such information is obviously "relevant and helpful" to the preparation of Mr. Kim's defense, as the government's case hinges on whether he engaged in the "unauthorized" disclosure of information that he reasonably believed could be harmful to the United States or helpful to a foreign nation.

Second, and more likely, the government may not have documents responsive to the defense's request because the government never asked Fox News or any other entity to withhold publication of the Rosen article or to remove it from its website. In that case, the absence of any such request by the government is exculpatory, as it tends to disprove the government's theory that disclosure of the information contained in the article was or could be harmful to the United States or helpful to a foreign nation. If the Rosen article truly contained "national defense information," one would expect the government to take some measure to ensure that the information did not remain in the public domain. The absence of any such measures thus speaks directly to whether the information at issue was truly NDI.

The government's offer to share the prosecutors' "understanding" of the facts does not satisfy the defense's request. The defense is entitled to discovery of all information that is "relevant and helpful" to preparation of the defense in a manner that can be used at trial. The defense requested discovery of an exculpatory fact, *i.e.*, that the United States government did not seek to limit or prevent the dissemination of the same information that Mr. Kim is now charged with disclosing to Mr. Rosen, in violation of the Espionage Act. The defense did not request the "understanding" of the Assistant United States Attorneys, because that information

cannot be used at trial. The defense thus moves the Court to order production of information related to any request made by the government to Fox News, Mr. Rosen, or any entity affiliated with Fox, to remove the Rosen article from its website or withhold publication of the article or its contents. If no such documents exist, the government can simply say so.

C. [redacted] of the Intelligence

The defense requested additional information regarding [redacted] confidence level [redacted] Dkt. 93, Ex. A, at 4. This request was based on an email produced by the government on November 30, 2012, in which [redacted] voiced concerns about [redacted] "confidence level" in the intelligence reporting contained in [redacted] *See* Ex. 3 (6/11/09 [redacted] Email). The government denied this request, stating that it "calls for the production of classified material to which the defense is not entitled." Dkt. 94, at 4. The defense now moves the Court to order production of the requested materials.

[redacted] email was addressed to a group of [redacted] working on a [redacted] that was based on [redacted] on June 11, 2009. In her email, [redacted] described concerns that had been raised at a 10:30 a.m. meeting regarding the intelligence contained in [redacted] According to [redacted] one participant in that meeting, [redacted] Ex. 3. Another participant in that

meeting "was apparently also probing on the [redacted][5] *Id.* Based on these concerns, [redacted] stated that "[redacted] wants to be sure that if we need to flag some doubt about the reporting in [redacted] – in light of [redacted] desire to see confidence statements when merited -- we do so."[6] *Id.*

The [redacted] email plainly states that high-ranking members of the intelligence community raised concerns about the accuracy and reliability of the information contained in [redacted] These concerns were echoed in the "Context Statement" of [redacted] itself, which states that [redacted]

[redacted] Ex. 4 at 3 ([redacted]) (emphasis added). The author of [redacted] in other words, expressed the same concerns as the participants in the 10:30 a.m. meeting, noting that the

[5] Although the [redacted] email does not explain the acronym [redacted] the defense understands that term to mean the original [redacted] upon which [redacted] was based, or the [redacted] of that material. In any event, the [redacted] email makes clear that confidence was "probing" the [redacted] that served as the basis for [redacted]

[6] The defense notes that [redacted] email was sent at 12:38 p.m. on June 11, 2009, after the first [redacted] was circulated at 12:16 p.m. but before a longer [redacted] was circulated at 2:41 p.m. The government has produced the [redacted] circulated at 12:16 p.m., but has refused to produce the draft circulated at 2:41 p.m. Based on [redacted] email, one can presume that the 2:41 p.m. [redacted] that the government refuses to produce may have contained statements about [redacted] "confidence level" in the reporting contained in [redacted] The defense's request for production of the 2:41 p.m. [redacted] is addressed separately in Mr. Kim's first motion to compel, regarding additional source documents. *See* Defendant's First Motion to Compel at 17. If the 2:41 p.m. [redacted] contains statements about the [redacted] intelligence community's confidence level in the reporting contained in [redacted] such statements provide an additional grounds for ordering production of the 2:41 p.m. draft, as explained in further detail below. The defense thus moves the Court to order production of the 2:41 p.m. [redacted] on these grounds as well.

information contained in [redacted] may reflect "informed speculation" based on open sources rather than [redacted] intelligence.

Any information regarding [redacted] "the [redacted] confidence level in [redacted] the reporting contained in [redacted] is "relevant and helpful" to the preparation of Mr. Kim's defense, as it is far from clear that [redacted] contained actual intelligence information that Mr. Kim reasonably could have believed was NDI. The [redacted] email and the Context Statement of [redacted] raise serious questions as to whether the content of [redacted] reflected sensitive information [redacted] or "informed speculation" from [redacted] perusal of publically-available open-source materials. Because the latter would not constitute NDI, the defense is entitled to any information assessing the accuracy and reliability of the alleged intelligence information contained in [redacted] The defense thus moves the Court to order production of any information related to the [redacted] of the information contained in [redacted] and the intelligence community's "confidence level" in that reporting.

D. **The Situation Room Meeting**

The defense previously requested meeting notes, agendas, talking points, summaries, and any other documents related to a June 12, 2009, Situation Room meeting (also referred to by government witnesses as a "Deputies" or "Principals meeting") at which the alleged disclosure at issue in this case was discussed. Dkt. 80, Ex. 10, at 6-7. This request was based on the statements of several NSC officials, who described this meeting during interviews with the FBI. In response, the government stated that the request "calls for the production of classified and

unclassified material to which the defense is not entitled."[7] Dkt. 80, Ex. 16, at 3. The government further represented that, to the best of its knowledge, none of the documents from the Situation Room meeting relates to the identification of Mr. Kim or anyone else as the source of the alleged disclosure. *Id.* Because the government's response does not fully address the defense's request, the defense now moves for production of documents related to this June 12, 2009, Situation Room meeting.

In its original request, the defense listed the topics raised at the June 12 meeting that would be "relevant and helpful" to the preparation of Mr. Kim's defense. *See* Dkt. 80, Ex. 10, at 6-7. Aside from documents relating to the identity of the alleged leaker, the defense also requested any documents "that describe or discuss the alleged unauthorized disclosure ..., the effect of the disclosure on national security and foreign relations, any relationship between the June 11 disclosure and any past unauthorized disclosure of intelligence information, and any actions to be taken by government officials to address the effects of the disclosure." *Id.* The government's representation that none of the documents from the June 12 meeting addresses the identity of the alleged leaker does not resolve the defense's request for documents related to these additional topics.

Documents related to these additional topics are "relevant and helpful" to the preparation of Mr. Kim's defense for many of the same reasons described above. Documents relating to any efforts made by high-ranking intelligence officials to prevent or limit the alleged disclosure (or the lack thereof) go directly to whether the information was sensitive enough that its disclosure could reasonably be expected to harm the United States or aid a foreign nation. The same is true

[7] The defense notes that, at this point, the government has not clarified which responsive documents are classified and unclassified. It is therefore unclear which documents, if any, would be subject to any heightened standard of discoverability that may apply to classified information.

of any documents concerning the effect of the alleged disclosure on national security. Documents addressing the relationship, if any, between the June 11 Rosen article and additional leaks of intelligence [redacted] during the same time period are "relevant and helpful" to the preparation of Mr. Kim's defense for the same reasons described in the defense's separate motion to compel discovery regarding other potential sources for Mr. Rosen. The defense thus moves the Court to order production of any documents related to the June 12, 2009 Situation Room addressing the topics described above.

E. **Electronic Security Profiles**

The defense previously requested "electronic security profiles" or other "official documents demonstrating" that the individuals who accessed the intelligence at issue prior to publication of the Rosen article "had the security clearances necessary to view the reports as of June 11, 2009."[8] Dkt. 80, Ex. 10, at 8. This request was prompted by the FBI's interviews of Darlene Bartley, the document control officer at the NSC's offices in the White House, who stated that she provided hard copies of [redacted] to certain individuals at the NSC that she knew were not cleared to view the report. *See* Ex. 5 (FBI-302 for Darlene Bartley). Ms. Bartley apparently provided the FBI with "electronic security profiles" demonstrating that at least two NSC officials were not cleared to view the report, but those profiles have not been produced to the defense.

The government denied the defense's request, stating that it "calls for the production of material to which the defense is not entitled." Dkt. 80, Ex. 16, at 3 (emphasis added). Notably, the government did not claim that the request calls for the production of classified material to

[8] In its request, the defense made clear that it was "not requesting comprehensive personnel or security clearance files for each individual." Dkt. 80, Ex. 10, at 8. Rather, the defense expressly limited the request to some "official document demonstrating that these individuals had the specific clearances necessary to view the intelligence reports at issue on June 11, 2009." *Id.*

which the defense is not entitled, so any heightened standard of discoverability applicable to classified information does not apply to this request. The defense now moves the Court to order production of the requested electronic security profiles or other documents demonstrating whether the individuals who accessed [redacted] had the clearances necessary to do so.

The requested documents are "relevant and helpful" to the preparation of Mr. Kim's defense because they tend to show whether the information at issue in this case was "closely held." As noted above, to prove the information contained in [redacted] was "national defense information," the government must demonstrate that the information was "closely held," meaning that the government took adequate steps to prevent unauthorized disclosure of the information to the public. Based on Ms. Bartley's statements, it appears that the government did not do so in this case, as government employees without the clearances necessary to view the report were nonetheless provided hard copies of [redacted] Any documents confirming Ms. Bartley's recollection (including the two electronic security profiles that Ms. Bartley apparently provided to the FBI, which have not been produced) go directly to whether the information contained in [redacted] was "national defense information." On that basis, the government moves the Court to order production of the requested materials.

F. **Other Intelligence Reports Accessed by Mr. Kim**

Finally, to convict Mr. Kim of violating the Espionage Act, the government must also prove that he acted "willfully," meaning that he disclosed the information to Mr. Rosen "voluntarily and intentionally and with the specific intent to do something that the law forbids. That is to say, with a bad purpose either to disobey or to disregard the law." *Morison*, 844 F.2d at 1071; *see also Kim*, 808 F. Supp. 2d at 53. Although the government has not yet revealed its theory of willfulness, several of the interviews conducted by the FBI as part of its investigation

indicate that the government believes Mr. Kim provided information to Mr. Rosen in an attempt to curry favor with Fox News.

For that reason, the defense requested "all intelligence reports accessed by Mr. Kim from April 1, 2009 to June 11, 2009 that were classified at the 'top secret' level," in order to show that, by comparison, the information contained in [redacted] was "nothing extraordinary." Dkt. 80, Ex. 10, at 12. The defense denied this request, stating that it "calls for classified material to which the defense is not entitled." Dkt. 80, Ex. 16, at 6. The defense now moves the Court to order production of the requested materials.

The other intelligence reports accessed by Mr. Kim during roughly the same time period are "relevant and helpful" to his defense, for two reasons. First, as noted above, the government's theory seems to be that Mr. Kim disclosed the contents of [redacted] to Mr. Rosen to curry favor with Fox News. Production of the requested intelligence reports will demonstrate that, if Mr. Kim were looking for a way to impress Fox News, disclosing the contents of [redacted] was not it. Mr. Kim regularly had access to far more sensitive reports than [redacted] at issue in this case, which – in the words of the government's own witnesses – contained "nothing extraordinary." *See* Ex. 1.

Second, given that the alleged disclosure took place almost four years ago, part of preparing Mr. Kim's defense will necessarily entail reconstructing the issues that Mr. Kim was working on and discussing with his colleagues during the relevant time period. Without access to the intelligence reports that Mr. Kim reviewed as part of his job responsibilities, the defense

cannot begin to reconstruct conversations and events that took place nearly four years ago.[9] The defense thus moves the Court to order the production of the requested intelligence reports.[10]

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 following materials forthwith:

1) Any damage assessment or other document addressing the effects, if any, of the alleged disclosure to Mr. Rosen on national security interests.

2) Any information in the government's possession, custody, or control regarding any request made by a government official to Mr. Rosen, Fox News, or any entity affiliated with Fox News to remove the June 11, 2009, Rosen article from the Internet or to withhold publication of the article and/or its contents.

3) Any documents relating to the [redacted] confidence level [redacted]

4) Any information relating to the [redacted] of the information contained in [redacted] and the intelligence community's "confidence level" in that reporting.

5) Any meeting notes, agendas, talking points, summaries, or other documents relating to a Situation Room meeting (also referred to by government witnesses as a "Deputies" or "Principals meeting") on or about June 12, 2009, at which the alleged disclosure at issue in this case was discussed, including but limited to any documents pertaining to:

   a) the alleged unauthorized disclosure;

   b) the effect of the disclosure on national security and foreign relations;

[9] To be clear, the defense has requested only those intelligence reports that Mr. Kim already viewed as part of his official duties at the State Department. Satisfying this request would not require the government to disclose any classified material that Mr. Kim has not already seen.

[10] Presently pending before the Court is an *ex parte* motion by the government pursuant to CIPA § 4, the resolution of which could result in the production of additional discovery to the defense. On February 8, 2013, the government also advised the defense that it is still in the process of responding to several outstanding discovery requests, which the parties expect to resolve shortly. The defense respectfully reserves the right to file a supplemental motion to compel discovery, if such a motion is warranted by any additional documents produced by the government.

c) any relationship between the June 11 disclosure and any past unauthorized disclosure of intelligence information; and

d) any actions to be taken by government officials to address the effects of the disclosure.

6) Any electronic security profiles or other official documents demonstrating that the individuals who accessed the intelligence at issue prior to publication of the Rosen article had the security clearances necessary to view that intelligence (or the reports in which the intelligence was set forth) as of June 11, 2009.

7) Copies of all intelligence reports accessed by Mr. Kim from April 1, 2009, through June 11, 2009, which were classified as Top Secret.

Respectfully submitted,

DATED: February 11, 2013

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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.	)	

PROPOSED ORDER

For the reasons set forth in Defendant Stephen Kim's Third Motion to Compel Discovery (Regarding "National Defense Information" and Willfulness), the government is hereby **ORDERED** to produce:

(1) Any damage assessment or other document addressing the effects, if any, of the alleged disclosure to Mr. Rosen on national security interests.

(2) Any information in the government's possession, custody, or control regarding any request made by a government official to Mr. Rosen, Fox News, or any entity affiliated with Fox News to remove the June 11, 2009, Rosen article from the Internet or to withhold publication of the article and/or its contents.

(3) Any documents relating to the [redacted] confidence level [redacted]

(4) Any information relating to the [redacted] of the information contained in [redacted] and the intelligence community's "confidence level" in that reporting.

(5) Any meeting notes, agendas, talking points, summaries, or other documents relating to a Situation Room meeting (also referred to by government witnesses as a "Deputies" or "Principals meeting") on or about June 12, 2009, at which the alleged disclosure at issue in this case was discussed, including but limited to any documents pertaining to:

(a) the alleged unauthorized disclosure;

(b) the effect of the disclosure on national security and foreign relations;

(c) any relationship between the June 11 disclosure and any past unauthorized disclosure of intelligence information; and

(d) any actions to be taken by government officials to address the effects of the disclosure.

(6) Any electronic security profiles or other official documents demonstrating that the individuals who accessed the intelligence at issue prior to publication of the Rosen article had the security clearances necessary to view that intelligence (or the reports in which the intelligence was set forth) as of June 11, 2009.

(7) Copies of all intelligence reports accessed by Mr. Kim from April 1, 2009, through June 11, 2009, which were classified as Top Secret.

Hon. Colleen Kollar-Kotelly