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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed with Classified Information Security Officer
CISO
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 FOURTH MOTION TO COMPEL DISCOVERY (REGARDING IMPROPER [redacted] SUBSTITUTIONS AND REDACTIONS)

Defendant Stephen Kim, by and through undersigned counsel, hereby moves[1] this Honorable Court for an Order directing the government to provide unredacted copies of the classified discovery materials, in particular, to disclose [redacted] set forth in the discovery materials instead of [redacted] provided by the government thus far. The government's substitution of [redacted] without first obtaining Court approval violates CIPA and is not otherwise permitted by law in a criminal case. This is particularly so given that the defense is not seeking authority to disclose [redacted] publicly; that issue will be taken up by the Court in the CIPA Section 6 process. At this stage, all that is sought is an opportunity for defense counsel with the appropriate security clearances to review this information in their SCIF.

I. **Factual Background and Procedural History**

A. **The List of 168 Possible Leakers**

Mr. Kim is charged with one count of disclosing national defense information to a person not entitled to receive it in violation of the Espionage Act, 18 U.S.C. § 793(d), and one count of

[1] In addition to this motion, the defense is filing three motions to compel discovery corresponding to the categories of requests previously made to (and denied by) the government.

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 organization." Dkt. 3 at 1. During discovery, the government has clarified that the "classified report" referenced in the Indictment is [redacted]3630-09, [redacted] and the reporter is James Rosen of Fox News.

At the core of the government's proof are spreadsheets, generated as the investigation has progressed, that purport to identify all the people who accessed, or may have accessed, [redacted] prior to the publication of a June 11, 2009, article by Mr. Rosen that contained the allegedly leaked information (hereinafter "the spreadsheets"). By the government's current count, 168 people accessed the intelligence information at issue in one form or another prior to the publication of the Rosen article. Mr. Kim was one of those 168 people. This motion is being submitted because the government has refused to provide defense counsel [redacted]

The government's case against Mr. Kim is premised on the notion that an identifiable, finite number of government employees and contractors accessed [redacted] prior to the posting of the Rosen article on June 11, 2009, and that Mr. Kim is the only one of the 168 who both accessed [redacted] and was in contact with Mr. Rosen on that date. In order to prepare Mr. Kim's defense, defense counsel must have the ability to investigate the facts surrounding the other 167

potential sources to demonstrate that the government's belief that Mr. Kim is the only possible leaker is incorrect.[2]

B. **The Discovery Substitutions**

The government first produced a spreadsheet identifying 118 individuals to defense counsel by letter dated March 8, 2011. *See* Dkt. 58, Ex. 13 at 1; Ex. 1 ("List of 118"). A 119th person was later identified, *see* Dkt. 91, Ex. 1, and a subsequent list was produced by letter dated November 30, 2012, bringing the total number to 168. *See* Dkt. 91, Ex. 4, at 3-5.

A review of the spreadsheet and its supplements reveals that the government has disclosed [redacted]

C. **The Government's Original Rationale for the Substitutions, Now Abandoned**

In its March 8, 2011, letter, the government acknowledged that the individuals identified on the spreadsheet were people who may have accessed the alleged NDI prior to the publication

[2] As set forth in the defendant's separate motion to compel discovery regarding other contacts for the reporter, the government's attempt to limit and identify the universe of potential sources has been demonstrably unreliable, having grown from 78 people at the outset of the investigation, to 118 people at the time of indictment, to168 people by November 2012. *See* Second Motion to Compel at 2-3.

of the Rosen article on June 11, 2009. *See* Dkt. 58, Ex. 13, at 1. The government explained that [redacted]

As discussed *infra*, Section 4 of CIPA provides the mechanism by which the government can seek to redact/substitute classified information from discovery in a criminal case. Based on the absence of prior entries on the docket, the government did not file a CIPA Section 4 motion seeking this Court's permission to use these substitutions.

D. **The Meet and Confer Process**

The defense asked the government to provide [redacted] on the spreadsheet during the discovery process. Defense counsel understood that this information would be provided in the same manner as the other classified discovery in this case, and counsel acknowledged that the use of such substitutions might be necessary and proper [redacted] *See* Dkt. 80, Ex.10, at 12. The government denied this request, stating that it calls for classified material to which the defense is not entitled. *See* Dkt. 80, Ex. 16, at 5. The government did not rely on the claim that [redacted] in its written response, and thus the defense presumes that that rationale has been abandoned.

II. Argument

The government's use of substitutions for [redacted] at this discovery stage is improper on both procedural and substantive grounds. As a procedural matter, CIPA § 4 provides the sole mechanism by which the government can redact or substitute

information from discovery in a criminal case on the ground that the information is classified. That statute does not permit the government to substitute unilaterally; instead, it must obtain the Court's permission on a sufficient showing. There is no docket entry indicating that the government followed the required procedure here, and it cannot substitute for [redacted] without leave of the Court

Moreover, even had the government sought this Court's approval, it would not have been granted. There can be no doubt that [redacted] are "relevant and helpful" to the preparation of the defense. This is particularly the case given the fact (discussed further below) [redacted] disclosure solely to defense counsel with security clearances for review in the SCIF simply does not implicate the same security concerns.

Accordingly, for the reasons set forth below, the Court should order the government to produce [redacted]

A. The Government Failed to Obtain Court Approval for the Substitutions Under CIPA § 4

In response to the defendant's June 22, 2012, discovery letter requesting [redacted] on the spreadsheet, the government claimed that that information was

classified and the defense was not entitled to it, [redacted] then the government was required to obtain permission of the Court under CIPA § 4, which it did not do. Accordingly, the Court should require the government to seek authority to redact under CIPA § 4, or provide the defense with copies of the discovery [redacted] forthwith

CIPA is the procedural statute that manages the discovery and disclosure of information relating to national security. *See* 18 U.S.C. App. 3 § 1. The only provision of CIPA that permits, under defined circumstances, a limitation on discovery materials is Section 4.[3] That statute authorizes, but does not require, the Court, on a "sufficient showing," to do one of three things with respect to classified information in the discovery materials:

1. Delete specified items of classified information from documents to be made available to the defendant through discovery;
2. Substitute a summary of the information for such classified documents; or
3. Substitute a statement admitting relevant facts that the classified information would tend to prove.

18 U.S.C. App. 3 § 4.

A number of critical points emerge here. First, CIPA Section 4 allows the Court to authorize these three actions based on a "sufficient showing" by the government. It does not grant any authority to the government to delete or substitute in the first instance. Second, allowing these substitutions/deletions is permissive, not mandatory; the Court is not required to authorize the deletions or substitutions even if it finds that the government has met its burden.

[3] Section 4 does not address whether the information may be disclosed at trial, nor does it change the plain meaning of terms otherwise contained in the rules of discovery. Issues related to the disclosure of classified information at trial are covered by CIPA Section 6.

A review of the docket indicates that the government did not seek the Court's permission to substitute and redact the discovery in this case. Without such permission, the government attempted to bypass the judicial supervision that CIPA requires to ensure that the defendant's rights are protected in criminal discovery. Had the government followed CIPA, it would have had to provide the Court with a detailed showing that [redacted] not "relevant and helpful" to the preparation of the defense. A mere representation or certification that the information at issue is not exculpatory would not suffice. *See generally Al Odah v. United States*, 559 F.3d 539 (D.C. Cir. 2009) (applying CIPA standard to withheld classified discovery in Guantanamo Bay *habeas corpus* actions). As discussed *infra*, the government could not meet this burden.[4] Ultimately, if the government is permitted to substitute without Court approval, as it has done here, CIPA Section 4 would be rendered a nullity.

It bears repeating that the defense is not seeking to disclose [redacted] at trial or in any other public document at this time. Counsel recognize that any public disclosure would have to be approved by the Court pursuant to CIPA Section 6. All that would occur would be the disclosure to counsel, with security clearances, in the SCIF, and subject to the Protective Order -- procedures that already govern the other classified discovery in this case.

B. [redacted] Clearly Relevant and Helpful to the Preparation of the Defense and Must be Produced Under *Yunis*

The standard to be applied in a CIPA Section 4 analysis is well-established. If the government asserts a colorable claim of its national security privilege over classified information sought in discovery, that information must be produced if it "crosses the low hurdle of

[4] Moreover, even though CIPA § 4 permits the government to proceed *ex parte*, the defendant would have been given an opportunity to file a motion for reconsideration and make a record for appeal if the redactions/substitutions were approved. *See United States v. Libby*, 429 F. Supp. 2d 18, 26 (D.D.C. 2006) (permitting motion for reconsideration of *ex parte* CIPA § 4 ruling).

relevance" and is "at least helpful to the accused." *See United States v. Mejia*, 448 F.3d 436, 455-56 (D.C. Cir. 2006). If the classified information is both relevant and helpful to the defense, it must be produced, notwithstanding the government's claim of privilege. *United States v. Yunis*, 867 F.2d 617, 621-23 (D.C. Cir. 1989). To be "helpful," the evidence need not rise to the level that would trigger the government's obligation under *Brady*. *United States v. Aref*, 533 F.3d 72, 80 (2d Cir. 2008); *Mejia*, 448 F.3d at 456-57. The "at least helpful" test is applied in a fashion that gives the defendant the benefit of the doubt. *Mejia*, 448 F.3d at 458.

It cannot be reasonably disputed that [redacted] "relevant and helpful" to the preparation of the defense. Indeed, the government has already acknowledged the relevance of [redacted] in discovery. (It is notable, however, that the government has not produced interview reports [redacted]

It is well-established that information that may lead to the discovery of witnesses or evidence is material to the preparation of the defense. Under Rule 16, evidence is material, among other things, if "there is a strong indication that it will play an important role in uncovering admissible evidence, aiding witness preparation . . . or assisting impeachment or rebuttal." *United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993) (internal quotation omitted). Documents are material if they help the defense to ascertain the strengths and weaknesses of the government's case. *United States v. Marshall*, 132 F.3d 63, 67-68 (D.C. Cir. 1998). The defense is entitled to use such materials to prepare its trial strategy and conduct investigations to discredit the government's evidence. *Id.* at 68.

[redacted]

The decision in *Al Odah* offers a helpful comparison. In that case, the court applied the CIPA standard to the discovery of classified information by counsel for certain Guantanamo Bay detainees. The detainee's counsel sought discovery of redacted portions of certain classified documents that related to individuals other than the detainees at issue. The government resisted, arguing that the information was "especially sensitive source-identifying information" that the detainees had no "need to know," and further certified that the redacted information did not support a determination that the requesting detainee is not an enemy combatant. 559 F.3d at 543.

The district court ordered the information produced pursuant to the Protective Order in the case and the government appealed. [redacted]

[redacted] It is "relevant and helpful" to the preparation of the defense for defense counsel to be able to investigate this discrepancy.

[redacted]

Absent production [redacted] defense counsel have no means to determine [redacted] Defense counsel have no ability to [redacted] In short, defense counsel have no ability to undertake the same type of reasonable investigation that they would conduct in any other case.[6] Accordingly, [redacted] is squarely within the category of information that is "relevant and helpful" to preparation of the defense and must be produced.

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[5] As set forth in the defendant's separate motion to compel discovery regarding other contacts for the reporter, the government has not been able to account for those people who may have obtained access to the alleged intelligence through hard copies of the report or word-of-mouth. *See* Second Motion to Compel at 6-7.

[6] It is important to note in this regard that the government has not provided the defense with [redacted]

C. Any Non-CIPA Justifications for Redacting [redacted] Do Not Apply

It is not disputed that the government is permitted to redact or withhold [redacted] from discovery in certain circumstances in non-CIPA cases. As the Court is well-aware, the government may rely on [redacted] and its progeny to attempt to withhold [redacted] and may rely on cases like [redacted] In this instance, however, the government has not raised such bases for the redaction of [redacted] and such bases would be inapplicable.

First, the government has not claimed that [redacted] does not apply. Second, the government has not claimed that [redacted] Nor could the government make such a claim, [redacted] concerns have already been taken into account by the Protective Order, the CIPA procedures, and the limitation on counsel's use of the classified discovery.[7] Accordingly, neither of these non-CIPA rationales could support the government's use of [redacted] in the discovery materials.[8]

[7] It is worth reiterating that what may or may not be admitted at trial is a different consideration than what has to be provided to the defense during the broader discovery phase of a criminal proceeding. Any concerns about the public disclosure of [redacted] will be addressed by the Court during the CIPA process.

[redacted]

D. The Government's Further Use of Redactions is Similarly Improper

In addition to [redacted] substitutions, the government has utilized significant redactions throughout its classified discovery production. Given the absence of a docket entry suggesting otherwise, the defendant presumes that the government did so without obtaining Court approval under CIPA § 4. For the reasons discussed above, this is impermissible and the government should be ordered to either (a) provide unredacted copies, or (b) seek Court approval to redact on a sufficient showing under CIPA.

Some of these redactions are discussed elsewhere in the defendant's other motions filed with the Court today, and are the subject of requests for the disclosure of the presently redacted portions. Also important, however, is the government's decision to [redacted] Based on the discovery, it appears that there were [redacted] While the government provided these documents in discovery, a cursory review will reveal that large portions of the texts have been redacted -- [redacted] it is untenable that defense counsel should not [redacted]

have access to unredacted copies to determine if there is anything about these documents that undermines the government's case [redacted]

III. Conclusion

CIPA provides a mechanism for the Court-supervised redaction of classified discovery materials to the extent that they are not "relevant and helpful" to the defense. The government in this case has redacted the classified discovery and substituted [redacted] The government appears to have done so without going through CIPA and without the Court's permission. As a result, it has withheld [redacted] precluding the defense from conducting an adequate investigation [redacted] As a result, this Court should compel the government to disclose to defense counsel [redacted]

The government chose to bring this prosecution. It chose to do so on the theory that Mr. Kim was one of a limited number of people within the government who had access to the information before the publication of the Rosen article. [redacted] The government cannot be permitted to bring this case with full knowledge of this fact, and then deny the defendant the ability to investigate [redacted] *See generally Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (affirming defendant's right to a meaningful opportunity to present a complete defense). The government cannot be permitted to simultaneously prosecute the defendant and "attempt to restrict his ability to use information that he feels is necessary to defend himself against the

prosecution." *United States v. Fernandez*, 913 F.2d 148, 154 (4th Cir. 1990). "Although CIPA contemplates that the use of classified information be streamlined, courts must not be remiss in protecting a defendant's right to a full and meaningful presentation of his claim to innocence." *Id.*

WHEREFORE, for the reasons set forth above and any others appearing to the Court, the defense respectfully requests that the Court enter an Order compelling the government (a) to provide [redacted] and (b) to provide unredacted copies of the intelligence documents [redacted] which were previously produced in redacted form.

Respectfully submitted,

DATED: February 11, 2013

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FOR THE DISTRICT OF COLUMBIA

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	)	
STEPHEN JIN-WOO KIM,	)	
	)	
Defendant.	)	

PROPOSED ORDER

For the reasons set forth in Defendant Stephen Kim's Fourth Motion to Compel Discovery (Regarding Improper [redacted] Substitutions and Redactions), the government is hereby ORDERED to produce:

(1) the [redacted] (or prior iterations of the same intelligence report) prior to publication of the Rosen article on June 11, 2009; and

(2) unredacted copies of the intelligence documents [redacted] which were previously produced in redacted form.

Hon. Colleen Kollar-Kotelly