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 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 3. 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 5:00 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] 03630-09," 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.[5]

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.

[5] 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 11:33 a.m. email) appears to contain information regarding whether North Korea [redacted]

[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 [illegible]. 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,

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