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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed with the Classified Information Security Officer
CISO
Date 11/12/2013

UNITED STATES OF AMERICA)
)
v.)
)
STEPHEN JIN-WOO KIM,)
)
Defendant.)

Criminal No. 10-225 (CKK)

DEFENDANT STEPHEN KIM'S RESPONSE TO THE GOVERNMENT'S OBJECTIONS TO HIS SECOND CIPA SECTION 5 NOTICE

Defendant Stephen Kim, by and through undersigned counsel, respectfully submits the following response to the government's objections to the adequacy of his second CIPA § 5 notice. The government's objections are based on an unduly narrow reading of CIPA that finds no support in the text of the Act itself or the case law interpreting its provisions. The government's claim that defendant should be required to provide even greater specificity than has already been provided in his second Section Five notice ignores the level of detail in the notice itself and overlooks the fact that, in many instances, evidence at trial will consist of not only classified documents, but also the testimony of government witnesses regarding those documents. The government's approach elevates form over substance and, if accepted by the Court, would bring CIPA proceedings in this case to a grinding halt as the defense attempts to itemize and re-type every sentence of classified information contained in the discovery that the defense reasonably expects to disclose at trial.

I. THE PROPER STANDARD UNDER CIPA SECTION FIVE

On October 15, 2013, defendant filed his second notice under CIPA § 5. Section Five requires a defendant to "notify the attorney for the United States and the court in writing" if he

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"reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with any trial or pretrial proceeding." 18 U.S.C. App. 3 § 5(a). The Act only requires that such notice "shall include a brief description of the classified information" at issue. Id.

Section Five's requirements are designed to make "the government . . . aware, prior to trial, of the classified information, if any, which will be compromised by the prosecution." United States v. Collins, 720 F.2d 1195, 1197 (11th Cir. 1983). "To that end, the defendant who reasonably expects that his or her defense will result in the disclosure of classified information is required . . . to give the court and the government prior notice of the classified information deemed involved. . . . [T]his may be thought of as the 'price' the defendant asserts the government will have to pay if the prosecution continues." Id. Once the defendant has filed a Section Five notice, the government is then given "an opportunity . . . to try to minimize the cost" by moving for a hearing on relevance, use, and admissibility under CIPA Section 6(a). Id.

Although, by its plain terms, Section Five requires the defendant to provide only "a brief description of the classified information" at issue, see 18 U.S.C. App. 3 § 5(a), the government urges this Court to go much further and require the defendant to provide a more "particularized" notice that identifies "'exactly' what information in [the classified documents contained in the notice] the defendant seeks to disclose." Govt. Br. at 7, 11 (emphasis added). This argument is frustrating for several reasons.

First, the government's assertion that the defendant must provide a "particularized" notice identifying "exactly" what information within classified documents he reasonably expects may be disclosed at trial is inconsistent with the text and structure of CIPA. Although CIPA Section Six requires the government to notify the defendant of "the specific classified

information at issue" when it moves for a hearing on use, relevance, and admissibility, Section Five is bereft of any such language. Compare 18 U.S.C. App. 3 § 6(b)(1) with 18 U.S.C. App. 3 § 5. Rather, as noted above, Section Five requires the defendant to provide only a "brief description" of the classified information at issue. See 18 U.S.C. App. 3 § 5(a). The government's interpretation fails to take this difference into account, and improperly places the burden on the defendant to begin crafting the government's own Section Six motion.

The Ninth Circuit addressed precisely this issue in United States v. Miller, 874 F.2d 1255 (9th Cir. 1989), a case the government mischaracterizes in its brief. See Govt. Br. at 4. In Miller, the defendant notified the government that he intended to introduce a series of classified documents found at his home and work desk as part of his defense. Id. at 1276. His Section Five notice "consisted simply of a list indicating the length and title of each document found." Id. The district court found his Section Five notice inadequate on the same ground urged by the government in this case, namely that the notice failed to set forth, inter alia, "the particular contents of each document." Id.

The Ninth Circuit, however, disagreed, holding that the list of documents provided by the defendant was "fully adequate under § 5 of CIPA." Id. As the Court explained, "[t]he only language in § 5 concerning the form and content of the required notice is the statement that 'such notice shall include a brief description of the classified information.'" Id. (quoting 18 U.S.C. App. 3 § 5(a)). The list of documents provided by the defendant "satisfied the purpose of this requirement" because it "fully alerted the government as to what classified information [defendant] sought to introduce. The government knew exactly to which documents [defendant] was referring, and it knew what information was contained in them." Id. Contrary to the assertions in the government's brief, see Govt. Br. at 4, Miller thus rejected the government's

exam that a defendant must identify the specific classified contents of each document, ruling instead that a list of the classified documents produced by the government during discovery was "fully adequate under § 5 of CIPA."[3] Id.

Second, the principal cases relied upon by the government are easily distinguishable, as they involved defendants who either refused to identify the specific documents they intended to present as part of the defense or refused to file any Section Five notice at all. In United States v. Collins, 720 F.2d 1195 (11th Cir. 1983), for example, defendant noticed his intent to reveal "activities of the U.S. Government with respect to joint Intelligence/Military operations" as well as "the utilization of secret overseas bank accounts to finance such operations." Id. at 1200. The Eleventh Circuit observed that defendant's notice failed to specify a single classified "activity" or item of classified information that he expected to reveal, and was so vague as to conceivably include "any sensitive government intelligence and military operation from the creation of the nation until now, conducted anywhere in the world." Id. at 1199-1200. On that basis, the Court held defendant's Section Five notice inadequate. Id. at 1200-01.

In United States v. Badia, 827 F.2d 1458 (11th Cir. 1987), the defendant failed to file any Section Five notice identifying the specific classified information he intended to use in support of his unique "CIA involvement" defense. Id. at 1464-65. Because he "failed to comply with the explicit provision of CIPA and has demonstrated no reason to justify his noncompliance," the

[3] The Miller Court went on to hold that the defendant failed to satisfy his burden of demonstrating that the documents contained in his notice were relevant to his defense under CIPA § 6(a). See Miller, 874 F.2d at 1276-77. The Court made clear, however, that this ruling was based on CIPA § 6(a), not § 5. Id. The government describes Miller as "upholding district court order requiring defendant 'to specify with greater particularity which documents or portions of documents were relevant'" in his Section Five notice. See Govt. Br. at 4, but that is simply wrong. Miller expressly held "that [defendant's] notice was sufficient under § 5," but that he failed to carry his burden at the next stage of proceedings under CIPA § 6. 874 F.2d at 1276-77.

Court precluded him from introducing classified evidence as part of his defense. Id. at 1466. Badia thus concerned the failure to file a CIPA § 5 notice, not the level of specificity required under that provision.

Neither Collins nor Badia addressed a case, such as this one, in which the defendant has complied with CIPA's procedural requirements and identified the classified materials he reasonably expects to disclose at trial, often by page number.[2] Rather, Collins and Badia addressed situations in which the government was unable to determine what information the defendant expected to disclose at trial, either because defendant's Section Five notice was so vague as to include almost any covert "activity," or because defendant failed to provide any Section Five notice at all. Collins and Badia are therefore of limited use in this case, as neither addressed the crucial question of how much specificity is required to put the government on notice of the classified information that may be disclosed as part of the defense.[3] The Ninth

[2] The same is also true of the other cases relied upon by the government. See Govt. Br. at 4-7. United States v. Poindexter, 698 F. Supp. 316 (D.D.C. 1988), addressed CIPA's structure and procedural requirements before any Section Five notice had been filed. Id. at 319-21. The Court went out of its way to emphasize the unique circumstances of that case, explaining that the charges at issue were sui generis and fell outside "the precise strictures of CIPA." Id. at 319-20. United States v. North, 708 F. Supp. 389 (D.D.C. 1988), addressed the defendant's persistent refusal to comply with the Court's procedural orders in the same prosecution as Poindexter. The defendant in that case filed a Section Five notice that "was nearly 500 pages long" and included "masses of classified material which under no conceivable version of a defense could have utility whatsoever." Id. at 395. The Court found such notice inadequate because it exhibited "a deliberate disregard" for the Court's prior orders and ensured "confusion, delay, and uncertainty" during pretrial proceedings. Id. United States v. Rewald, 889 F.2d 836 (9th Cir. 1989), did not address the adequacy of a Section Five notice, but rather discussed whether a defendant must present arguments regarding relevance and admissibility in such a notice. Id. at 855.

[3] Moreover, the line of Eleventh Circuit cases relied upon heavily in the government's brief is the same line of cases that soundly rejected the government's proposed "balancing" of interests at the CIPA Section 6(a) stage. See Collins, 720 F.2d at 1199 ("CIPA appears premised upon the assumption that, if material to the defense and not otherwise avoidable, such information shall be admissible."); United States v. Baptista-Rodriguez, 17 F.3d 1354, 1364 (11th Cir. 1994) ("The district court may not take into account the fact that evidence is classified when determining its use, relevance, or admissibility," as "the relevance of classified information in a given case is

Circuit's decision in Miller, by contrast, squarely addressed this issue, holding that a list of classified documents produced by the government during classified discovery that the defendant intended to use at trial was sufficient to put the government on notice under CIPA § 5. See Miller, 874 F.2d at 1276.

Third, the government's position on the level of detail required in a CIPA § 5 notice also ignores the realities of trial practice. Section Five "is intended to cover not only information that the defendant plans to introduce into evidence, or to state in open court, but also information which will be elicited from witnesses and all information which may be made public through defendant's efforts." S. Rep. No. 823, 96th Cong., 2d Sess., at 7. Before trial, the defense obviously cannot be expected to predict precisely how government witnesses will respond to cross-examination, or whether their answers will reveal classified information. Yet CIPA expressly requires the defendant to provide some notice of any classified information that may be disclosed on direct or cross-examination of witnesses in some manner, or risk a court order precluding "the examination by the defendant of any witness with respect to any such information." 18 U.S.C. App. 3 § 5(b).

To preserve the defense's ability to effectively examine and cross-examine witnesses, a defendant in a CIPA case must therefore notice topics potentially implicating classified information in his Section Five notices. Such a notice cannot incorporate the level of precision

governed solely by the well-established standards set forth in the Federal Rules of Evidence." (citing Collins)); United States v. Juan, 776 F.2d 256, 258 (11th Cir. 1985) (same); see also Poindexter, 698 F. Supp. at 320 ("[Congress] emphasized that the Court should not undertake to 'balance the national security interests of the government against the rights of the defendant, but rather that in the end remedies and sanctions against the government must be designed to make the defendant whole again'"). Less than four weeks ago, the government urged this Court to reject these Eleventh Circuit cases (as well as Judge Walton's decision in United States v. Libby, 453 F. Supp. 2d 35 (D.D.C. 2006)), arguing that they misinterpret CIPA's provisions. See Gov't CIPA § Reply at 29 n.8. The government's view of Fourth and Eleventh Circuit precedent shifts with each successive motion, and is transparently results-oriented.

demanded by the government in this case, as the defense simply cannot know how a witness will respond under oath at trial – particularly when the defense does not have access to the witness or any foreign statements that may exist. For that reason, several items in defendant's second CIPA § 5 notice consist of a specific, defined topic, followed by the phrase "including but not limited to" and several examples of documents or factual details the defense expects to rely upon at trial. Item 8 in defendant's notice, for example, states that the defendant reasonably expects to disclose "information relating to the [redacted] concerning North Korean [redacted] (i.e., a classified topic), "including but not limited to (a) an [redacted] email from [redacted] describing North Korean [redacted] (CLASS_1368-09)" (i.e., a specific classified document) and the "sources of information relied upon by [redacted] in the assertions in the [redacted] email" (i.e., a factual detail known by [redacted]). Depending on [redacted] testimony, the defense may also have additional questions about the [redacted] email, and the information relied upon by [redacted] which could touch upon on classified information. The language contained in Item 8 preserves the defendant's ability to ask such questions at trial, without drawing an objection from the government that the defendant failed to notice any of the specific information that may be disclosed by [redacted] answers.

The government criticizes this approach, claiming that it lacks "specificity" and "any definiteness whatsoever," and is exactly "what the Eleventh Circuit condemned in Collins." Gov't Br. at 39. But, as noted above, Collins addressed a Section Five notice that was far less specific than defendant's notice in this case. See 720 F.2d at 1200 (noting that defendant's notice conceivably encompassed "any sensitive government intelligence and military operation

from the creation of the nation until now, conducted anywhere in the world"). Collins therefore does not suggest any inadequacy in Mr. Kim's second CIPA § 5 notice.[3]

Moreover, for all of its complaints, the government fails to explain how the defense could adequately notice any classified information that may be disclosed during the cross-examination of witnesses like [redacted] whose testimony will be required to authenticate and explain several of the key documents in the case. The government argues that more "definiteness" is required, but fails to explain how such a requirement would operate in practice when the witness has not yet been called to testify. If the defendant were instructed to provide a more "particularized" notice of the information he reasonably expects to elicit from [redacted] for example, what more could be said than what is already included in his notice? The government's brief offers no guidance on this issue. Its objections elevate form over substance without any discernable benefit to the parties or the Court, and should be rejected.

II THE SPECIFIC ITEMS NOTICED BY DEFENDANT

Defendant's second CIPA § 5 notice listed sixteen categories of information the defense reasonably expects to disclose at trial. The government does not object to categories 1, 2, 3, 4, and 6, see Govt. Br. at 2 n.1, so those items are not in dispute. As to the remaining items, the government fails to discuss these categories individually, but rather asserts four blanket objections. Id. at 8-11.

In the absence of any discussion of the actual items noticed by the defendant, it is difficult to discern what, exactly, the government finds lacking in defendant's notice. Several of the items described by the government as "impermissibly vague" or "lacking any definiteness" are, in fact, described in great detail. The defense thus urges the Court to consider the actual

[3] The defense also notes that as to testimonial evidence, this is exactly how counsel provided its Section 5 notice in the AIPAC case (United States v. Rosen & Weissman).

language of defendant's notice, which is far more specific than the government suggests. The substance of the government's categorical objections is addressed below.

A. Item 5 (FBI 302s)

Item 5 in defendant's notice consists of "FBI 302s reflecting interviews of [redacted] on the 'List of 11' who accessed the intelligence report at issue," followed by a list of specific Bates pages from classified discovery at which these 302s can be found. Relying in part on the Ninth Circuit's decision in Miller, the government claims that such notice "is inadequate because it does not permit the United States to 'exactly' what information in these particular documents the defendant seeks to disclose." Govt. Br. at 11.

This objection is meritless. As noted above, the government misreads Miller, which held that "a list indicating the length and title" of each classified document provided by the government was "fully adequate under § 5 of CIPA." Miller, 874 F.2d at 1276. The Court expressly rejected the argument made by the government, holding that the defendant was not required to "set forth the particular contents of each document." Id.

Moreover, the government's complaint that the 302s are "lengthy" and that it should not be required to "sift through the entire document" to determine "exactly" what information is at issue borders on the frivolous. The actual notice provided by the defendant includes Bates ranges that consist, on average, of three to four pages, which are already portion-marked. Defendant obviously intends to notice the classified, portion-marked information in these three to four page documents, which take no more than a few minutes to review.

B. Items 7 to 12

Items 7 through 12 in defendant's notice consist of categories of information related to the [redacted] certain emails from Daniel Russel and [redacted] the distribution of copies of the

intelligence report to people within the White House, and apparent contacts between White House National Security Council staff and Fox News on June 11, 2009. The government asserts two blanket objections to these categories of information. First, the government argues that these items contain "non-exhaustive lists within broad categories" of information. Govt. Br. at 9-10. Second, the government asserts that certain of these items are "new discovery demands disguised as a CIPA Section 5 Notice." Id. at 10-11. The government also complains that the defense has "failed to specify the classified information" within certain items. Id. at 11.

The government's "non-exhaustive list" objection stems from the defense's use of the phrase "including, but not limited to," which is addressed in Part I above. Although the government complains that this phrase lacks specificity and "definiteness," it overlooks the fact that the phrase modifies the specific topic directly preceding it. Item 8, for example, is limited to information regarding a specific document, "the [redacted] email concerning North Korean [redacted]." Item 8 therefore puts the government on notice that the defense reasonably expects to disclose information relating to the [redacted] email at trial. As explained above, the "including but not limited to" language is necessary to preserve the defendant's right to examine and cross-examine witnesses regarding this document which may cause the disclosure of additional classified information.

Like Item 8, items 7 through 12 each focus on a specific document or topic, and provide examples (with Bates numbers) of specific information already in the defendant's possession which he may disclose at trial. Even a cursory examination of these items shows that they do not reflect "broad categories" as the government suggests, nor do these items fail to provide the government with notice of the information that may be disclosed at trial. Items 7 through 12 are

in fact, far more detailed than the Section Five notices at issue in the cases relied upon by the government.

The government also argues that certain sub-categories contained in Items 7 through 10 are actually "new discovery demands disguised as a CIPA Section 5 Notice." Govt. Br. at 10-11. The legal basis for this objection is unclear, as Collins – the only case cited by the government for this proposition – does not discuss, let alone recognize, such an objection.

Defendant's notice does not request any additional discovery from the government. It does what CIPA requires – it provides the government with notice of the specific information the defense reasonably expects to elicit from government witnesses at trial. If the government intends to object to the defense asking [redacted] how he knew that the intelligence report at issue "should be out in minutes" as of 8:51 a.m. on the morning of June 11 (Item 7(c)), for example, the government may move for a hearing on relevance, use, and admissibility under CIPA Section 6(a). The fact that the government has not yet produced a classified document containing this information is not a basis for a CIPA Section Five objection. Section Five requires the defendant to provide a notice; the government will have its opportunity to object at the Section Six stage. The same is also true of other items to which the government objects on these grounds.

[redacted]

[1] In the single paragraph of its brief explaining this "disguised discovery" objection, the government states, "CIPA does not countenance such an attempt at 'suddenly shifting the burden to the government to anticipate and state what it fears from 'greymail.' Collins, 720 F.2d at 1199." Govt. Br. at 11. This quotation from Collins is misleading, as the cited passage (actually appearing on page 1200) addresses the government's obligations under CIPA Section 6, not the defendant's burden under Section 5. See 720 F.2d at 1200. Collins did not hold that defendant's Section Five notice was inadequate because it contained "new discovery demands disguised as a CIPA Section 5 Notice," nor did it consider such a theory. Rather, as noted above, the Court held that defendant's notice was insufficient because it failed to specify a single item of classified information and "conceivably" included "any sensitive government intelligence and military operation from the creation of the nation until now." 720 F.2d at 1199-1200.

Finally, the government complains that Items 7(a), 7(b), 10(b), 11(g), 11(h), 11(k), and 11(m) are "lengthy documents" that it should not have to "sift through" to identify "exactly" what information is at issue. Id. at 11. As noted above with respect to FBI 302s, the government's argument mischaracterizes the Ninth Circuit's decision in Miller, which expressly held that a list of classified documents produced during discovery is "fully adequate" for Section 5 purposes. Miller, 874 F.2d at 1276. The defense also notes that the documents at issue are pdf documents used to identify the classified information involved. The defense reasonably expects to disclose the classified information contained in these portion-marked documents.

C. Items 13 and 14

Items 13 and 14 in defendant's notice are documents generated by [redacted] law enforcement officials discussing the alleged disclosure at issue in this case. Item 13 is four pages long. Item 14 is nine pages long. The government complains that these are "lengthy documents" that it should not have to "sift through" to identify "exactly" what information is at issue. Govt. Br. at 11. The argument cannot be taken seriously.

Like the FBI 302s and Items 7 to 12, the defendant's notice is more than adequate under Miller, as it identifies the specific classified documents the defense reasonably expects to disclose at trial by Bates number. See Miller, 874 F.2d at 1276. The applicable pages are already portion-marked and should take the government no more than a few minutes to review. Defendant reasonably expects to disclose the portion-marked sections containing classified information at trial.

D. Items 15 and 16

Items 15 and 16 in defendant's notice are categories of information regarding the government's procedures for classifying and declassifying documents and preparing media

statements based on classified documents. The government objects to these items on the grounds that they are "broadly worded" and "impermissibly vague." Govt. Br. at 8-9.

As noted above, the purpose of a Section Five notice is to make the government aware of any classified information that may reasonably be disclosed as part of the defense. Collins, 720 F.2d at 1197. Items 15 and 16 satisfy that goal, by providing notice of defendant's intent to elicit testimony regarding the government's procedures for classifying and declassifying information and preparing media statements on classified topics. The government fails to explain exactly what it finds "vague" or "non-particularized" about these topics.

Moreover, it should come as no surprise to the government that the defense will seek to elicit testimony on these topics to rebut the government's continued reliance on the classified nature of the intelligence report at issue as proof that Mr. Kim had reason to believe that disclosure of the information could be damaging to the United States or helpful to a foreign nation. The government complains that defendant's notice is "impermissibly vague," but fails to address how Mr. Kim would otherwise notice his intent to elicit testimony on these crucial issues.

III. CONCLUSION

For the reasons set forth above, the government's objections should be denied. The defense has provided the government with a notice that is "fully adequate under CIPA § 5," as it "fully apprise[s] the government as to what classified information" the defendant reasonably expects to disclose at trial. See Miller, 874 F.2d at 1276. However, if the Court agrees with any part of the government's objections, the remedy is to require the defense to file an amended notice. The government asserts that the Court should either "order the defendant to file a new Section 5 Notice" or "preclude the disclosure of any classified information falling into the

objectionable categories in the defendant's Notice." Govt. Br. at 11-12. The government cites no authority for the latter proposition, which would plainly violate the defendant's constitutional right to present a defense. Indeed, the cases relied upon by the government demonstrate that if a Section 5 notice is found inadequate, the proper remedy is to require the defendant to file an amended notice. See, e.g., Collins, 720 F.2d at 1201.

WHEREFORE, for the reasons set forth above and any others appearing to the Court, the government's objections to defendant's second CIPA § 5 notice should be denied.

Respectfully submitted,

DATED: November 12, 2013

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