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Filed with LSO
date 8/5/11
name Mistry

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA**

Alexandria Division

UNITED STATES OF AMERICA,

vs.

JEFFREY ALEXANDER STERLING,

Defendant.

Case No. 1:10-cr-00485-LMB

DEFENDANT'S SECOND MOTION TO COMPEL

COMES NOW Jeffrey A. Sterling, by counsel, and for his Second Motion to Compel

Discovery, states as follows:

1. The defendant has previously filed a Motion for Discovery in this case which sets forth both the legal authorities and the factual bases for certain discovery that has been requested. In that Motion, the defense set forth the elements of the crimes charged under 18 U.S.C. §§ 793 (d) and (e). In short, in order to bear its burden in this case the government must prove that the disclosed information is "related to the national defense" that "could be used to the injury of the United States or to the advantage of a foreign power." United States v. Rosen, 445 F.Supp. 2d 602, 621 (E.D. Va. 2006) (citing United States v. Morison, 844 F.2d 1057, 1071-72 (4th Cir. 1985). In that light, information that is merely embarrassing to the United States or to any of the officials of the United States is not "national defense information."

2. The gravamen of the charges in this case is that the alleged disclosures at issue here had the potential to aid Iran in its nuclear weapons program. The defense has the right to

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argue to the jury, however, that Iran does not even have a nuclear weapons program and did not have such a program in 2000 or thereafter. Therefore, any alleged disclosure was not even potentially damaging, much less actually damaging. The defense has retained an expert who it intends to call in this matter. That expert has indicated to the defense that he needs certain documents in order to prepare and support an opinion that no national defense information is disclosed in Chapter 9 of State of War. This opinion can be preliminary made with public information, but that public information must be supplemented by complete and unredacted, non-public information so that defense expert can support a complete and accurate opinion. Thus, on July 22, 2011, the defense requested that the United States make available to the defense all of the following information. A copy of this letter is provided with this Motion.

- A. Any and all National Intelligence Estimates ("NIEs") that refer or relate to the existence or capabilities of the Iranian Nuclear Weapons Program. It is publicly reported that there was such an estimate in 2005 and another in December of 2007. The defense requested the complete, unredacted copies of such estimates as they relate to the Iranian Nuclear Weapons Program from 1997 to the present.
- B. Any Memorandums to Holders of the National Intelligence Estimate since 1997 that refer or relate in any way to the Iranian Nuclear Weapons Program and any estimate as to its capabilities.
- C. Any and all CIA or DIA published analytic papers regarding the issue of the Iranian Nuclear Weapons Program and or Iranian Nuclear Weapons Proliferation from on or about the date of the Vienna drop described in Chapter 9 of State of War.

3. In response, the Government asked that the defense explain how such information was relevant or material to any issue in the case. As such, the defense has made a good faith effort to resolve this matter without the intervention of the Court.

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4. The defense submits that the requested information is relevant and material to a fair determination of the cause in this case. United States v. Smith, 780 F.2d 1102, 1107-10 (4th Cir. 1985). The defense, through expert testimony and otherwise, will seek to show that the Iranians do not even have a nuclear weapons program. This means that the alleged unauthorized disclosure about a ' scheme designed to interfere with a weapons program that does not even exist could only be an embarrassment and not National Defense Information. To make this argument, the defense needs all of the requested information to show that the Iranians did not, as a matter of fact, gain any benefit from this alleged disclosure and, further, the United States suffered no damage. The Government, in discovery, has posited a parade of horrors that could have "potentially" occurred, over a long period of time, from the publication of the book. On the other hand, given the fact that eight years have passed since the date of the alleged disclosure, there is an actual record of what has transpired since the disclosure that is plainly material to this case. Stated otherwise, the truth may trump the hypothetical in the eyes of the jury. The defense surely must be able to show, with classified and unclassified reports, public and non-public documents, that no damage, as claimed by the government, ever occurred and that this case is just the type of alleged leak that is merely embarrassing to the public officials that provided nuclear blueprints to the enemy.

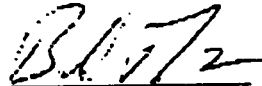
Dated: August 5, 2011

JEFFREY A. STERLING
By counsel

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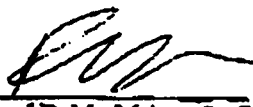
Counsel for Jeffrey A. Sterling

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CERTIFICATE OF SERVICE

I hereby certify that on August the 5th, 2011, I delivered an original of the following
Defendant's Second Motion to Compel to the CISO as directed by the Classified Information
Protective Order issued in this case.

By: 
Edward B. MacMahon, Jr. (VSB #25432)

Counsel for Jeffrey A. Sterling

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BY HAND

July 22, 2011

William M. Welch, II
Senior Litigation Counsel
United States Department of Justice
2100 Jamieson Avenue
Alexandria, VA 22314-5794

Re: United States v. Jeffrey A. Sterling, 1:10CR485 (LMB)

Dear Bill:

As we prepare for trial, and anticipating the expert disclosures that loom on the horizon, there are several items of additional discovery that we need. These items are necessary to prepare a defense expert on the issue of national defense information as well as to confront the claims that national defense information is somehow disclosed in Chapter 9 of *State of War*. I am happy to sit and discuss this with you at your convenience. In the interim, we are requesting the following information:

1. Any and all National Intelligence Estimates ("NIEs") that refer or relate to the existence or capabilities the Iranian Nuclear Weapons Program. It is publicly reported that there was such an estimate in 2005 and another in December 2007. We especially need the 2007 NIE. This request seeks the complete, unredacted copies of such estimates as they relate to the Iranian Nuclear Weapons Program from 1997 until today.
2. Any Memorandums to Holders of the National Intelligence Estimate since 1997 that refer or relate in any to the Iranian Nuclear Weapons Program and any estimate as to its capabilities. This request is specifically directed to the 2005 and 2007 NIEs but should be considered as broadly made in time and scope.
3. Any and all CIA or DIA published analytic papers regarding the issue of the Iranian Nuclear Weapons Program and or Iranian Nuclear Weapons Proliferation from on or about the date of the Vienna drop described in Chapter 9 of *State of War*.

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Please let me know your response at your convenience. We will need this information in time to prepare our expert and to make whatever CIPA disclosures may be required.

Best Regards,

A handwritten signature in black ink, appearing to read 'E. MacMahon', followed by a long horizontal line.

Edward B. MacMahon, Jr.

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