[redacted]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	)	**Criminal No.: 10-225 (CKK)**
	)	
v.	)	
	)	
STEPHEN JIN-WOO KIM,	)	
also known as Stephen Jin Kim,	)	
also known as Stephen Kim,	)	
also known as *Leo Grace*,	)	
	)	
Defendant.	)	

GOVERNMENT'S OMNIBUS OPPOSITION TO THE DEFENDANT'S MOTIONS TO COMPEL DISCOVERY

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(U)[1] **I. Introduction**

(U) On February 11, 2013, the defendant filed four separate Motions to Compel discovery with the Classified Information Security Officer ("CISO"). As captioned, the defendant moves to compel discovery regarding: (1) additional "source documents" ("First Motion"); (2) other contacts with the reporter ("Second Motion"); (3) national

[1] (U) The classification and control markings affixed to this memorandum and accompanying paragraphs were made pursuant to the requirements of Executive Order 13526 and applicable regulations. The classification level of this memorandum as a whole is the same as the highest classification level of information contained in any of its paragraphs. Each paragraph of this classified document is portion-marked. The letter or letters in parentheses designate(s) the degree of sensitivity of the paragraph's information. When used for this purpose, the letters "U," "C," "S," and "TS" indicate respectively that the information is either "UNCLASSIFIED," or is classified "CONFIDENTIAL," "SECRET," or "TOP SECRET." Under Executive Order 13526, the unauthorized disclosure of material classified at the "TOP SECRET" level, by definition, "reasonably could be expected to cause exceptionally grave damage to the national security" of the United States. Exec. Order 13526 § 1.2(a)(1), 75 Fed. Reg. 707 (December 29, 2009). The unauthorized disclosure of information classified at the "SECRET" level, by definition, "reasonably could be expected to cause serious damage to national security." Exec. Order 13526 § 1.2(a)(2). The unauthorized disclosure of information classified at the "CONFIDENTIAL" level, by definition, "reasonably could be expected to cause damage to national security." Exec. Order 13526 § 1.2(a)(3).

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defense information ("Third Motion"); and (4) substitutions and redactions ("Fourth Motion"). None of these motions has merit. For the Court's convenience, we address each of the defendant's motions in the order of their filing in this omnibus opposition and refer back to each subheading in the defendant's motions.

(U) As described more fully below, the defendant is charged with the unauthorized disclosure of the contents of a classified intelligence report to a reporter on the same day that the defendant accessed the report, that is, on June 11, 2009. The United States has produced voluminous classified discovery to the defense, with certain substitutions and redactions from classified documents in order to withhold sensitive, classified information that is neither exculpatory nor relevant and helpful to the defense.

(U) To place the defendant's Motions to Compel in the proper context for the Court – and thereby assist the Court in making the requisite determinations under Roviaro v. United States, 353 U.S. 53 (1957), United States v. Yunis, 867 F.2d 617 (1989), Brady v. Maryland, 373 U.S. 83 (1963), and Rule 16 of the Federal Rules of Criminal Procedure – the United States provides substantial background information in Section II. below. Section III. details the relevant legal standards, and Section IV. applies those standards to the facts of this case, demonstrating that the defendant's motions should be denied in their entirety.

(U) II. Factual Background

(U) A. The Indictment

(U) On August 19, 2010, a federal grand jury empaneled in the United States District Court for the District of Columbia returned a two-count indictment against Stephen Jin-Woo Kim. Count One charges the defendant with the Unauthorized

[redacted]

[redacted]

Disclosure of National Defense Information, in violation of 18 U.S.C. § 793(d). The Indictment alleges that in or about June 2009, the defendant had lawful possession of information relating to the national defense – that is, a specific, uniquely-numbered[2] intelligence report marked TOP SECRET//SENSITIVE COMPARTMENTED INFORMATION ("SCI")[3] that concerned intelligence sources and/or methods and intelligence about the military capabilities of a particular foreign nation – which information the defendant had reason to believe could be used to the injury of the United States or to the advantage of a foreign nation, and that the defendant willfully communicated that information to a person not entitled to receive it, namely a reporter for a national news organization. Count Two charges the defendant with False Statements, in violation of 18 U.S.C. § 1001(a)(2). The Indictment alleges that on or about September 24, 2009, the defendant lied to agents of the Federal Bureau of Investigation ("FBI") with respect to his contacts with the same reporter.

(U) **B.** <u>The Classified Information that was Unlawfully Disclosed</u>

[redacted] The classified information at the core of this case, which the defendant is charged with unlawfully disclosing, concerns TOP SECRET//SCI [redacted]

[2] (U) The Indictment identifies the unique number of the intelligence report by its last six digits: 3630-09.

[3] [redacted] The full classification markings on this intelligence report are themselves classified. Although the unclassified indictment refers generally to the markings as TOP SECRET//SENSITIVE COMPARTMENTED INFORMATION ("SCI"), the full classification markings are as follows: [redacted] 3630-09. For ease of reference, except where otherwise noted, these full classification markings are abbreviated herein as [redacted]

[redacted]

[redacted]

released an intelligence report, bearing the unique report number [redacted]3630-09, containing this highly-classified information to certain Intelligence Community personnel through a [redacted] information database called [redacted]

[redacted]

[4] (U) All times referred to herein are Eastern Standard Time.

[redacted]

[redacted] the TOP SECRET intelligence information from the [redacted] report was published by Fox News. Specifically, no later than at or around 3:16 p.m. on the afternoon of June 11, 2009, James Rosen, a Fox News reporter working out of the State Department headquarters building, published an article entitled "North Korea Intends to Match U.N. Resolution with New Nuclear Test" on the Fox News website ("the Rosen article" or "Mr. Rosen's June 11th article"). The Rosen article [redacted] contained in the [redacted] report. Further,

[redacted]

[redacted]

the Rosen article revealed that [redacted]

[redacted] The defendant is charged with the unauthorized disclosure of the classified information from the [redacted] report to Mr. Rosen that appeared later that same day in the Rosen article [redacted] Needless to say, this classified information was not declassified before its disclosure to Mr. Rosen and Fox News, and its public disclosure was never lawfully authorized. Indeed, the classified information at issue in this case remains classified at the [redacted] level to this day.

(U) C. The Government's Evidence Against the Defendant[7]

[redacted] The defendant asserts repeatedly in his Motions to Compel that the government's case against him "hinges" on the notion that "an identifiable, finite number of government employees and contractors accessed [redacted] [i.e., the [redacted] report] prior to the posting of the Rosen article on June 11, and that Mr. Kim was the only one of those individuals who both accessed [redacted] and communicated with Mr. Rosen on that date." Second Mot. at 2; see also First Mot. at 3 ("the government . . . contend[s]

[redacted]

[7] (U) The following is not intended as a complete proffer of the government's evidence that the defendant committed the charged unauthorized disclosure. Rather, it is intended to provide context for the Court's consideration of the requests contained in the defendant's Motions to Compel.

[redacted]

[redacted]

that on a limited number of government employees and contractors had access to [redacted] on June 11, [and] that Mr. Kim and Mr. Rosen were in contact with one another on June 11"). The defendant is simply wrong. As demonstrated below, the United States has substantial evidence demonstrating that the defendant willingly became a clandestine source for Mr. Rosen, and the government does not rely on the number of individuals who had access to the TOP SECRET intelligence at issue to establish the defendant's guilt.

[redacted] Specifically, the defendant and Mr. Rosen communicated through personal email accounts where both he and the Mr. Rosen used aliases, or through a clandestine telephone communications plan proposed by Mr. Rosen. Prior to the unauthorized disclosure at issue, Mr. Rosen solicited specific, sensitive intelligence information about North Korea from the defendant, a senior intelligence advisor at the State Department with expertise on that country. The defendant spoke with Mr. Rosen on the telephone on June 11, 2009, multiple times, including one call which occurred *at the same time* that the defendant was actually viewing the TOP SECRET [redacted] report on his classified desk computer. The [redacted] report concerned the same subject matter as that previously solicited by Mr. Rosen, i.e., [redacted] After viewing the TOP SECRET report, the defendant met with Mr. Rosen a short time later outside the State Department. Within hours, Mr. Rosen published classified information from the [redacted] report to the world, [redacted] When confronted with this evidence, the defendant initially lied to the FBI

[redacted]

[redacted]

about his contacts with Mr. Rosen, but later admitted that he had lied and made other key admissions about his conduct and the gravity of the charged offense. Thus, the government's evidence establishing the defendant's guilt is substantial and does not "hinge" on the number of individuals with access to the TOP SECRET intelligence at issue.

(U) **1. The Defendant's Background**

(U) In June 2009, the defendant was on detail from the Lawrence Livermore National Laboratory to the State Department's Bureau of Verification, Compliance, and Implementation ("VCI"). VCI was responsible for ensuring that appropriate verification requirements were fully considered and properly integrated into arms control, nonproliferation, and disarmament agreements and to monitor other countries' compliance with such agreements. On his detail to VCI, the defendant worked as a Senior Advisor for Intelligence to the Assistant Secretary of State for VCI. Although his responsibilities were broader in scope, the defendant considered himself an expert on North Korea.

(U) The defendant's VCI office was located in a Sensitive Compartmented Information Facility ("SCIF") within the State Department headquarters building. As a prerequisite for his work, the defendant maintained a TOP SECRET//SCI security clearance. In consideration for his being granted access to classified information, the defendant executed multiple SF 312 Classified Information Non-Disclosure Agreements ("NDAs") with the United States. Through the NDAs that he signed, the defendant was advised that "the unauthorized disclosure . . . of [classified information] by me could cause irreparable injury to the United States or could be used to advantage by a foreign

[redacted]

[redacted]

nation." By virtue of signing the NDAs, the defendant acknowledged that "any unauthorized disclosure of [classified information] by me may constitute violations of United States criminal laws, including the provisions of Section[] 793 . . ."

[redacted] While working at VCI, the defendant had authorized access to the [redacted] database on which the [redacted] report was released. Through [redacted], the defendant was able to access classified intelligence reports on his State Department classified desk computer. The "click through" banner warned the defendant, like other users of [redacted]

> Due to recent unauthorized disclosures of sensitive intelligence, you are reminded of your responsibility to protect the extremely sensitive, compartmented intelligence contained in this system. Use of this computer system constitutes consent to monitoring of your actions. None of the intelligence contained in this system may be discussed or shared with individuals who are not authorized to receive it. Unauthorized use . . . is prohibited and violations may result in disciplinary actions or criminal prosecution.

The defendant used the [redacted] database to access the [redacted] report.

(U) 2. **The Defendant's Source/Reporter Relationship**

[redacted] Mr. Rosen began working at the State Department headquarters building as the Fox News State Department correspondent on or about April 14, 2009. A few weeks later, at the defendant's request, a State Department colleague of the defendant, John Herzberg, introduced the defendant to Mr. Rosen. Beginning no later than May 11, 2009, the defendant and Mr. Rosen exchanged numerous emails leading up to the unauthorized disclosure of the classified contents of the [redacted] report on June 11, 2009. While they sometimes sent and received emails to each other reflecting their true names, they also employed aliases (i.e., "Leo" for the defendant and "Alex" for Mr. Rosen) while using personal email accounts (i.e., [redacted]@yahoo.com for the

[redacted]

[redacted]

defendant and [redacted]@gmail.com[8] for Mr. Rosen). What follows is a chronological listing of the most pertinent emails:

- On May 11, 2009, the defendant sent an email to Mr. Rosen that stated:

> I am back from my trip. Here is my personal information.
>
> Please send me your personal cell number. I believe you have mine. It was great meeting you.
>
> Thanks,
> Stephen

The defendant attached to this email his resume and a biographical description, both of which noted his access to classified information and his expertise concerning North Korea.

- On May 20, 2009, Mr. Rosen sent an email to the defendant responding to the above May 11, 2009 email. In the email, Mr. Rosen solicited the defendant as an unnamed source of non-public government documents and information, and outlined a clandestine communications plan. The email stated:

> Your credentials have never been doubted – but I am nonetheless grateful to have the benefit of a chronological listing of your postings and accomplishments. I only have one cell phone number, on my Blackberry, which I gave you[redacted]. Unfortunately, when I am seated in my booth at the State Department, which is much of every day, it does not get reception. thus [sic] I instruct individuals who wish to contact me simply to send me an email to this address [redacted]@gmail.com]. *One asterisk means to contact them, or that previously suggested plans for communication are to proceed as agreed; two asterisks means the opposite.* With all this established, and presuming you have read/seen enough about me to know that I am trustworthy . . . let's get about our work! What do you want to accomplish together? As I told you when we met, I can always go on

[redacted]

[redacted]

[redacted]

> television and say: "Sources tell Fox News" But I am in a much better position to advance the interests of all concerned if I can say: "Fox News has obtained . . ."
>
> Warmest regards,
>
> James

[Emphasis added.]

- In another May 20, 2009 email, the defendant indicated to Mr. Rosen that they should communicate through his [redacted]@yahoo.com account. He also asked for guidance from Mr. Rosen on information that would be of interest to him. The email stated:

> Let's use this account [i.e., [redacted]@yahoo.com]. I will email you when there is something you need or vice versa [sic].
>
> I am new to this. Do you have any good suggestions on things you might be interested in doing?

- On May 22, 2009, Mr. Rosen sent an email, seemingly in response to the defendant's inquiry in the May 20th email above, and explicitly sought from the defendant the disclosure of intelligence information about North Korea. The defendant and Mr. Rosen began to uses aliases in this email. The email stated:

> Thanks Leo [a.k.a. the defendant]. What I am interested in, as you might expect, is breaking news ahead of my competitors. I want to report authoritatively, and ahead of my competitors, on new initiatives or shifts in U.S. policy, events on the ground in North Korea, *what intelligence is picking up*, etc. As possible examples: I'd love to report that the *IC*[9] *sees activity inside DPRK* [Democratic People's Republic of Korea, i.e., North Korea] suggesting preparations for another nuclear test. I'd love to report on what the hell Bosworth is doing, maybe on the *basis of internal memos* detailing how the U.S. plans to revive the six-party talks (if that is even really our goal). I'd love to see some *internal State Department analyses* about the state of the DPRK HEU program, and Kim's health or his palace intrigues [redacted]

[9] (U) "IC" is a common acronym denoting "the Intelligence Community."

[redacted]

[redacted] In short: Let's break some news, and expose muddle-headed policy when we see it or force the administration's hand to go in the right direction, if possible. The only way to do this is to EXPOSE the policy, or *what the North is up to*, and the only way to do that authoritatively is *with EVIDENCE.*

Yours faithfully, Alex [a.k.a., Mr. Rosen]

[Emphasis added.] As mentioned above, part of the classified information from the [redacted] report that the defendant disclosed to Mr. Rosen and Fox News on June 11, 2009, was [redacted]

- On May 26, 2009, Mr. Rosen sent an email to the defendant that stated:

> Is the honeymoon over already? Thought we would have much to discuss today. [redacted]

Telephone records demonstrate that in the hours before this email, numbers associated with Mr. Rosen or Fox News placed seven brief phone calls to the defendant. Based on the language of the email, it does not appear that Mr. Rosen was able to reach the defendant during those calls. A half-hour after this email was sent, however, two calls were placed from the defendant's cell phone, first a 70 second call to Mr. Rosen's cell phone and then a 43 second call to Mr. Rosen's State Department desk phone which was the number he told the defendant to call. Forty minutes later, a call was placed from Mr. Rosen's desk phone to the defendant's desk phone. This call lasted over twenty minutes.

[redacted]

- On June 4, 2009, the defendant sent an email to Mr. Rosen the subject line of which was "personal leave." In the email, the defendant advised Mr. Rosen about his leave schedule for the coming month. It stated:

> Alex,
>
> I will be away on personal leave from June 22 to July 10. I will be in Seoul not in Washington. This email here would be best to reach me, if need be.
>
> Leo

In addition to these email exchanges, an analysis of the available phone records shows dozens of calls between phone numbers associated with the defendant and phone numbers associated with Mr. Rosen for the period May 26, 2009, through June 11, 2009, and thereafter.

(U) **3. <u>The Defendant's Activities on June 11, 2009</u>**

[redacted] The United States has collected compelling classified and unclassified electronic evidence during its investigation demonstrating that the defendant disclosed the contents of the [redacted] report at issue to Mr. Rosen [redacted] on June 11, 2009. According to badge records, Mr. Rosen arrived for work at the State Department's press offices at or around 10:14 a.m. on June 11th. According to State Department telephone records, Mr. Rosen checked his voicemail,[10] and then immediately placed a telephone call to the defendant's State Department desk phone. This call lasted approximately 34 seconds. Two minutes later, at or around 10:17 a.m., the defendant returned Mr. Rosen's call. They spoke for approximately 11 minutes and 35 seconds. Immediately following the conclusion of that

[10] (U) State Department phone records indicate that the defendant left a voice message for the reporter the previous afternoon.

[redacted]

telephone call, State Department badge records indicate that the defendant and Mr. Rosen left the Main State headquarters building at nearly the same time. They were absent from the building for nearly 40 minutes, and then they returned to the building at nearly the same time. While outside of the State Department headquarters building, the defendant forwarded to his [redacted]@yahoo.com account the May 22, 2009 email from Mr. Rosen that detailed the type of intelligence information that Mr. Rosen wanted the defendant to provide Fox News about North Korea, including [redacted] Immediately after returning to State Department headquarters, at or around 11:18 a.m., the defendant called Mr. Rosen. They spoke for approximately 3 minutes and 58 seconds. Moments after that call ended, at or around 11:24 a.m., the defendant called Mr. Rosen again. That call lasted around 18 seconds.

[redacted] Approximately three minutes later, the defendant accessed on his State Department TOP SECRET desk computer the [redacted] report concerning North Korea's [redacted] The defendant plainly found the intelligence report of interest. According to electronic audit records of the [redacted] database, the defendant first accessed the report at approximately 11:27 a.m. and reviewed it over the next three minutes. He then accessed the report again at or around 11:37 a.m. and again at or around 11:48 a.m.

[redacted] At the same time that the defendant was viewing the [redacted] report on June 11, 2009, he called Mr. Rosen. Specifically, the defendant called Mr. Rosen's State Department desk phone at or around 11:37 a.m. That call lasted

[redacted]

[redacted]

approximately 20 seconds. Immediately thereafter, the defendant called Mr. Rosen's cell phone. This second call lasted approximately 1 minute and 8 seconds.

[redacted] Approximately 23 minutes later, the defendant and Mr. Rosen again departed the State Department headquarters building at nearly the same time. They were absent from the building for approximately 25 minutes. They then returned to the building within 10 minutes of each other. It appears that Mr. Rosen's return to the building was delayed somewhat. At the same time that the defendant was re-entering the building, but just before Mr. Rosen's return, telephone records show that Mr. Rosen began contacting his superiors at Fox News by telephone. Specifically, at or around 12:21 p.m., Mr. Rosen placed calls to phone numbers associated with the Fox News Washington Bureau Chief, the Fox News Washington Bureau Vice President, and the Fox News Washington Bureau Assignment Editor. After his re-entry to the State Department headquarters building, Mr. Rosen placed a call to a phone number associated with the Fox News Washington Bureau Chief at or around 12:43 p.m. Soon thereafter, at or around 12:50 p.m., Mr. Rosen received a phone call from a number associated with Fox News (area code 202) that lasted nearly twenty minutes. About an hour and a half later, at or around 2:21 p.m., through then-Fox News White House correspondent Major Garrett, Fox News sent an email to a White House press official seeking "NSC guidance" about "some very good stuff on North Korea" that Mr. Rosen had obtained. [redacted]

[redacted]

[redacted]

[redacted] No later than at or around 3:16 p.m., the Rosen article was posted on the Fox News website. The classified information from the [redacted] report about North Korea's [redacted] was published by Fox News using strikingly similar language:

[redacted]

Tracking closely the classified content of the [redacted] report, the Rosen article reported that [redacted] The article also states that [redacted]

[redacted]

[redacted]

[redacted] Immediately after the Rosen article appeared on the Fox News website, the defendant placed another call to Mr. Rosen on June 11, 2009. This call lasted approximately 22 seconds.[11]

(U) 4. The Defendant's Post-Disclosure Emails

[redacted]

[redacted] On the morning of June 13, 2009, a Saturday, the defendant received an email from a colleague at DOE. The body of the email stated that [redacted] The subject line of the email to the defendant was

[11] (U) An analysis of the available phone records also shows continued phone contact between the defendant and the reporter through mid-July 2009.

[redacted]

[redacted]

"WE WON!!!" The defendant responded with an email approximately two minutes later that include the [redacted] On June 14, 2009, a Sunday, the defendant sent an email to Mr. Rosen, the subject line of which was "Alex." In the email, the defendant wrote:

> I was thinking that perhaps it would be a good for you to write a [redacted]
>
> Just a thought. I am work [sic] this week but am off starting next Saturday for about 2 weeks.
>
> Please read and delete.
>
> Thanks.

(U) On Monday, June 15, 2009, another DOE intelligence colleague sent an email to the defendant, stating in part:

> [We] are kind of going around and around on the news out of NK.
>
> [redacted]
>
> My opinion is more nuanced and sophisticated. I say that [redacted]

The defendant responded with an email that stated, in part:

> Instead of splitting hairs, why don't you start growing some? :)) . . . .

[redacted]

[redacted]

T.S. Eliot said, humankind cannot bear very much reality. But it seems that some humans cannot bear even a little bit of reality . . . .

Who said I told you so? I did . . . .

(U) 5. Discoveries in the Defendant's State Department Office

[redacted] On the evening of August 31, 2009, federal agents with the State Department's Diplomatic Security Service entered the defendant's VCI office, without his knowledge, pursuant to State Department internal regulations, procedures, and computer banner authority, for purposes of imaging his computer hard drives. The agents saw lying in plain view on the defendant's desk next to his computer a photocopy of the Rosen article, as well as another article written by Mr. Rosen. (These articles were also observed on the defendant's desk during similar entries made on September 21 and 22, 2009. The articles were no longer there during a similar entry on September 26, 2009, which occurred after the defendant's first interview with the FBI.) The agents also saw lying in plain view on the defendant's desk next to his phone a handwritten note with Mr. Rosen's alias "Alex" and Mr. Rosen's Blackberry and State Department desk numbers on it.

[redacted] On the evening of September 22, 2009, when the federal agents returned to the defendant's VCI office, they discovered handwritten notes underneath classified hard drives that were then being stored inside of a government safe in the defendant's office. The handwritten notes listed a series of intelligence reports

[12] (U) The defendant is fluent in Korean.

[redacted]

with a brief description of the substance of the report and the report number. This list included a reference to the [redacted] report at issue in this case. The handwriting appears to reflect the following notation: [redacted] The handwriting also reflects the [redacted] report number: [redacted]3630-09."

(U) 6. **The Defendant's Statements to the FBI**

[redacted] On September 24, 2009, the FBI conducted a non-custodial interview of the defendant about the unauthorized disclosure of the classified information contained in the [redacted] report. The defendant denied being a source of the classified information in Mr. Rosen's June 11th article. The defendant admitted to meeting Mr. Rosen in approximately March 2009, but denied having had any contact with him after that. The defendant acknowledged that State Department protocol required him to go through the State Department press office before he could speak with the press. The defendant stated, "I wouldn't pick-up a phone and call Rosen or Fox News." The defendant was dismissive of the significance of the classified information in the Rosen article, referring to it as "nothing."

[redacted] On March 29, 2010, the FBI conducted a second non-custodial interview of the defendant. During the interview, the defendant made numerous admissions, including:

- confirming that the classified information disclosed in the Rosen article was national defense information and that most of it, in the defendant's mind, was properly classified at the TOP SECRET//SCI level;
- confirming that the same disclosures in the Rosen article were, in the defendant's mind, "egregious," involved [redacted] and "bad";

[redacted]

[redacted]

- acknowledging that, while he could not recall the specifics of the [redacted] report, he was "fairly certain" he had reviewed it and agreed that if electronic records indicated that he had accessed the report then he did so;

- agreeing that the classified information disclosed in the Rosen article appeared to be derived from the [redacted] report with [redacted]

- [redacted]

- admitting that the classified information disclosed in the Rosen article, to his knowledge, did not "match" information in the public domain, but advising that "bits and pieces" of the article were possibly derived from open source information;

- re-stating his false statement from his interview with the FBI on September 24, 2009, that he had had no contact with Mr. Rosen after they first met in Spring 2009;

- after being confronted with the evidence of his extensive contacts with Mr. Rosen in the months after they had first met, (i) first stating that his calls with Mr. Rosen had been facilitated by an unidentified "friend" and that he did not inform the FBI of his phone contacts with Mr. Rosen because he did not consider them to be "direct contacts;" but then later (ii) openly admitting during the interview that he had "lied" to the FBI about the extent of his relationship with Mr. Rosen because he was "scared" that the FBI might investigate him for the unauthorized disclosure;

- admitting that emails seized during the FBI's investigation were, in fact, emails between himself and Mr. Rosen;

- while denying that he had met face-to-face with Mr. Rosen on the day the Rosen article was published (June 11, 2009), admitting that he had met with Mr. Rosen outside of the State Department headquarters building at other times including once following the FBI's first interview of him on September 24, 2009; and

[redacted]

[redacted]

[redacted]

- after being asked if he confirmed information in the Rosen article, admitting that "I discussed some aspects of North Korea issue on June 11th. I did not provide Rosen with any documents."

According to the FBI agents who interviewed him, the defendant never provided a coherent explanation for the evidence of his extensive contacts with Mr. Rosen, including the contacts that occurred on June 11, 2009 – the day of the unauthorized disclosure charged in this case. At one point, the defendant indicated that he was communicating with Mr. Rosen in the hope that Mr. Rosen "could help put him in a think tank." To be clear, the defendant denied that he was a source for Mr. Rosen or had knowingly provided Mr. Rosen with classified documents or information. Nevertheless, the defendant also told the FBI agents that he may have "inadvertently" confirmed information that he believed Mr. Rosen had already received from other individuals. Indeed, the defendant vacillated during the interview about whether he had disclosed the classified information in the [redacted] report to Mr. Rosen: "It's apparent I did it. I didn't say 'did you see this.' I think I did it. I can't deny it. I didn't give him [redacted] I didn't provide him with the stuff."

(U) III. Legal Standards

(U) The majority of the documents sought in the defendant's Motions to Compel are classified. The adjudication of the motions must, therefore, be governed by the legal standards for classified discovery. See Roviaro v. United States, 353 U.S. 53 (1957), United States v. Yunis, 867 F.2d 617 (1989). The defendant also seeks discovery under Rule 16 discovery and Brady v. Maryland, 373 U.S. 83 (1963). We set forth below the different legal standards for classified and unclassified discovery.

[redacted]

[redacted]

(U) A. Classified Information Privilege

(U) 1. The Executive Branch Has Sole Authority to Classify Information

(U) The Executive Branch of the United States has a "'compelling' interest in withholding national security information from unauthorized persons in the course of executive business." Department of the Navy v. Egan, 484 U.S. 518, 527 (1988) (quoting Snepp v. United States, 444 U.S. 507, 509 n. 3 (1980)). As the Supreme Court has repeatedly stressed, courts have been "reluctant to intrude upon the authority of the Executive in . . . national security affairs." Id. at 530; see Center for Nat'l Sec. Studies v. United States Dep't of Justice, 331 F.3d 918, 926-27 (D.C. Cir. 2003). Accordingly, courts have recognized that the determination of whether to classify information, and the proper classification thereof, is a matter committed solely to the Executive Branch: "[T]he government . . . may determine what information is classified. A defendant cannot challenge this classification. A court cannot question it." United States v. Smith, 750 F.2d 1215, 1217 (4th Cir. 1984), rev'd on other grounds, 780 F.2d 1102 (4th Cir. 1985) (en banc); see also United States v. Musa, 833 F. Supp. 752, 755 (E.D. Mo. 1993).

(U) 2. The Government's Classified Information Privilege Can Preclude Discovery of Otherwise Relevant Evidence

(U) The United States possesses a common law privilege in classified information similar to that relating to confidential informants. See Roviaro v. United States, 353 U.S. 53 (1957). In Roviaro, the defendant sought the identity of a confidential informant who was the "sole participant, other than the accused, in" a charged drug transaction." 353 U.S. at 64. The Supreme Court recognized the government's privilege in protecting the identity of confidential informants, but held that "[w]here the disclosure of an informer's

[redacted]

[redacted]

identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." Id. at 60-61. The Court explained that determining whether the privilege should be breached ultimately

> calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.

Id. at 62. In light of the fact that the confidential informant in Roviaro, "helped to set up the criminal occurrence and . . . played a prominent part in it," the Court was convinced his identity had to be disclosed to the defendant. Id. at 64.

(U) The Roviaro standard has been applied to cases involving classified information in this Circuit. See United States v. Yunis, 867 F.2d 617, 622 (D.C. Cir. 1989). In Yunis, which involved the highjacking of an international flight, the United States Court of Appeals for the District of Columbia Circuit held that classified information may be withheld from discovery unless it is both relevant and "helpful to the defense of the accused . . . ." Id. at 623. At issue in Yunis were audio recordings of the defendant's conversations with an undercover law enforcement asset – some of which were relevant to the charges at issue. The United States produced some of the statements and moved under CIPA to withhold others. In ruling on the government's motion for a protective order withholding discovery of some of the recorded conversations under Rule 16(d)(1) and CIPA Section 4, the Yunis court noted that the withheld conversations discussed many matters that were "completely unrelated to the hijacking or any other

[redacted]

terrorist operation or criminal activity." Id. at 618. The court then applied the Roviaro standard:

> [C]lassified information is not discoverable on a mere showing of theoretical relevance in the face of the government's classified information privilege . . . [T]he threshold for discovery in this context . . . requires that a defendant seeking classified information, like [the] defendant seeking the informant's identity in Roviaro, [be] entitled only to information that is at least "helpful to the defense of the accused."

Id. at 623 (quoting Roviaro, 353 U.S. at 60-61); see also id. at 625 (noting that "relevant and helpful" phrase was preferred articulation of term "materiality" also used in Roviaro).

(U) Before ruling on the relevance or helpfulness of the discovery sought by the defense, the Yunis court held that the United States had a colorable claim that the discovery sought contained classified information. Id. at 623. In so holding, the court found the United States had an interest in protecting from disclosure not only the contents of the conversations, but also the sources and methods used to collect them. Id. (citing CIA v. Sims, 471 U.S. 159, 175 (1985)). Specifically, the Yunis court recognized that – as in cases where the United States invokes its informant privilege – much of the government's national security interest "lies not so much in the contents of the [Rule 16] conversations, as in the time, place and nature of the government's ability to intercept the conversations at all." Id.; see also United States v. Felt, 491 F. Supp. 179, 183 (D.D.C. 1979) ("Protection of sources, not information, lies at the heart of the claim [of privilege] by the Attorney General."). The court found that details revealed in surveillance "would make all too much sense to a foreign counter-intelligence specialist who could learn much about this nation's intelligence-gathering capabilities from what the documents withheld from discovery revealed about sources and methods." Yunis, 867 F.2d at 623.

[redacted]

(U) 3. Cleared Defense Counsel is Not Automatically Entitled to Classified Material

(U) A defense attorney's security clearance alone does not authorize him or her to have access to classified information; there must also be a "need-to-know." Executive Order 13526 § 4.1(a)(3), 75 Fed. Reg. 707 (December 29, 2009). This determination rests with the Executive Branch. Indeed, where a court orders the production of classified information to the defense following an ex parte, in camera review of such information pursuant to CIPA § 4, the United States "would then need to decide prior to court-ordered disclosure whether to produce the information to defense counsel subject to appropriate security clearance, seek alternative relief under CIPA – such as substitution of a summary or statement of the discoverable information – or file an interlocutory appeal under CIPA § 7." United States v. Abu-Jihaad, No. 3:07-CR-57 (MRK), 2007 WL 2972623, at *2 (D. Conn. Oct. 11, 2007). Of course, the Executive Branch could choose an even more drastic result and move to dismiss the charges.

(U) In any event, defense counsel's security clearance does not make discoverable that which is not otherwise discoverable under the Roviaro/Yunis "relevant and helpful" standard for classified discovery. See, e.g., United States v. Bin Laden, 126 F.Supp.2d 264, 287 n. 27 (S.D.N.Y. 2000), aff'd sub nom. In re Terrorist Bombings of U.S. Embassies in E. Africa, 552 F.3d 157 (2d Cir. 2008) ("Defense counsel's assertion that, given their security clearance, they ought to have access to the sensitive documents is not persuasive to the Court. As the Government explains those security clearances enable El-Hage's attorneys to review classified documents, but they do not entitle them to see all documents with that classification.") (internal quotation marks and citation omitted); Abu-Jihaad, 2007 WL 2972623, at *2 ("If . . . the Court decides that the information is

[redacted]

not discoverable at all, Defendant is not entitled to production of the information, regardless whether its counsel is willing to submit to security clearance procedures.") (citations omitted). See also United States v. Libby, 429 F.Supp.2d 46, 48 (D.D.C. 2006) (acknowledging the appropriateness of the government's seeking to withhold classified material through ex parte proceedings under CIPA § 4, "even where defense counsel have security clearances").

(U) **B. Rule 16 of the Federal Rules of Criminal Procedure**

(U) To the extent that the defendant seeks the production of unclassified material that is not exculpatory within the meaning of Brady v. Maryland, 373 U.S. 83 (1963), he must rely on Rule 16(a)(1)(E) of the Federal Rules of Criminal Procedure. Rule 16(a)(1)(E) provides in pertinent part:

> Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and . . . the item is material to preparing the defense.

Fed. R. Crim. P. 16(a)(1)(E). Disclosure under this Rule is only required when the information sought is "material to preparing the defense"; that is, "there is a strong indication that it will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal." United States v. Marshall, 132 F.3d 63, 68 (D.C. Cir. 1998) (internal quotation marks and citation omitted). "Although the materiality standard is 'not a heavy burden,' . . . the Government need disclose Rule 16 material only if it 'enable[s] the defendant significantly to alter the quantum of proof in his favor.'" United States v. Graham, 83 F.3d 1466, 1477 (D.C. Cir. 1996) (citations omitted). In United States v. George, Chief

[redacted]

Judge Lamberth elaborated on the "materiality" requirement in the context of a national security case:

> When analyzing materiality, a court should focus first on the indictment which sets out the issues to which the defendant's theory of the case must respond. See United States v. Poindexter, 727 F. Supp. 1470, 1473 (D.D.C. 1989), rev'd on other grounds, 951 F.2d 369 (D.C. Cir. 1991). An "abstract logical relationship to the issues in the case" is not, however, sufficient to force production of discovery under Rule 16. United States v. Ross, 511 F.2d 727, 762 (5th Cir. 1975). Materiality is, to some degree, a sliding scale; when the requested documents are only tangentially relevant, the court may consider other factors, such as the burden on the government that production would entail or the national security interests at stake, in deciding the issue of materiality. See id. at 763; Poindexter, 727 F. Supp. at 1473. It may also be relevant that the defendant can obtain the desired information from other sources. See Ross, 511 F.2d at 763.

786 F. Supp. 56, 58 (D.D.C. 1992). In this case, the sliding scale of materiality tilts strongly against the compelled disclosure of the few unclassified documents that the defendant seeks.

(U) **IV. Argument**

(U) None of the material that the defendant seeks in his Motions to Compel is exculpatory. Nor could the classified materials be construed as "relevant and helpful" to the defense under the Roviaro/Yunis standard. Indeed, the arguments in the defendant's motions are based repeatedly on misstatements of law, faulty factual premises, incorrect assumptions, and rank speculation. Accordingly, the defendant is not entitled to discovery of the classified material that he seeks. In the few instances where the defendant appears to be moving to compel unclassified material, the defendant has failed to make the requisite showing even under the comparatively lesser standard for unclassified discovery under Fed. R. Crim. P. 16. Thus, as discussed in detail below, the defendant's four Motions to Compel should be denied in their entirety.

[redacted]

[redacted]

(U) A. Defendant's First Motion to Compel Should Be Denied

(U) In his First Motion to Compel, the defendant seeks "an order compelling the government to produce discovery materials . . . relating to additional source documents for the charged disclosure in this case." First Mot. at 1. The defendant moves to compel a variety of classified documents under the rubric of "additional source documents." The thrust of the defendant's First Motion is that there is classified material that the United States has withheld from discovery, either through redactions or entire withholdings, that constitutes other potential sources for the charged unauthorized disclosure in this case. In large part, the defendant simply guesses, misapprehends, or incorrectly assumes what has been withheld. Without confirming or denying the existence of the purported classified material that the defendant seeks, the United States demonstrates next that there is still no foundation for the defendant's First Motion. Therefore, the Court should deny it in its entirety.

(U)1. Additional Intelligence Reports on the Same Subject Matter

[redacted] Under this subheading, the defendant has moved to compel other classified intelligence reports "created between April 1, 2009, and June 11, 2009, addressing the same topics as those described in [redacted] [i.e., the [redacted] report] and the Rosen article." First Mot. at 6. The defendant's stated rationale for this sweeping request for classified material is that the government's discovery productions indicate that the [redacted] report "was not the only intelligence report discussing [redacted] as of June 11, 2009." Id. The United States does not disagree with the assertion that there were other classified documents that contained the same intelligence information as that found

[redacted]

[redacted]

in the [redacted] report. Indeed, the United States has already produced all such classified documents to the defense (i.e., the predecessor documents and the [redacted] materials).[14] Without conceding that the United States was required to do so under any defense theory, the government has searched for "any additional intelligence reports concerning any of the specific topics discussed in the Rosen article, namely North Korea's [redacted] First Mot. at 8. Following a broad and time-consuming search, the United States has found no additional responsive material, under the definition provided by the defendant in his motion.

[redacted] It is plain, however, that the defendant's request for classified information is much more expansive than the rationale that he sets forth to support it. In his proposed Order for the Court, the defendant does not limit his request to any additional intelligence reports concerning "North Korea's [redacted] First Mot. at 8. Rather, the defendant's request is far broader in subject matter and temporal scope. The defendant seeks any intelligence reports addressing eleven topics (see First Mot., Proposed Order, (1)(a) through (1)(k)). While the listed requests all use the term "North Korea," they are untethered to the actual intelligence information at issue

[14] [redacted] In support of the request for additional classified intelligence reports, the defendant asserts that "there is no reason to assume that the article was based on one, and only one, intelligence report." First Mot. at 8 n. 7. Yet, in the same section of his motion, the defendant acknowledges that the government's case, supported by discovery provided to the defense, is that the article was based on the contents of one intelligence report (or iterations thereof) and that the defendant was the only person who both accessed that one intelligence report and spoke with the reporter on June 11, 2009. Id. at 7. While the defendant is, of course, entitled to challenge the government's case and the evidence in support of its case, the defendant's statement that there is "no reason to assume" that the article was based on the one intelligence report simply ignores the evidence.

[redacted]

[redacted]

in this case – specifically, the intelligence information that the defendant is charged with disclosing to Mr. Rosen and that the defendant himself defines as the relevant subject matter of this case (i.e., "North Korea's [redacted] For example, any [redacted] (see First Mot., Proposed Order, (1)(c)), is irrelevant to what [redacted] Moreover, the temporal scope of the defendant's request far exceeds any claim that such classified material ever could be relevant and helpful under the Roviaro/Yunis standard. To illustrate, any intelligence reports on the topics listed in the defendant's Proposed Order [redacted] could not be relevant and helpful to the charged disclosure, which concerns [redacted]

(U) What the defense really seeks with this request (and others discussed elsewhere in this omnibus opposition) is to open the floodgates of classified discovery. The defendant acknowledges as much, when he signals what he would do with such discovery if it were compelled. That is, the defendant seeks to "expand the universe of individuals who may have disclosed classified material" to the reporter. First Mot. at 8. The defendant would have this trial delayed indefinitely as the United States would be called upon to expend enormous time and resources to track down irrelevant classified documents and information about who accessed them (including, when and how), and to respond to a myriad of new defense requests. The term "graymail" typically refers to

[redacted]

[redacted]

defense demands for classified information that the United States is loath to disclose upon pain of dismissal of an indictment. See United States v. Smith, 899 F.2d 564, 565 n. 1 (6th Cir. 1990). The defendant here is engaging in a kind of "process graymail," whereby he seeks to have the Court force the United States to go far beyond any conceivable discovery requirement in a futile exercise to plow and re-plow through classified databases, all the while pushing the trial of this matter further off into the distance. The Court should decline the defendant's invitation to grind this case to a halt.

(U) 2. **The Daniel Russel and Jeffrey Bader Materials**

[redacted] Under this subheading, the defendant has moved to compel: (1) an unredacted copy of an email sent by Daniel Russel, then-NSC Director for Japan and Korea, on the morning of June 11, 2009, and "related source documents"; (2) an unredacted copy of a reply email sent by Jeffrey Bader, then-Special Assistant to the President and National Security Staff Senior Director for Asian Affairs, later that morning and "any intelligence reporting or other materials relied upon by Mr. Bader"; (3) an email sent by [redacted] and an unredacted copy of an email sent by [redacted] that was based on [redacted] email; and (4) an unredacted copy of the FBI 302 report of Mr. Russel's interview on August 11, 2009, along with the underlying agents' notes of that interview. Each of these requests is based on a faulty factual premise and on that basis should be denied.

[redacted] The defendant presumes that the material that has been withheld, either by redaction or entire withholding, must constitute or refer to "additional source documents discussing North Korea's [redacted]

[redacted]

[redacted]

See, e.g., First Mot. at 9 (speculating about redactions taken from Mr. Russel's June 11th email). As for the Russel and Bader materials ((1), (2), and (4), above), the defendant is simply wrong. As for the [redacted] materials ((3), above), the defendant is not only wrong in his speculation about the redactions and withholdings, the classified material that he seeks could not possibly be relevant and helpful under the Roviaro/Yunis standard, because it concerns [redacted] that occurred well before the relevant time period. The timing of the charged disclosure is a key feature of this case that the defendant chooses to ignore. Again, the charged disclosure concerns [redacted] The defendant strains credulity when he asserts that government emails circulated in [redacted] that the defendant is charged with disclosing on June 11, 2009.[15]

(U) And, once again, the defendant is transparent about his real intentions in lodging these requests. For example, the defendant seeks unredacted copies of the [redacted] emails because they purportedly "point[] not only to the existence of additional source documents, but also to other potential leakers, as anyone who received the [redacted] emails could have disclosed their contents" to the reporter. First Mot. at

[15] [redacted] In making this argument, the defendant selectively quotes from [redacted] email, omitting the language in bold: [redacted] Cf. First Mot. at 12. [redacted] in the Rosen article.

[redacted]

13. The defendant presumably would investigate, or have the United States investigate for him through a myriad of new discovery demands, where the information from the [redacted] emails went, by what means, and to whom.[16] The Court should not condone further delay of trial in this matter so that the defense can engage in such a fruitless exercise.

(U) 3. [redacted] and [redacted] Materials [redacted] Under this subheading, the defendant has moved to compel: (1) an email sent by [redacted] at 2:41 p.m. on June 11, 2009, with an attachment; (2) an email sent by [redacted] on June 12, 2009; and (3) [redacted] that [redacted] brought to his interview with the FBI on July 12, 2012. The defendant provides differing rationales for each of these classified documents. All of which rest on faulty factual assumptions.

[redacted] The defendant's demand for [redacted] 2:41 p.m. email and attachment rests on the incorrect assumption that they provide a "clear indication that the [redacted] report] was not the only document in existence on June 11, 2009, discussing North Korea's [redacted] As stated above, the United States has produced in classified discovery to the defense other classified documents containing the same intelligence information as the [redacted] report, namely the predecessor documents and the [redacted] materials. The defendant's

[16] (U) To address the last request in this section of the defendant's First Motion (i.e., additional intelligence reports identified [redacted], see First Mot. at 15-16, the parties held a meet-and-confer session at the U.S. Attorney's Office on March 13, 2013. At that meeting the United States made representations to the defense about the government's search for electronic records that could be responsive to the defendant's request. Based on those representations, the defense has advised the United States that it considers this demand resolved. Therefore, this aspect of the defendant's motion should be denied as moot.

[redacted]

complaint here is that he believes that [redacted] 2:41 p.m. email and its attachment constitute other potential source documents. They do not. The body of the email refers to the [redacted] report itself (i.e., [redacted] 360-09), but does not discuss its contents. Nor does the attachment to the email discuss [redacted] Therefore, while the United States disagrees with the defendant's contentions about the "cut-off" time,[17] that disagreement is irrelevant to this request.

[redacted] The defendant also seeks [redacted] June 12th email on the mistaken belief, purportedly based on [redacted] FBI 302, that this email "discusses the relationship between the information in the Rosen article and the information contained in the [redacted] First Mot. at 24. [redacted] June 12th email contains no such discussion. Moreover, [redacted] FBI 302 does not purport to state otherwise. Rather, according to the FBI 302, the sum and substance of [redacted] statement on this topic is as follows: [redacted] displayed an e-mail for Agents from 06/12/2009 at

[17] [redacted] The United States had previously used 3:24 p.m. as the "cut-off" time, based on the then-best evidence of the earliest time of publication of Mr. Rosen's June 11th article. The purpose of the cut-off time is to establish a time after which the dissemination of the intelligence information at issue is irrelevant, because the unauthorized disclosure to reporter James Rosen and Fox News had already occurred. The cut-off time of 2:21 p.m. is more appropriate, because the unauthorized disclosure had already occurred by that time. This conclusion is based on the following events, supported by documentary evidence produced in discovery: at 2:21 p.m., Fox News contacted the White House by email asking for guidance "about some very good stuff on North Korea" that Mr. Rosen had already received; Mr. Rosen called the White House at 2:33 p.m.; the White House returned Mr. Rosen's call at 2:36 p.m.; Fox News published Mr. Rosen's fifteen paragraph article on the Internet no later than 3:16 p.m.; and that [redacted] The defendant's contention that "there is no indication in any of the documents produced by the government in this case that the 'very good stuff' referred to in the 2:21 p.m. email meant the contents of [redacted] report]" (First Mot. at 21 n. 13) (emphasis added), is specious.

[redacted]

[redacted]

12:21pm in which the topic pertained to [redacted]

[redacted] The defendant's demand for the [redacted] publication that Mr. Claster brought to his interview with the FBI on July 12, 2012, is based on nothing more than erroneous guesswork. First, the defendant speculates, incorrectly, that the report might have "completely debunked the alleged intelligence contained in th[redacted] report]." First Mot. at 24. It did not. Second, the defendant speculates, incorrectly, that the report might have contained the same information disclosed to Mr. Rosen, as reported in Mr. Rosen's article. Id. It did not. Finally, the defendant seeks to manufacture a discovery argument out of the fact that [redacted] chose to bring the report to his interview. Id. There is no support in law or logic that the defense is entitled to any document or tangible item that a witness chooses to bring to an interview, let alone that such a document would, perforce, meet the Roviaro/Yunis "relevant and helpful" standard for classified discovery. The defendant's demand for these materials should be denied.

(U) 4. The [redacted] Reports

[redacted] Under this subheading, the defendant has moved to compel: (1) an intelligence report identified as [redacted]" which was faxed to [redacted] on the morning of June 11, 2009, and which [redacted] mistakenly believed was a source document for Mr. Rosen's June 11th article; and (2) an intelligence report identified as [redacted]" which [redacted] mistakenly believed was a source document for Mr. Rosen's June 11th article.

[redacted]

[redacted]

The defendant's argument for compelled discovery of these classified reports rests on these witnesses' accounts. For example, referring to [redacted], the defendant states that "[i]f [redacted] found that the information contained in [redacted] was 'related to' the information contained in the Rosen article, it is certainly 'relevant and helpful' to the defense to determine for itself whether it was an additional source document for the Rosen article." First Mot. at 28-29. The United States does not contest that these witnesses initially provided accounts to the FBI that identified these classified documents as potential source documents for Mr. Rosen's June 11th article. (After later reviewing the documents in question, both witnesses corrected their error.) Nonetheless, that a witness incorrectly believed that a particular intelligence report was a source document for a news story (however the witness may have come to that mistaken conclusion) does not make the classified report "relevant and helpful" to the defense. Without revealing the content of either intelligence report in this filing, they are not potential source documents. The defendant has simply taken mistakes made by these witnesses to manufacture a discovery argument. His request for these classified materials should be denied.

(U) 5. Government Employee Emails

[redacted] Under this subheading, the defendant has moved to compel the production of "any emails from June 10 or June 11, 2009, in which those government employees and contractors who accessed [redacted] report] prior to publication of the Rosen article discussed the topics addressed in the article." First Mot. at 29. The defendant defines the scope of this request to encompass the same eleven topics discussed in Section IV.A.1. The defendant contends that this request is

[redacted]

[redacted]

necessitated, notwithstanding the government's representations about its search for potentially-discoverable emails, because the United States has not produced emails in which: (1) [redacted] comment on the content of [redacted] or discuss [redacted] the information contained therein"; (2) there is discussion of the "alleged significance of [redacted]"; or (3) "one employee or contractor instructed another to view the report." First Mot. at 30. Without listing all of the emails produced to date, or conceding that such emails are in fact discoverable, the defendant is simply wrong about each category of emails which collectively purport to form the basis for this request.[18] Not only has the United States produced such emails, the defendant cites or refers to emails from each category to advance other arguments in his Motions to Compel.

[redacted] For example, in the first category, the defendant cites to an email sent by [redacted], on June 11, 2009, about the content of the [redacted] report. See Third Mot. at 9. In the second category, the defendant cites to the production of classified material, including emails, concerning the inclusion of classified information from the [redacted] report in the [redacted]. See First Mot. at 17. In the third category, the defendant refers to National Security Council officials who were "surrounded by colleagues who had accessed" the [redacted] report (see Second Mot. at 11), which assertion is based in part on an NSC email produced in classified discovery.

[18] (U) To be sure, the United States does not agree that the defendant is entitled to the content of internal emails that [redacted], as opposed to emails that may identify other potential source documents or other individuals who may have had access [redacted]. Indeed, the emails were a means to identify some individuals who may have accessed the intelligence at issue.

[redacted]

[redacted]) It bears repeating that the defendant's request is a variation on the "process graymail" approach that he employs elsewhere in his Motions to Compel. Like with his request for any additional intelligence reports addressing the eleven topics concerning North Korea, see Section IV.A.1., the defendant seeks the wholesale production of classified and unclassified email from 168 government employees or contractors for two full days with no demonstrable connection between the emails sought and the unauthorized disclosure at issue in this case. Many of these employees and contractors are analysts with a focus on North Korea. Unsurprisingly, they send and receive a large volume of email about North Korea on a daily basis. The review and production, even in classified discovery, of all of their emails that touch upon any one of the eleven topics defined by the defendant would require an unwarranted and exorbitant expenditure of time and resources that is not reasonably likely to lead to discoverable information. In any event, without conceding that the United States was required to do so, the government has already conducted a broad search through government employee and contractor email for potentially-discoverable email. The United States should not be required to do so again.

(U) B. Defendant's Second Motion to Compel Should Be Denied

(U) The thrust of the defendant's Second Motion to Compel, like his first, is to "expand the universe of individuals who may have disclosed classified material." First Mot. at 8. The defendant does so by seeking discovery concerning other uncharged, alleged unauthorized disclosures [redacted] over a two year period, and about senior government officials for whom there is no evidence that they had access to the classified information at issue. Again, the defendant would have trial in this matter

[redacted]

[redacted]

delayed indefinitely as the United States would be called upon to expend enormous time and resources to track down irrelevant classified documents and information about alleged unauthorized disclosures and senior government officials that have nothing to do with this case. Without confirming or denying the existence of the purported classified material that the defendant seeks, the United States demonstrates next that there is no foundation for the defendant's Second Motion. Therefore, the Court should deny it in its entirety.

(U) **1. Document Control Records for Hard Copies of the Report**

[redacted] Under this subheading, the defendant has moved to compel "document control records and any other documents showing distribution and access to hard copies of [redacted] printed by thirteen different government employees who accessed and printed [redacted] prior to publication of the Rosen article on June 11, 2009." Second Mot. at 6. The United States considers this request resolved. Without conceding that the United States had any obligation to do so, the government has now searched for the requested material related to the thirteen employees identified by the defendant[19] and found no responsive material. Therefore, this aspect of the defendant's Second Motion to Compel should be denied as moot.

[19] [redacted] The defendant asserts inaccurately that "electronic document access records produced by the government" indicate that these thirteen individuals had printed a hard copy of the intelligence report at issue prior to the publication of Rosen's June 11th article. Second Mot. at 7. In fact, audit records show that only nine of these thirteen individuals printed a hard copy of the intelligence report. Nevertheless, the United States searched for the requested material for each of the thirteen individuals identified by the defendant.

[redacted]

[redacted]

[redacted] 2. Other Leaks of Intelligence

[redacted] Under this subheading, the defendant has moved to compel voluminous discovery related to formal requests for formal investigations[20] of other uncharged unauthorized disclosures of information [redacted] on a variety of topics from June 2008 to June 2010. Second Mot. at 8-9. The defendant seeks such discovery apparently to try to establish the possibility that an as-of-yet unidentified individual committed one or more of these other putative unauthorized disclosures and therefore this heretofore unidentified individual was the one who actually made the unauthorized disclosure to Mr. Rosen on June 11, 2009 (i.e., a broad third-party perpetrator theory). Second Mot. at 9. To probe this theory, the defendant seeks a vast amount of presumptively classified documents and information wholly unrelated to the charges in this case. For each such allegedly unauthorized disclosure falling within its request, the defendant demands all material generated during the course of any formal investigation of the disclosure to include the identity of the potential perpetrator, the underlying classified information, if any, that was disclosed, a list of the individuals who accessed that classified information before the unauthorized disclosure, the date and time of their respective accesses, and any documents, emails, or investigative FBI 302s and

[20] (U) For purposes of this request, the defense has defined "formal request" to mean any formal request made by an agency in the Intelligence Community, the Department of Defense, or the White House (including the President's national security advisors) to the Department of Justice for a formal investigation of the potential unauthorized disclosure of intelligence [redacted] from June 2008 through June 2010. See Notice of Filing, ECF Docket No. 80, Exhibit 10 (defense's classified discovery letter, dated June 22, 2012, p. 4); Second Mot. at 8, n. 4. For purposes of this request, the defense has defined "formal investigation" to mean any inquiry by the FBI seeking to identify the potential source of the unauthorized disclosure. See id.

[redacted]

agents' notes generated during the investigation. See Notice of Filing, ECF Docket No. 80, Exhibit 10 (defense's classified discovery letter, dated June 22, 2012, p. 6).

(U) The defendant's demands, if permitted, would expand exponentially the government's discovery obligations in this case, would significantly delay the trial, and would force the United States to turn over to the defense voluminous material – much of which would likely be classified – that has no realistic possibility of generating evidence probative of the unauthorized disclosure charged in the Indictment. Further, given the great difficulty in investigating unauthorized disclosures in the first instance, see United States v. Kim, 808 F.Supp.2d 44, 55 (D.D.C. 2011); United States v. Morison, 844 F.2d 1057, 1067 (4th Cir. 1988) (discussing difficulty in establishing violations of 18 U.S.C. § 793(d)), any suggestion by the defense that either it, or the prosecution team in this matter, can now productively investigate other uncharged unauthorized disclosures would be far-fetched.[21]

[redacted] Moreover, even assuming the defendant could establish who was responsible for one or more other alleged unauthorized disclosures [redacted] that fact would not exculpate the defendant. This is so, because the defendant's argument wrongfully assumes that there can only be one miscreant who is unlawfully disclosing such information. Stated another way, proof that someone else unlawfully disclosed classified information about [redacted] from another intelligence report on another occasion to someone other than Mr. Rosen could not raise a reasonable doubt

[21] [redacted] Even with the [redacted] time frame between the [redacted] receipt of the classified information in the [redacted] report and its unauthorized disclosure to Mr. Rosen on June 11, 2009, the FBI determinedly investigated this case for over a year before it was charged.

[redacted]

[redacted]

about whether the defendant disclosed classified information from the [redacted] report to Mr. Rosen on June 11, 2009.

[redacted] In any event, there is no legal basis to permit the discovery that the defense seeks. Courts have set a threshold for the introduction of such other crimes evidence to prove identity under Fed. R. Evid. 404(b), whether by the prosecution to prove the identity of a charged defendant or, as the defendant would argue here, by the defendant to prove the identity of a third-party perpetrator who purportedly committed the charged offense along with other like offenses. Specifically, introduction of such evidence is limited to those circumstances where the "extrinsic act bears some peculiar or striking similarity to the charged crime, but also that it is the defendant's [or the third-party perpetrator's] trademark, so unusual and distinctive as to be like a signature." United States v. Carter, 87 F.3d 1405, 1413 (D.C. Cir. 1997) (citations and internal quotation marks omitted), rev'd on other grounds, 519 U.S. 1087 (1997).[22] Even assuming that the defendant could establish the identity of a third-party perpetrator for one or more other unauthorized disclosures, he could not show the requisite similarity to the charged crime here. None of the alleged unauthorized disclosures identified by the defendant concern [redacted]

[22] (U) The United States recognizes that there is a split of authority outside of this Circuit about whether and/or how to apply Rule 404(b) to the situation where a defendant seeks to introduce evidence about another person's prior bad acts, i.e., so-called "reverse 404(b) evidence." See generally Wynne v. Renico, 606 F.3d 867, 872 (6th Cir. 2010) (concurrence, collecting cases). While the D.C. Circuit has not ruled on this issue, a plain reading of the Rule demonstrates that its strictures apply to evidence concerning "a person," and not just a defendant. Fed. R. Evid. 404(b). Nonetheless, whether Rule 404(b) is strictly applied where the defendant is the proponent of the other crimes evidence, or whether a more relaxed standard should be applied in that circumstance, there must still be a nexus between the other crimes evidence and the charged offense. That nexus is lacking here.

[redacted]

[redacted]

[redacted] With [redacted] exceptions about which the defendant seeks no discovery,[23] all of the defense-identified alleged unauthorized disclosures [redacted] were made to reporters other than Mr. Rosen. Further, no unauthorized disclosures [redacted] during the defense-identified timeframe were the subject of a formal request for formal investigation by the FBI, to include the alleged unauthorized disclosure to Fox News regarding [redacted][24] Second Mot. at 9-10. Thus, even if the defendant could identify a third-party perpetrator for any of the remaining alleged unauthorized disclosures [redacted] that were the subject of formal requests for investigation, he would not be entitled to present this evidence to the jury in support of a third-party perpetrator theory because there would be no conceivable nexus between those disclosures and this matter.

(U) This is not to say that the defendant could not put on any third-party perpetrator defense in this case. Indeed, it is "widely accepted" that evidence tending to

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[23] [redacted]) The defense has informed the United States that it does not seek discovery regarding [redacted] unauthorized disclosures of classified information to Mr. Rosen [redacted]. The United States had previously advised the defense that the government has evidence [redacted]

[24] [redacted]) The defendant also asserts inaccurately that "there is no evidence that Mr. Kim ever responded to [Mr. Rosen's] inquiry" concerning the [redacted] See Second Mot. at 9. Telephone records show that one day after Mr. Rosen [redacted] the defendant placed a six-and-a-half minute phone call to Mr. Rosen on the same telephone number that Mr. Rosen asked the defendant to call [redacted] the day before.

[redacted]

show that another person committed *the charged crime* may be introduced by a defendant when it is inconsistent with, and raises a reasonable doubt about, the defendant's guilt. Holmes v. South Carolina, 547 U.S. 319, 327 (2006) (citations omitted). But, conversely, such evidence may be excluded when evidence offered for this purpose is remote and lacking a connection with the charged crime. Id. Therefore, a defendant cannot present as part of a third-party perpetrator defense evidence regarding a third party's other crimes in order to prove the identity of that third-party as the perpetrator for the charged crime without demonstrating a nexus between the two. Whether applying the "strikingly similar" standard under Rule 404(b) or a more relaxed standard, the defendant cannot establish the threshold connection between the charged disclosure and the other alleged unauthorized disclosures he has identified in his motion. Accordingly, this Court should deny the defendant's Motion to Compel any existing material concerning these matters.

(U) 3. Other Investigations of NSC Officials

(U) Under this subheading, the defendant has moved to compel "information regarding any other investigation for the unauthorized disclosure of national defense information" with respect to three former senior National Security Council officials: former Deputy National Security Advisor for Homeland Security and Counterterrorism and Assistant to the President, John Brennan;[25] former Deputy National Security Advisor for Strategic Communications, Denis McDonough;[26] and former Chief of Staff and Deputy National Security Advisor for Operations, Mark Lippert.[27] Second Mot. at 10-11.

[25] (U) Mr. Brennan is now the Director of the CIA.

[26] (U) Mr. McDonough is now the White House Chief of Staff.

[27] (U) Mr. Lippert is now the Assistant Secretary of Defense for Asian and Pacific Security Affairs.

[redacted]

The defendant's demand for such material is based on rank speculation and therefore should be denied.

[redacted] Without conceding that the United States had any obligation to do so, the government has searched for documents or information concerning any formal criminal investigation of unauthorized disclosures of national defense information by any of the 168 individuals who may have accessed the intelligence at issue (hereinafter, "the Access List"). Nothing was found. Id. at 10, n. 6; see Notice of Filing, ECF Docket No. 80, Exhibit 16 (government's classified discovery letter, dated August 27, 2012, p. 6); Notice of Filing, ECF Docket No. 91, Exhibit 4 (government's classified discovery letter, dated November 30, 2012, p. 6). The United States also voluntarily searched for and produced information concerning whether any of the individuals on the Access List had "ever failed [a polygraph] examinations, generated inconclusive results, or self-reported inappropriate handling of classified information either prior to or during such an examination." Id. Unsatisfied with these voluntary efforts by the United States, the defendant now demands that the government conduct a search for the same documents and information for Mr. Brennan, Mr. McDonough, and Mr. Lippert. The defendant's request should be denied as there is no evidence that any of these former senior NSC officials ever accessed the intelligence at issue prior to the publication of Rosen's June 11th article.

(U) To address this fatal flaw in his request, the defendant layers two speculative assumptions on top of one another. First, he baldly asserts "that all three had access to [redacted]" because "all three worked in the NSC offices at the White House, and were thus surrounded by colleagues who had accessed the intelligence

[redacted]

[redacted]

report." Second Mot. at 11. On top of that thin reed, the defendant rests further speculation: "that at least one of those three spoke with Mr. Rosen prior to the publication of the Rosen article" because "all worked in the same NSC office in which someone . . . communicated with Mr. Rosen prior to the publication of the article on June 11, 2009." Id.[28] Combining those two assumptions, the defendant therefore concludes that all three NSC officials "both had access to the intelligence at issue and contact with Mr. Rosen on June 11, 2009." Second Mot. at 12. This logic is plainly flawed. Zero plus zero still equals zero.

[redacted] The defendant's layered and erroneous assumptions also ignore the following facts: (1) all three senior officials have denied being the source of the unauthorized disclosure at issue, and there is no evidence demonstrating otherwise; (2) none of them has acknowledged even knowing about the intelligence prior to the publication of the Rosen article, and there is no evidence demonstrating otherwise; and (3) as for the communication from the NSC office in question, [redacted] First Mot., Ex. 2. Thus, it is most reasonable to conclude from the facts that the communication between the NSC office in question and Mr. Rosen on June 11th was nothing more than [redacted].[29] The defendant's

[28] (U) The defendant ignores that at least four other NSC employees also had access to the NSC office phone that had contact with the reporter's phone on June 11th.

[29] (U) The defendant's alternative argument, that the information he seeks "may . . . shed light on the extent to which NSC press officials like Mr. McDonough were in fact authorized to speak to the press on these issues," is specious. Second Mot. at 12

[redacted]

[redacted]

transparent attempt to drag three former senior White House officials into this matter based on rank speculation should be denied.

(U) **4. Other Investigations of John Herzberg**

(U) The defendant goes even further out on limb when he demands that the Court order the disclosure of any polygraph and criminal investigation records of John Herzberg. Second Mot. at 12-13. Mr. Herzberg was the Director of Public Affairs and Public Diplomacy for VCI, the State Department office where the defendant worked on June 11, 2009. As the press officer for VCI, it was Mr. Herzberg's job to communicate with members of the media, including Mr. Rosen. Not surprisingly, at the defense's request, the United States found and produced email communications between Mr. Herzberg and Mr. Rosen. None of those emails demonstrates that Mr. Herzberg ever disclosed classified information to Mr. Rosen, and Mr. Herzberg has denied ever doing so. Most importantly, there is no evidence showing that Mr. Herzberg had access to the intelligence at issue prior to its publication in the Rosen article. Mr. Herzberg is not on the Access List. He has denied having access to the intelligence prior to its publication in the Rosen article. Nevertheless, the defendant demands the review of Mr. Herzberg's polygraph and criminal investigation records.[30] He does so based solely on his speculation that because Mr. Herzberg "worked at the State Department . . . [he] may have obtained the information at issue by word-of-mouth or hard copy from any one of a number of State Department employees who accessed the [intelligence] on June 11, 2009." Second Mot. at 13. The defendant could make that claim with regard to any

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(emphasis in original). The polygraph and criminal investigation records that the defendant seeks could not possibly illuminate that issue.

[30] (U) Unlike some members of the Intelligence Community, the State Department does not polygraph its employees with security clearances.

[redacted]

employee who worked at the State Department on June 11, 2009, or any employee who worked at any of the departments or agencies which then employed individuals on the Access List. The contorted logic of the defendant's request sweeps across the Executive Branch. The defendant's request should be denied.

(U) C. **Defendant's Third Motion to Compel Should Be Denied**

(U) In his Third Motion to Compel, the defendant seeks "an order directing the government to disclose . . . discovery items regarding whether the information at issue in this case is 'national defense information' and whether the alleged disclosure was willful." Third Mot. at 1. In large part, the defendant's requests are based on a faulty understanding of the meaning of those terms. On that basis, and without confirming or denying the existence of the purported classified material that the defendant seeks, the United States demonstrates next that there is no foundation for the defendant's Third Motion. Therefore, the Court should deny it in its entirety.

(U) 1. **Damage Assessment**

[redacted] Under this subheading, the defendant has moved to compel "damage assessments" or other documents "addressing the effects, if any, of the alleged disclosure on national security interests." Third Mot. at 5. According to the defendant, such assessments may demonstrate that the information in the June 11th article allegedly disclosed to Mr. Rosen "was potentially damaging to the United States or helpful to a foreign nation." Id. As demonstrated below, the plain language of Section 793(d) does not impose any such proof requirement on the United States. The defendant's reliance on Fourth Circuit case law that suggests otherwise is misplaced. Properly read, none of Section 793(d)'s elements requires the United States to prove harm – whether potential or

[redacted]

[redacted]

actual – to the national security occurring as a result of an unauthorized disclosure. Nor would the absence of any such harm be relevant to rebut the government's case-in-chief or to any defense to the charged offense. Thus, even if classified, after-the-fact damage assessments by the Intelligence Community[31] were to exist, the defendant would not be entitled to use them at trial because they are simply irrelevant to the determination of guilt or innocence.

[redacted] As this Court previously ruled when denying the defendant's pretrial motions, to convict the defendant of a violation of 18 U.S.C. § 793(d), the United States must only prove that: (1) the defendant lawfully had possession of, access to, control over, or was entrusted with (2) information relating to the national defense (3) that the defendant "ha[d] reason to believe could be used to the injury of the United States or to the advantage of any foreign nation," and (4) that the defendant willfully communicated, delivered, or transmitted such information to a person not entitled to receive it. 18 U.S.C. § 793(d); Kim, 808 F.Supp.2d at 55. With regard to the second element, Section 793(d)'s plain language requires only that the United States prove the information's "relat[ion] to," or connection with, the national defense. 18 U.S.C. § 793(d); see also Kim, 808 F. Supp.2d at 53 ("'The question of the connection of the information with national defense is a question of fact to be determined by the jury as negligence upon undisputed facts is determined'" quoting Gorin v. United States, 312 U.S. 19, 32 (1941)). By its terms, Section 793(d) does not require the United States to prove any harm, whether potential or actual, to the intelligence source or method

[31] (U) Damage assessments are formal Intelligence Community evaluations of the effect of a compromise of classified information on the national security. They are the end result of a long-term, multi-disciplinary process. By definition, any such assessments would post-date the disclosure at issue.

[redacted]

[redacted]

specifically or to the United States more generally as a result of an unauthorized disclosure. Rather, all the United States must show is that the disclosed information *relates to*, or is connected with, the national defense, which is a "generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness." Gorin, 312 U.S. at 28, 31-32. Under this rubric, it is the pre-disclosure "relation to" or "connection with" the national defense that matters, not post-disclosure assessments of harms that could have, or may in fact have, flowed from a given unauthorized disclosure. The information disclosed in this case was either related to the national defense, or it was not, at *the time of the unauthorized disclosure*. While of grave concern to [redacted] and the United States Government generally, what actually happened [redacted] is irrelevant to that question.

(U) Indeed, given the nature of the information at issue – intelligence regarding a hostile foreign country – the United States might never discover the actual harm that a given unauthorized disclosure has caused, or such a discovery may not occur until months, years, or even decades after the crime has been committed. Nothing in the plain language of Section 793(d) requires the United States to delay prosecution until such time as an actual harm arising from the unauthorized is discovered or realized – let alone forgo prosecution altogether in the event that no such harm is ever detected. Nor does Section 793(d) afford the perpetrator of an unauthorized disclosure a windfall, where, by happenstance, the unlawful disclosure causes no detectible harm by the time that he faces trial. Imposing such a requirement would not only be contrary to the plain language of the statute, it would render enforcement of the statute in nearly all cases involving

[redacted]

unauthorized disclosures of intelligence information extraordinarily difficult, if not impossible.

[redacted] The defense's assertion that the government must prove that the "information allegedly disclosed to Mr. Rosen [on June 11th] was potentially damaging to the United States or helpful to a foreign nation" is based on a "judicial gloss" imposed by the Fourth Circuit in United States v. Morison, 844 F.2d 1057, 1073-74 (4th Cir. 1988), on the meaning of "related to the national defense." Third Mot. at 2, 5-6. The Morison decision, however, is not binding and is, in fact, inapposite to this Court's decision denying the defendant's pretrial motions. The Fourth Circuit imposed the "judicial gloss" in Morison in the face of the defendant's First Amendment claims about his prosecution under Section 793. 844 F.2d at 1070; see also id. at 1076 (Wilkinson, J., concurring) and at 1084 (Philips, J., concurring). This Court, on the other hand, has held that the defendant's prosecution raises no such First Amendment concerns. See Kim, 808 F. Supp.2d at 56-57. In so doing, this Court relied not on non-binding Fourth Circuit case law, but on more recent Supreme Court and D.C. Circuit case law. As this Court instructed:

> Relying on the Supreme Court's decision in United States v. Aguilar, 515 U.S. 593, 115 S.Ct 2357, 132 L.Ed.2d 520 (1995), the D.C. Circuit explained [in its en banc 2007 decision in Boehner v. McDermott, 484 F.2d 573, 578 (D.C. Cir. 2007)] that "those who accept positions of trust involving a duty not to disclose information they lawfully acquire while performing their responsibilities have no First Amendment right to disclose that information." . . . . Under that standard, it seems clear that Defendant's prosecution under § 793(d) does not run afoul of the First Amendment. By virtue of his security clearance, Defendant was entrusted with access to classified national security information and had a duty not to disclose that information. He cannot use the First Amendment to cloak his breach of that duty.

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[redacted]

Id. Accordingly, this Court rejected the defense's various First Amendment challenges, and did not impose on the United States the Fourth Circuit's judicial gloss on the meaning of the term "information relating to the national defense." See id. at 55. Nor has any other court outside of the Fourth Circuit imposed the requirement that the United States prove that the unauthorized disclosure at issue was "potentially damaging to the United States or helpful to a foreign nation." See, e.g., United States v. Abu-Jihaad, 630 F.3d 102, 135 (2d Cir. 2010) (defining the "national defense" element of a Section 793(d) offense like this Court did). Indeed, more recent Fourth Circuit case law has noted that Morison's judicial gloss on the meaning of the phrase "information related to the national defense" arguably "offer more protection to defendants than required by [the Supreme Court in] Gorin." United States v. Squillacote, 221 F.3d 542, 580, n. 23 (4th Cir. 2000).

(U) And it is that decision – Gorin, not the Fourth Circuit's decision in Morison – that should serve as this Court's touchstone on the meaning of "related to the national defense." In Gorin the Supreme Court considered the meaning of that same phrase in section 2(a) of the Espionage Act in the face of defense arguments that it infringed "upon the traditional freedom of discussion of matters connected with national defense which is permitted in this country," and that the "innocuous character" of the disclosed intelligence reports at issue "forbade the conclusion" that the reports were "related to the national defense." See Gorin, 312 U.S. at 21 n. 1, 23, 28-29. In rejecting those arguments, the Gorin Court found no reversible error in much more general jury instructions on the "related to the national defense" element than those given in Morison. See Squillacote, 221 F.3d at 580, n. 23. The instructions in Gorin stated, in part, that:

> You are instructed that the term "national defense" includes all matters directly and reasonably connected with the defense of our nation against its enemies.

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[redacted]

Gorin, 312 U.S. at 30. On the other hand, according to the Ninth Circuit decision affirmed by the Supreme Court, the jury in Gorin was specifically instructed that it was not required that:

> the documents or information alleged to have been taken necessarily injure the United States or benefit any foreign nation. The document need not in fact be vitally important or actually injurious. The document or information must be, however, connected with or related to the national defense.

Gorin v. United States, 111 F.2d 712, 717 (9th Cir. 1940). Again, the Supreme Court held that these jury instructions did "no injustice . . . [to the] petitioners by their content," and demonstrated that "the trial court undertook to give the jury the tests by which they were to determine whether the acts of the petitioners were connected with or related to the national defense." Gorin, 312 U.S. at 30, 31. Similarly, as required by the language of the statute, the Court's analysis of the intelligence reports at issue in Gorin (which detailed surveillance of Japanese persons suspected of espionage inside the United States) focused only on the reports' relation or connection to the national defense, not on the harm actually caused by the reports' disclosure. According to the Supreme Court,

> As [the intelligence reports] gave a detailed picture of the counterespionage work of the Naval Intelligence, drawn from its own files, they must be considered as dealing with activities of the military forces. A foreign government in possession of this information would be in a position to use it either for itself, in following the movements of the agents reported upon, or as a check upon this country's efficiency in ferreting out foreign espionage. It could use the reports to advise the state of the persons involved of [sic] the surveillance exercised by the United States over the movements of these foreign citizens. The reports, in short, are a part of this nation's plan for armed defense. The part relating to espionage and counterespionage cannot be viewed as separated from the whole.

Gorin, 312 U.S. at 29.

[redacted] Similarly here, as this Court has recognized, there can be no reasonable dispute that [redacted]

[redacted]

[redacted], qualifies as information related to our Nation's defense. Kim, 808 F.Supp.2d at 53. Most importantly at this juncture, *the defense concedes the point.* In his third Motion to Compel the defendant states:

> 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 to 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.

Third Mot. at 2, n. 3. Thus, even if any damage assessments existed regarding the charged unauthorized disclosure, the defendant (and his counsel) should not be permitted to review them – or conduct any other classified discovery for that matter – in order to rebut a concededly "basic" element of the charged offense that he agrees the United States has satisfied.[32]

(U) The defendant also seriously misreads the statute when he asserts that any post-disclosure damage assessments would be relevant and helpful to a determination of the third element of Section 793(d), i.e., whether the defendant "ha[d] reason to believe

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[32] (U) Indeed, even the Fourth Circuit in Morison affirmed the trial court's exclusion at trial of "evidence of possible countermeasures the Soviets had taken to counter the information derived by them from" the unauthorized disclosure in that case. Morison, 844 F.2d at 1078. According to the Fourth Circuit:

> [T]o require the Government to produce evidence of countermeasures by the Soviets would likely force the Government to disclose its ongoing intelligence operations in a critical area and might seriously compromise our intelligence-gathering capabilities. Such evidence would add little or nothing to defendant's defense but could be of great damage to our intelligence capabilities. We think the district judge correctly refused to be diverted into such excursions in the presentation of evidence which offered no particular benefit to defendant's defense but which would pose the likelihood of grave injury to our national interests.

Id.

[redacted]

[the information] could be used to the injury of the United States or to the advantage of any foreign nation." Third Mot. at 6. The defendant's argument presumes incorrectly that he can use at trial any facts to demonstrate the reasonableness of his belief. Id. The defendant is incorrect. The statute's plain language requires that the defendant must first be shown to have known the facts from which he reasonably should have concluded that the information could be used for the prohibited purpose. See United States v. Truong Dinh Hung, 629 F.2d 908, 919 (4th Cir. 1980) (citing with approval the district court's jury instructions which defined the term "reason to believe" as meaning that "a defendant must be shown to have known facts from which he concluded or reasonably should have concluded that the information could be used for the prohibited purpose"). Stated another way, as Chief Judge Denise R. Lind recently held in connection with the prosecution of Army Pfc. Bradley E. Manning, the element that the accused had "reason to believe the information he communicated could be used to the injury of the United States or to the advantage of any foreign nation" is an "objective element evaluated on facts actually known by the accused." United States v. Manning, Slip. Op. at 3 (U.S. Army 1st Judicial Cir. Jan. 16, 2013) (attached as Exhibit A hereto). For that reason, Chief Judge Lind held that damage assessments concerning the unauthorized disclosures in that matter would not be relevant to corroborate the reasonableness of the defendant's belief:

> The relevant inquiry [is] facts known by the accused at or before the charged offenses. The damage assessments were created or compiled after the alleged offenses were committed. What, if any, future damage occurred after disclosure was not knowable by the accused during the time period of the charged offenses . . . . Thus, the damage assessments would not be relevant to corroborate the reasonableness of the accused's belief . . . .

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Id. at 4-5.[33] For the same reason, the defendant's request for damage assessments in this matter should be denied.

(U) **2. Government Requests to the News Organization**

[redacted] Under this subheading, the defendant has moved to compel "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." Third Mot. at 7. For the same reasons that the Court should deny the defendant's request for post-disclosure damage assessments, the Court should also deny the defendant's demand for any post-disclosure government requests to Fox News seeking to mitigate the damage caused by the defendant's unauthorized disclosure.

(U) As an initial matter, the United States has informed the defendant that it has produced all discoverable material responsive to this request. Further, as a courtesy, during the meet-and-confer sessions the United States offered to share with the defense its understanding of the facts concerning this request on the condition that the defense not use those statements as admissions. The defense declined the government's offer. See Notice of Filing, ECF Docket No. 80, Exhibit 16 (government's classified discovery letter, dated August 27, 2012, p. 2, ¶ 2). The defendant now presses for just such an admission in its Third Motion, by demanding a statement from the United States as to whether any such documents exist. See Third Mot. at 9. Unlike the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure do not require the United States

[33] (U) Chief Judge Lind further held that even if relevant, "the probative value of the damage assessments is substantially outweighed by the danger of confusion of the issues" under the military's equivalent to Federal Rule of Evidence 403. Manning, slip op., at 3.

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[redacted]

to respond to interrogatories or requests for admission. See Fed. R. Crim. P. 16. For that reason, the defendant's demand for such a response here should be denied.

[redacted] It should also be denied because it is based on a number of faulty factual or legal premises. First, the defendant argues that any request by government officials to Mr. Rosen or Fox News to withhold some details of the Rosen article would be exculpatory because it would go "directly to whether the disclosure of the information *contained in the article* was truly 'unauthorized.'" Third Mot. at 7 (emphasis added). The defendant is wrong. The charged unauthorized disclosure is not the disclosure to the world caused by Rosen's article, but the unauthorized disclosure by the defendant to Mr. Rosen that preceded the publication of Mr. Rosen's article. Any discussions between Mr. Rosen and government officials following that initial disclosure by the defendant would be irrelevant as to whether that initial disclosure was authorized.[34]

(U) Second, any government mitigation actions or inactions caused by the defendant's unauthorized disclosure would be inadmissible at trial as neither would be relevant to proving or rebutting any of Section 793(d)'s elements.[35] According to the

[34] [redacted] The one exception would be a post-disclosure statement by an Original Classification Authority of the owner of the information, [redacted], stating that the defendant was, in fact, authorized to make the disclosure to Mr. Rosen. The United States knows of no such statement. To the contrary, [redacted] made a criminal referral to the Department of Justice concerning Mr. Rosen's June 11th article.

[35] [redacted] The defendant's argument is also rooted in a world that simply does not exist – one where the United States has the power (1) to stop the media from publishing classified information it has discovered; and (2) to remove that information from the public domain once it is published. Neither is true. Given real-world limitations, frequently the only appropriate response a government official can give to a reporter inquiring about classified information that the reporter has obtained is to say "no comment," thereby avoiding any official confirmation of the information's accuracy.

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[redacted]

defendant, if the United States took such actions it would speak "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," and if the United States failed to take such actions, it would "tend[] 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." Third Mot. at 8. The defendant is incorrect on both counts. As demonstrated in Section IV.C.1 above, post-disclosure assessments of harms that could have resulted, or in fact did result, from a given unauthorized disclosure are irrelevant to whether the information disclosed relates to, or is connected with, the national defense. Again, the defendant concedes that that admittedly "basic" requirement has been satisfied here. Third Mot. at 2, n. 3.

(U) Any such post-disclosure mitigation actions or inactions would also be irrelevant to whether the defendant had "reason to believe" that the information he disclosed "could be used to the injury of the United States or to the advantage of any foreign nation" unless the defendant could show that he knew those mitigation measures at the time of the disclosure. Given that any such mitigation actions or inactions necessarily took place following the charged unauthorized disclosure, such a showing would be impossible here. See Manning, Slip. Op. at 3 (excluding from trial as irrelevant, "mitigation measures [which] were implemented by affected agencies to prevent or minimize actual damage" because the "accused could not have known what, if any, mitigation measures would be taken by the United States government agencies and what, if any, impact those measures had on actual damage caused").

See First Mot., Ex. 2 [redacted]

[redacted]

[redacted]

(U) 3. [redacted] the Intelligence

[redacted] Under this subheading, the defendant has moved to compel material regarding [redacted]" and [redacted] confidence level in [redacted] and the reporting." Third Mot. at 9. As before, the request should be denied because it is both based on a faulty factual premise and the defendant cannot be shown to have had knowledge at the time of the unauthorized disclosure of the documents that he seeks.

[redacted] According to the defendant, [redacted] discussion about [redacted] "raise[s] serious questions as to whether the content of [redacted] report] reflected sensitive information." Third Mot. at 11.[36] The defendant is wrong. As an initial matter, questions concerning [redacted] is properly treated as national defense information. More fundamentally, however, Section 793(d) only requires proof that the information at issue was "related to" or connected with the national defense. See 18 U.S.C. § 793(d). The [redacted] As the Supreme Court acknowledged in Gorin, a foreign government target of

[36] [redacted] Also incorrect is the defendant's suggestion that the acronym [redacted]" in the June 11, 2009, email from [redacted] email means [redacted]." Third Mot. at 10, n. 5. As the United States has informed the defense, the acronym stands for [redacted] and refers to "[redacted]," one of the predecessor documents to the [redacted] report which was produced to the defense in classified discovery. Also incorrect is the defense's presumption that the [redacted] attached to the [redacted] email at 2:41 p.m. on June 11, 2009, contained statements about the [redacted] and the [redacted] 'confidence level' in the reporting contained in [redacted] report]." Third Mot. at 10, n. 6. It does not.

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[redacted]

an inaccurate U.S. counterintelligence report can use such a report "as a check upon this country's efficiency in ferreting out foreign intelligence." Gorin, 312 U.S. at 29; see also id. at 31 (citing with approval a jury instruction defining information related to the national defense as encompassing "he possession of [counterintelligence] information by another nation . . . . For from the standpoint of military or naval strategy, it might . . . be dangerous to us for a foreign power to know our weaknesses and our limitation . . . .").

[redacted]

[redacted] The defense's argument also ignores reality: the fact that the [redacted] submission for inclusion in the [redacted] substantially undermines any suggestion that the [redacted]. In any event, the defendant has conceded that the [redacted] has satisfied the "basic" requirement that it relate to the national defense. Third Mot. at 2, n.3. His request for further classified discovery in a futile effort to somehow demonstrate [redacted] should, therefore, be denied.[37]

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[37] [redacted] The defendant's assertion that the intelligence at issue is based on open-source information has grown wearisome. Third Mot. at 10. Anything that may exist in the public domain is as available to the defense as it is to the United States. Since before the defendant was indicted, the United States has asked the defense to produce any material from the public domain, for use at trial, showing that [redacted] Despite the defense's

[redacted]

[redacted]

[redacted] Similarly misguided is the defendant's assertion that "it is far from clear that [redacted] contained actual intelligence information that Mr. Kim reasonably could have believed was NDI." Third Mot. at 11. As before, because the defendant cannot prove that he had access to [redacted] material that he now seeks in discovery, such material can have no bearing on whether he had reason to believe that the classified information that he is charged with disclosing could be used to the injury of the United States or to the advantage of a foreign nation. See Manning, Slip Op. at 3 ("reason to believe" element is an "objective element evaluated on facts actually known by the accused"); Truong Dinh Hung, 629 F.2d at 919. Accordingly, the defendant's demand for such material should be denied.

(U) **4. The Situation Room Meeting**

[redacted] Under this subheading, the defendant has moved to compel "meeting notes, agendas, talking points, summaries, and any other documents related to a June 12, 2009, Situation Room meeting . . . at which the alleged disclosure at issue in this case was discussed." Third Mot. at 11. For the same reasons stated above, nothing that might have occurred at that post-disclosure meeting could possibly be relevant to proving or rebutting any of Section 793(d)'s elements. For the reasons stated in sections IV.C.1 and IV.C.2, any post-disclosure discussion during that meeting of the "effect of the disclosure on national security and foreign relations," see Third Mot. at 12, or of "actions to be taken by the government officials to address the effects of the disclosure," see id., would not be relevant to whether the information disclosed on June, 11, 2009, was related

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obligation to provide such material to the United States, it has produced nothing. See Fed. R. Crim. P. 16(b)(1)(A) (defense must produce to the government documents that are within its possession, custody or control that it intends to use in its case-in-chief at trial). Absent some showing from the defendant now, the Court can fairly conclude at this point, as the United States has, that no such material exists.

[redacted]

to the national defense at the time of the disclosure. Further, the United States has reviewed the existing material the defendant seeks from the June 12, 2009, Situation Room meeting. None of it suggests, let alone identifies, any potential perpetrator for the charged unauthorized disclosure or any other unauthorized disclosure. Nor does it contain any exculpatory information. Finally, the defendant cannot possibly demonstrate that he had access on June 11th to the material that he seeks from a meeting a day later. Thus, such material could have no bearing on whether the defendant had reason to believe that the classified information that he is charged with disclosing on June 11th could be used to the injury of the United States or to the advantage of a foreign nation. Accordingly, the defendant's demand for this material should be denied.[38]

(U) 5. **Electronic Security Profiles**

[redacted] Under this subheading, the defendant has moved to compel "electronic security profiles" or other "official documents demonstrating" that the individuals who accessed the intelligence at issue prior to the publication of the Rosen article "had the security clearances necessary to view the reports as of June 11, 2009."

[38] (U) As demonstrated above, the material that the defendant seeks concerning the Situation Room meeting is plainly irrelevant to the charged offenses and not discoverable. Nonetheless, the United States advises the Court that it would invoke executive privilege as an additional basis to oppose the material's production in discovery if the Court were to find the material discoverable under Rule 16. The Supreme Court has admonished that courts should consider objections to the scope of discovery before requiring the United States to invoke executive privilege. See Cheney v. United States District Court for the District of Columbia, 542 U.S. 367, 385-91 (2004). The Cheney Court relied on two criminal prosecution precedents, observing that in United States v. Nixon, 418 U.S. 683 (1974), "the Court addressed the issue of executive privilege only after having satisfied itself that the special prosecutor had surmounted the[] demanding requirements" of Rule 17(c) (relevancy, admissibility, and specificity), Cheney, 542 U.S. at 387, and citing United States v. Poindexter, 727 F. Supp. 1501 (D.D.C. 1989), as "sound precedent . . . for district courts to explore other avenues, short of forcing the Executive to invoke the privilege, when they are asked to enforce against the Executive Branch unnecessarily broad subpoenas," Cheney, 542 U.S. at 390.

[redacted]

[redacted]

Third Mot. at 13. The request should be denied as it is based on a misunderstanding of the meaning of the term "closely held."

[redacted] The defendant asserts that the legal test for "closely held" is whether "the government took adequate steps to prevent the unauthorized disclosure of the information to the public." Id. at 14. He cites no legal authority for this assertion. See id. There is none. As the term has been interpreted by the courts, information is not "closely held" only if it either (1) "has been made public by the United States Government and is found in sources lawfully available to the general public;" or (2) "where sources of information are lawfully available to the public and the United States Government has *made no effort* to guard such information." United States v. Abu-Jihaad, 600 F.Supp.2d 362, 387 (D. Conn. 2009) (emphasis added); United States v. Squillacote, 221 F.3d 542, 576-80 (4th Cir. 2000) (same); United States v. Dedeyan, 584 F.2d 36, 40 (4th Cir. 1978) (same). The evidence the defendant seeks – documents showing the security clearances of the 168 individuals on the Access List – does not address those legal requirements. It will not demonstrate whether the intelligence information at issue had been made public by the United States as of the time of the unauthorized disclosure. It will not demonstrate whether the intelligence information is found in sources lawfully made available to the general public as of that time. Nor will it even demonstrate whether the United States has "made no effort" to guard such information. The fact that a handful of senior U.S. government officials on the National Security Council ("NSC"), all of whom possessed TS//SCI clearances, see Third Mot. at 13,[39] may not have executed a classified

[39] (U) The officials whom the defendant refers to in his motion who may or may not have signed the NDA for the particular compartment at issue are: Thomas Donilon, then Assistant to the President and Deputy National Security Advisor; Mr. Donilon's Executive Assistant, Matthew Spence; Charles Lutes, then NSC Director of

[redacted]

[redacted]

information non-disclosure agreement ("NDA") for the particular SCI compartment at issue,[40] says nothing about whether the United States "made no effort" to guard the information at issue. Indeed, the United States submits that where, as here, the intelligence came from an intelligence report marked TOP SECRET//SCI that was disseminated over classified systems to members of the Intelligence Community, even had all the individuals on the Access List been remiss and failed to sign the NDA for the compartment at issue, that still would not even begin to demonstrate that the United States "made no effort" to guard the highly classified intelligence at issue.

(U) Further, to permit such discovery would be very time-consuming[41] and would ultimately confuse what is at issue in this case. As the Fourth Circuit reasoned in Morison:

> The point in this case was not how many people in government could have qualified for receipt of this information (i.e., entitled to receive "Secret" material); the decisive point is that [the editor-in-chief of Jane's Defense Weekly] and Jane's Defense Weekly, the ones to whom the defendant transmitted the secret material in this case, did not have a "Secret" clearance and were thus, to the knowledge of the defendant not qualified to receive the information. To have gone into all the evidence of the number of employees in the Government who had "Secret" clearances and the methods of issuing such classification in particular cases would have cluttered the record with needless and irrelevant evidence, the only result of the introduction of which would have been to confuse the basic issues in this case. Moreover, the development of such evidence would likely have been extensive, covering various agencies and the methods of

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Counterproliferation Strategy; and Daniel Russel, then NSC Director for Japan and Korea.

[40] (U) NDAs are not security clearances. Rather, they are legally binding agreements between an individual being granted, or already in possession of, a security clearance, and the United States government, wherein the parties agree that the individual shall never disclose classified information without the authorization of the United States government.

[41] (U) The individuals on the Access List span 12 government intelligence agencies or subcomponents.

[redacted]

[redacted]

> assigning clearances with various limitations by the various agencies and defense contractors. The district judge acted properly in denying the introduction of such evidence.

844 F.2d at 1078. For the same reason, this Court should deny the defendant's demand for "security profiles" and security clearance information for every person on the Access List.

(U) 6. **Other Intelligence Reports Accessed by the Defendant**

(U) Under this subheading, the defendant has moved to compel "all intelligence reports accessed by Mr. Kim from April 1, 2009 to June 11, 2009, that were classified at the 'top secret' level." Third Mot. at 15. The defendant seeks this enormous volume of classified information[42] first to demonstrate that the defendant's conduct was not "willful" because he "had access to far more sensitive reports than the [intelligence report] at issue in this case" which he did not disclose to the reporter, and second, to "reconstruct[] the issues that Mr. Kim was working on and discussing with his colleagues during the relevant time period." Id. at 14-15. Neither of these rationales begins to justify the defendant's demand for the wholesale production of two-and-half-months of TOP SECRET intelligence reports.

[redacted]) The defendant's first rationale is based on another faulty legal premise. To demonstrate "willfulness" under Section 793(d) the United States must only "prove that the defendant acted with knowledge that his conduct was unlawful," not

[42] [redacted] As a Senior Advisor for Intelligence to the Assistant Secretary of State for VCI, the defendant had wide-access to TOP SECRET government information, to include intelligence from over [redacted] SCI programs. The defendant's request for two-and-a-half months of intelligence reports encompasses 52 work days. Over the course of five hours on the morning of June 11, 2009 alone, the defendant reviewed no fewer than nine TOP SECRET intelligence reports on a single classified database. At that pace, the defendant would have reviewed nearly 750 such reports on that database alone during the two-and-a-half month period for which the defendant now requests such reports.

[redacted]

[redacted]

prove, as the defendant suggests, that the defendant acted with bad faith or a subversive intent. Kim, 808 F. Supp.2d at 54 (quoting Bryan v. United States, 524 U.S. 184, 191-92 (1998)); see also United States v. Kiriakou, 2012 WL 4903319, *5 (E.D.Va. 2012); Morison, 622 F. Supp. at 1010. Indeed, the defendant's assertion that he needs two-and-a-half months of TOP SECRET intelligence reports to prove that he was not "curry[ing] favor with Fox News" on June 11th when he disclosed the intelligence information at issue, confuses willful intent with motive. Third Mot. at 15. Whatever motivation the defendant may have had to cause him to violate the law – whether it was a desire to "curry favor with Fox News" or for some other reason – is irrelevant to the willfulness analysis under Section 793(d). As the District Court instructed in United States v. Morison, 622 F. Supp. 1009, 1010 (D. Md. 1985): "No showing of an evil purpose is required under [Section 793(d)] . . . Proof of the most laudable motives, or any motive at all, is irrelevant under this statute."

[redacted]) Moreover, it is well-established that a defendant cannot seek to negate criminal intent and rebut allegations of wrongdoing by introducing evidence that he had prior opportunities to commit the crime at issue, but refrained from doing so. See United States v. Ellisor, 522 F.3d 1255, 1270 (11th Cir. 2008); United States v. Marrero, 904 F.2d 251, 260 (5th Cir. 1990); United States v. Scarpa, 897 F.2d 63, 70 (2d Cir. 1990); United States. v. Camejo, 929 F.2d 610, 613 (11th Cir. 1991), cert. denied, United States v. Setien, 502 U.S. 880 (1991); United States v. Brown, 503 F.Supp.2d 239, 243-44 (D.D.C. 20078); United States v. Rosen, 2007 WL 4142776 at *1 (E.D. Va. Sept. 7, 2007); King v. United States, 2006 WL 741904, at *3 (W.D. Mo. Mar. 20, 2006). That is precisely what the defendant admits that he is seeking to do here. Third Mot. at

[redacted]

[redacted]

14-15. The defendant demands the production of all TOP SECRET intelligence reports that he reviewed in the two-and-a-half months prior to June 11, 2009, to demonstrate that he had access to "far more sensitive reports than the [intelligence] at issue in this case" that he never disclosed to Mr. Rosen. Third Mot. at 15. Such an attempt to portray the defendant's innocence through the use of his alleged prior "good acts" should be denied as contrary to law.

(U) Indeed, courts have rejected very similar requests in Section 793 cases. In United States v. Rosen, for example, the defendant sought to compel production of *unclassified* FBI interview summaries to prove that he had never "solicited or received national defense information documents" prior to the unauthorized disclosures at issue. Rosen, 2007 WL 4142776 at *1, n. 1.[43] The trial court denied the defendant's motion to compel, reasoning that the defendant could not "seek to establish his innocence . . . through proof of the absence of criminal acts on specific occasions" prior to the charged offense. Id. at *1 (internal quotations omitted); see also United States v. Morison, 622 F. Supp. 1009, 1011(D. Md. 1985) (finding that "evidence of the defendant's patriotism is irrelevant to the issues raised in 18 U.S.C. § 793(d) and (e)"); United States v. Kiriakou, 2012 WL 4903319, *4 (E.D. Va. Oct. 16, 2012) (denying the defendant's requests for "discovery that would support a good faith defense . . . because any claim that he acted with a salutary motive, or that he acted without a subversive motive, when he allegedly communicated NDI to journalists is not relevant to this case"). The same result should obtain here, where the defendant seeks not unclassified discovery, but a mountain of the Nation's most sensitive TOP SECRET intelligence to prove his alleged prior "good acts."

[43] (U) Lead defense counsel was counsel of record in Rosen.

[redacted]

[redacted]

(U) The defendant's second rationale for demanding the wholesale disclosure of TOP SECRET intelligence – that he needs this material to "reconstruct[] the issues that Mr. Kim was working on and discussing with his colleagues during the relevant period" – fares no better. Third Mot. at 15. The defendant does not even attempt to relate this rationale back to rebutting any element of Section 793(d), or asserting any defense, and on that basis the request should be denied. The United States should not now be required to produce to the defendant – who stands accused of the unauthorized disclosure of TS//SCI information – an enormous volume of unrelated TS//SCI intelligence reports for the sole purpose of "refresh[ing] his recollection" concerning other work and discussions that he does not even attempt to argue are relevant to this matter. Indeed, to grant the defendant's request based on such a slight showing would render the classified information privilege a nullity.

(U) **D. Defendant's Fourth Motion to Compel Should Be Denied**

[redacted]) In his Fourth Motion to Compel, the defendant seeks an order "directing the government to provide unredacted copies of the classified materials, in particular, to disclose [redacted] [.]" Fourth Mot. at 1. In this motion, the defendant argues two points, albeit under four separate subheadings. First, the defendant complains that the United States has failed to invoke CIPA § 4 for its substitution of [redacted] and the redaction of classified information from documents produced in classified discovery. Id. at 5-7 and 11. Second, the defendant contends that the [redacted] are relevant and helpful under the Roviaro/Yunis standard for the discovery of classified information. Id. at 7-10 and 12-13. Without confirming or denying the existence of the purported

[redacted]

classified material that the defendant seeks, the United States demonstrates next that there is no foundation for the defendant's Fourth Motion. Therefore, the Court should deny it.

(U) 1. Court Approval for the Substitutions Under CIPA § 4

[redacted] Under this subheading, the defendant raises a process complaint, arguing that the United States was required to seek Court approval before substituting [redacted] in classified discovery. The defendant is explicit about the relief that he seeks: "the Court should require the government to seek authority to redact under CIPA § 4, or provide the defense with copies of the discovery without the substituted [redacted] forthwith." Fourth Mot. at 6. The defendant neglects to mention that the United States sought to expedite the production of classified discovery to the defense by producing twenty-two rounds of classified discovery, which included substitutions and redactions, prior to filing its first motion under CIPA. The government's first CIPA motion was filed on September 7, 2012. The government's second CIPA motion was filed on January 18, 2013. (The United States has produced twenty-seven rounds of classified discovery as of this filing.) The defendant's process complaint appears to be that the United States should have filed a CIPA motion and awaited the Court's resolution of that motion prior to each production of classified discovery containing substitutions and redactions. Without belaboring the issue, the defense has benefitted from the government's approach to classified discovery and now raises a frivolous process point to belittle it. In any event, without discussing with specificity the government's classified ex parte, in camera, under seal CIPA filings, the United States represents that the substitutions and redactions taken in classified discovery have been submitted to the Court for court authorization under CIPA § 4. Because the primary

[redacted]

[redacted]

relief sought by the defendant – namely, that "the government . . . seek authority to redact under CIPA § 4" (Fourth Mot. at 6) – has been obtained, the Court should deny this request as moot.

[redacted] 2. [redacted]

[redacted] Under this subheading, the defendant has moved to compel the production of [redacted] substituted in classified discovery. Fourth Mot. at 7-10. The defendant contends that the [redacted] is relevant and helpful information under the Roviaro/Yunis standard for classified discovery. Id. at 8. Preliminarily, the defendant wrongly suggests that the United States has conceded the relevance of [redacted]. Id. ("the government has already acknowledged the relevance of [redacted] The defendant ignores that the United States has instructed the defense repeatedly and explicitly that its production of material in discovery in this case should not be construed as any such concession. In numerous discovery letters, the United States has advised the defense: "[W]e are producing all of the enclosed materials to the defense notwithstanding the fact that the Government believes that such production exceeds its discovery obligations at this time." See, e.g., Notice of Filing, ECF Docket No. 58, Exhibit 13 (government's classified discovery letter, dated March 8, 2011, p. 1). The United States has never conceded the relevance of this information.

[redacted] On the merits, the defendant's claimed entitlement to the [redacted] is specious. First, the defendant argues that the [redacted]." Fourth Mot. at 9.

[redacted]

[redacted]

That is a gross misstatement of the government's theory.[44] Quite simply, there is no evidence to suggest that [redacted] Most strikingly, the defendant had telephone contact with Mr. Rosen at precisely the same time that electronic records show he was accessing [redacted] report. Moreover, the history of the defendant's relationship with Mr. Rosen both before and after the charged unauthorized disclosure is compelling evidence of his guilt. The defendant has come forth with no evidence to suggest that [redacted] Id.

[redacted] Second, in an attempt to substantiate this request, the defendant suggests a variety of investigative steps that he would take, if he were to obtain [redacted]. For example, the defendant contends that the government's substitution of [redacted] has deprived him of the "ability to see if [redacted]" Fourth Mot. at 10. Absent some basis to believe that [redacted], this would simply be a fishing expedition predicated on obtaining extremely sensitive classified information. [redacted]

[44] (U) Elsewhere in his Fourth Motion, the defendant states that: "At the core of the government's proof are spreadsheets[.]" Fourth Mot. at 2. While hardly necessary, this opposition pleading puts to rest such folly. See Section II.C (summarizing the evidence against the defendant).

[redacted]

[redacted] The defendant offers up no good faith basis to believe, let alone any evidence, that [redacted] at any time, let alone during the relevant time period.

[redacted] Third, even if one were otherwise inclined to accept at face value the defendant's assertion that he would, in fact, undertake this "type of reasonable investigation" (Fourth Mot. at 10), the defense's conduct in this case belies this assertion. In the background section to his Fourth Motion, the defendant acknowledges that the United States has disclosed [redacted] Id. at 3. Tellingly, over two-and-a-half years since the filing of the Indictment, the defense has chosen not to [redacted] Nothing has prohibited the defense from seeking to [redacted]" Id. at 10.[45] The defense's failure to do so reveals the transparency of this request, that is, to force the United States to choose between the compelled disclosure of [redacted] and

[45] (U) As the Court knows from early status hearings in this case, the defense is well familiar with the procedures for [redacted]. Indeed, the defendant refers to these procedures in his motion. Fourth Mot. at 11 n. 8.

[redacted]

[redacted]

the potential dismissal of the indictment. Once again, the defendant has deployed a graymail technique that should not be condoned.[46]

[redacted] Finally, in the background section of this motion, the defendant also refers to the meet-and-confer process. Fourth Mot. at 4. Yet the defendant fails to mention the fact that the defense has vacillated in its approach to the request for [redacted]. Initially, the defense sought [redacted]. See Notice of Filing, ECF Docket No. 58, Exhibit 24 (defense's classified discovery letter, dated October 6, 2011, p. 15, ¶ 24). When asked in the meet-and-confer process to provide a justification for this request, the defense retreated and reduced its request to [redacted] Unsatisfied with the government's provision of additional information about [redacted], the defense reverted to its original position of indiscriminately seeking [redacted]. See Notice of Filing, ECF Docket No. 80, Exhibit 10 (defense's classified discovery letter, dated June 22, 2012, p. 12, ¶ 19). The indiscriminate nature of his pending demand, coupled with the prior vacillation, underscores the defendant's true purpose – graymail.

[46] [redacted] Furthermore, the United States has offered to assist the defense in [redacted]. The defense has never taken the United States up on its offer. Separately, the defendant's complaint that he has "no ability to [redacted]" (Fourth Mot. at 10) is one that he would have to direct to the Court in the first instance, as the defense presently has no [redacted]. To the government's knowledge, the defense has never sought relief from the Court to obtain such [redacted]. Nonetheless, consistent with the need to protect the [redacted] information, the United States is prepared to work with the defense in [redacted].

[redacted]

[redacted]

(U) 3. Non-CIPA Justifications for Redacting [redacted]

([redacted]) Under this subheading, the defendant appears to argue that the United States could only proceed under CIPA § 4 to obtain court authorization for the substitution of [redacted]. Fourth Mot. at 11. Without taking any position on the merit of the defendant's argument, it is premised on a mistaken assumption. As stated above, the government's substitutions and redactions in classified discovery have been submitted to the Court for court authorization under CIPA § 4. Accordingly, the Court should deny this aspect of the defendant's motion as moot.

(U) 4. The Government's Further Use of Redactions

(U) Under this subheading, the defendant argues that the United States should be required to obtain court authorization for redactions taken in classified discovery under CIPA § 4 or provide unredacted copies of discovery materials to the defense. Fourth Mot. at 12. As stated above, the government's substitutions and redactions in classified discovery have been submitted to the Court for court authorization under CIPA § 4. Accordingly, the Court should deny this aspect of the defendant's motion as moot.

[redacted]

[redacted]

(U) **V. Conclusion**

(U) For all of the foregoing reason, the defendant's Motions to Compel should be denied. A proposed order is attached hereto as Exhibit B.

Respectfully submitted,

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