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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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UNITED STATES OF AMERICA v. STEPHEN JIN-WOO KIM, Defendant.	)))))))	Criminal No. 10-225 (CKK)

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DEFENDANT STEPHEN KIM'S REPLY TO THE GOVERNMENT'S OMNIBUS OPPOSITION TO DEFENDANT'S MOTIONS TO COMPEL DISCOVERY

Pursuant to the Court's December 13, 2012, Order, Defendant Stephen Kim, by and through undersigned counsel, files the following reply to the government's omnibus opposition to his motions to compel discovery. The defense filed four motions to compel discovery on February 11, 2013. The government filed its opposition two months later, on April 5, 2013.

INTRODUCTION

The government's opposition is a bit of an oddity, in that the government spends the first twenty-five pages of its brief laying out its case against Mr. Kim. Drawing every possible inference in its own favor, the government claims that it has "substantial evidence demonstrating that the defendant willingly became a clandestine source for Mr. Rosen" and that it "does not rely on the number of individuals who had access to the TOP SECRET intelligence at issue to establish the defendant's guilt." Opp. at 10. But the government's perception of the strength of its own case against Mr. Kim is not a factor in determining whether the materials sought by the defense are discoverable. Reading the government's brief gives the impression that the government is withholding discovery due to the "substantial evidence" that it believes it has

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against the defendant. It is precisely the discovery process that allows a defendant to rebut the government's assessment.

The defense obviously takes a far different view of the evidence than the government, which strains to paint even the most mundane of details in a sinister (or "clandestine") light. A motion to compel discovery is designed to gather evidence, not to characterize it. The purpose of a motion to compel discovery is to obtain the evidence necessary to rebut the government's case and to prepare a defense, not to debate whether it matters that Mr. Kim had a pre-existing email address named [redacted] or whether the defense should ultimately be permitted to introduce evidence of other leaks at trial. The government's filing of what amounts to a closing argument is not germane to resolving the specific discovery issues before the Court, which turn on whether the materials in question would be "relevant and helpful" to the preparation of the defense. In many instances, the government has nothing substantive to say about the specific items sought by the defense, merely asserting that the defense's view of the evidence "is wrong." If the government could avoid its discovery obligations whenever it believed it had a strong case, there would be no discovery.

As is the case in seemingly every Espionage Act prosecution, the government also goes to great lengths to accuse the defense of "graymail" and delay.[1] *See, e.g.*, Opp. at 34-35. Any such claim is refuted by the specificity of the defense's discovery motions, which provide a detailed factual basis (often resulting from an interview statement the government provided) for each item sought from the government. Moreover, the government has now had notice of the

[1] In addition, more than a dozen times, the government's opposition relies upon pejoratives (*e.g.*, the defense's position is "specious," the defense engages in "rank speculation") and *ad hominem* assertions about defense counsel's motives instead of legal argument to resist its discovery obligations. This does not advance the record on which this Court will decide these issues.

defense's discovery requests for over eighteen months, since the defense's discovery letter of October 6, 2011. *See* Dkt. 58, Ex. 24. None of the items listed in the defense's motions are a surprise to the government, as the parties discussed each item during an agreed-upon process that culminated in the filing of the defense's motions. If anything, the government is responsible for any delay in this case, as it failed to uncover or produce key exculpatory documents (the [redacted] [redacted] and related materials) until November 30, 2012, over two years after Mr. Kim was indicted. The government suggested the meeting and draft letter approach about which they now complain.

The specific items sought by the defense in its motions are discussed in turn below. Where appropriate, the defense also identifies those items that have either been resolved or withdrawn since the filing of its motions to compel discovery in February.

ARGUMENT

I. First Motion to Compel Discovery

In its first motion, the defense moved to compel the production of additional intelligence reports and other materials addressing the same topics as those discussed in [redacted] [redacted] that Mr. Kim is accused of disclosing to Mr. Rosen. The defense explained that there are significant discrepancies between [redacted] and the news article, a fact that the government now acknowledges in its opposition. *See* Opp. at 8 n.6. Those discrepancies draw into question whether [redacted] was the "source document" for the news article (as the government alleges), or whether the article was based on some other document to which Mr. Kim did not have access. The government's responses to the defense's first motion are unavailing.

A. **The Daniel Russel and Jeffrey Bader Materials**

1. **The June 11, 2009, Daniel Russel and Jeffrey Bader Materials**

The defense moved to compel certain documents created or relied upon by two National Security Council ("NSC") officials, Daniel Russel and Jeffrey Bader. *See* First Mot. at 8-15. On the morning of the alleged disclosure (June 11, 2009), Russel and Bader exchanged emails regarding almost three hours before either of them had viewed or its "predecessor documents."[2] *Id.* at 8-9. the defense moved to compel the production of unredacted copies of these emails as well as any intelligence reports or other documents upon which they were based. *Id.* at 9-11.

In its opposition, the government responds to the substance of the defense's argument in a single paragraph, asserting that "the defendant is simply wrong" to presume "that the material that has been withheld, either by redaction or entire withholding, must constitute or refer to 'additional source documents discussing " Opp. at 35-36. The government does not explain what has been withheld or why the withheld information is not "relevant and helpful" to Mr. Kim's defense. The government does not explain how Mr. Russel managed to write an email regarding without viewing that morning, nor does it explain how Mr. Bader knew exactly what Mr. Russel was referring to without viewing any such document himself. There was something that the two had seen or

[2] The government uses the term "predecessor documents" to refer to "a few other classified documents that were created in advance of the report." Opp. at 7. The report" is the electronic version of

knew about, and that "something" is certainly "relevant and helpful" to the preparation of the defense.

Merely asserting that the defense is "wrong" is not an adequate response to the defense's motion, as it fails to provide the Court with any reasoned basis to conclude that the documents sought are not "relevant and helpful" to the preparation of Mr. Kim's defense. The email exchange described above makes clear that, roughly three hours before they first accessed [REDACTED] on June 11, Mr. Russel and Mr. Bader viewed (and then discussed) some other document(s) [REDACTED] The existence of another document is directly relevant to the defense that the source of the article was some document other than [REDACTED] The defense first requested these documents and unredacted emails over 18 months ago, on October 6, 2011, *see* Dkt. 58, Ex. 24, at 10, but they have yet to be produced. The Court should order their production.

2. The [REDACTED] Materials

The defense also moved to compel the production of documents related to an email exchange between [REDACTED] and [REDACTED] on [REDACTED] *See* First Mot. at 11-13. Like the June 11 emails described above, this email exchange was provided to the FBI by Mr. Russel, the NSC Director for Japan and Korea, and discussed [REDACTED] *Id.* at 12. Based on the similarity between the [REDACTED] exchange and the information contained in [REDACTED], Mr. Russel told the FBI that [REDACTED] "would be [information] already known to" those who had viewed the [REDACTED] emails. *Id.* at 12-13.

In its opposition, the government again limits its substantive response to a single paragraph, arguing that the [REDACTED] exchange "could not possibly be relevant and helpful under

the Roviaro/Yunis standard" because it took place prior to

Opp. at 36. This response is insufficient, for several reasons.

First, although the government refers to the "Roviaro/Yunis standard" in its opposition, that is not the standard that applies to the materials. As the defense explained in its motion, the government has *not* claimed that the materials are classified. *See* First Mot. at 12. Any heightened standard is therefore inapplicable.

Second, the government's argument regarding the timing of the email *vis a vis* is far too simplistic, unless one believes that foreign governments

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Third, contrary to the government's assertions, the defense is not *speculating* that the materials addressed the same subject matter as the rather, Mr. Russel, the NSC Director who provided the emails to the government, *told the FBI* that the emails

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[3] The government also complains that the defense's request for a list of recipients of the email would "further delay trial" by permitting the defense to engage in the "fruitless exercise" of investigating "where the information from the emails went, by what means, and to whom." Opp. at 36-37. This is nothing more than a scare tactic. Generating a list of recipients of the email should not cause any delay whatsoever, as the names of the recipients of an email typically appear on the email itself. Moreover, the defense first requested this information on October 6, 2011. *See* Dkt. 58, Ex. 24, at 8-9. If the government were truly concerned about delay for other than rhetorical purposes, it has now had the past 18 months to gather the materials in question in the event that the Court ordered their production.

contained information [redacted] First Mot. at 12. Although the government paints the defense's motion as some sort of wild goose chase for sensitive documents, the defense was quite careful to describe the specific factual basis for each of the categories of documents that it seeks. In this case, the defense's motion was based on specific statements by Mr. Russel, and the government's opposition contains nothing to explain or otherwise rebut those statements. The [redacted] materials are thus discoverable.[4]

3. **Additional Daniel Russel Materials**

The defense moved to compel the production of another report identified by Mr. Russel during his interview with the FBI, as well as unredacted copies of the FBI-302 and Agent's notes from that interview. *See* First Mot. at 14-15. During the interview, Mr. Russel stated that the content of the Rosen article [redacted]

[redacted]

[redacted] *Id.* at 14. Despite multiple defense requests, the government has refused to produce the "information from [redacted] to the [redacted]" referred to by Mr. Russel.

In its opposition, the government makes little effort to justify a denial of the defense's motion to compel production of the report. The government asserts that "the defendant is simply wrong" to presume that the materials "constitute or refer to 'additional source documents discussing North Korea's [redacted]" Opp. at 35-36, but fails to explain what has been withheld/redacted or why Mr. Russel would describe those materials as "similar to" the Rosen article. The government again leaves the Court without any reasoned

[4] Aside from their relevance and helpfulness to the defense's theory that the Rosen article was based on some document other than [redacted] materials are also necessary to allow the defense to prepare for [redacted] testimony at trial. Given his statement to the FBI, [redacted] could be an important witness for the defense; however, the defense cannot prepare for his testimony without access to the [redacted] materials, which the government already has in its possession.

basis to conclude that these materials are not relevant and helpful to the preparation of Mr. Kim's defense. The government should therefore be compelled to produce the additional Russel materials.

B. [REDACTED] and [REDACTED] Materials

In its motion, the defense also moved to compel the production of several documents related to the drafting of a [REDACTED] on the morning and afternoon of June 11, 2009. *See* First Mot. at 17-25. The [REDACTED] – which the government did not discover until July 12, 2012, more than three years after the alleged disclosure in this case – contained the same information as the charged article, yet there is no evidence or allegation that Mr. Kim accessed the [REDACTED] on June 11, 2009. The Court is already familiar with the parties' views on the importance of the [REDACTED], so that discussion will not be repeated here. The specific items listed in the defense's motion to compel are addressed in turn below.

1. The 2:41 p.m. [REDACTED]

The defense moved to compel the production of a [REDACTED] circulated to several members of the intelligence community at 2:41 p.m. on June 11, 2009. *See* First Mot. at 18-23. This 2:41 p.m. [REDACTED] was provided to the FBI by [REDACTED], who described it as "the longest version of [REDACTED] which contained information derived from [REDACTED] 3630-09 and other sources." First Mot., Ex. 14, at 2. Although the government produced an earlier draft of [REDACTED] (conceding its relevance), the government has thus far refused to produce the 2:41 p.m. draft, which appears to contain revisions made on the afternoon of June 11.

The government initially objected to producing the 2:41 p.m. [REDACTED] on the basis of its revised "cut-off time," a topic addressed at length in the defense's motion to compel. *See*

First Mot. at 19-22. In its opposition, the government essentially abandons that argument, stating that the "cut-off time" is now "irrelevant."[5] Opp. at 37-38. Instead, the government asserts – as it does repeatedly in its brief – that the documents are not discoverable because, although the defense believes they relate to other potential source documents, "[t]hey do not." Opp. at 37-38.

The government's response cannot be squared with the [redacted] description of the 2:41 p.m. [redacted] as "the longest version of [redacted] which contained information derived from [redacted] 3630-09 and other sources." The government offers no explanation for how a [redacted] containing "information derived from [redacted] and other sources," whose cover email expressly refers to [redacted] and whose prior iterations were based solely on the contents of [redacted] could possibly contain no information from the [redacted][6] As a result, the government's response cannot provide a basis to reject the defense's tailored request for that draft and any documents related to the drafting and dissemination of that draft.

The government's conclusory response is further undermined by the history of discovery in this case. For 13 months after the defense first requested [redacted] materials, the government represented that the contents of [redacted] were not reflected in [redacted] or [redacted]

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[5] Even now, the government's description of its decision to revise the "cut-off time" is shifting. The government claims that though its prior "cut-off time" was based on the "then-best" evidence of the time of the alleged disclosure, it has since concluded that an earlier "cut-off time" is "more appropriate." Opp. at 38. What the government neglects to mention is that none of the evidence cited in support of its revised "cut-off time" is newly-discovered. As the defense pointed out in its motion, all of the evidence that the government now relies on in support of its revised "cut-off time" was also available when it established its prior "cut-off time." The "best" evidence of the time of the alleged disclosure has not changed; the only thing that has changed is the government's argument to avoid producing certain materials.

[6] There is no doubt that the 2:41 p.m. draft exists. *See* Opp. at 63 n.36 (referring to "the [redacted] [redacted] attached to the [redacted] email at 2:41 p.m."). The government also concedes that the cover email to the 2:41 p.m. draft "refers to the [redacted] report itself," although it claims (contrary to [redacted] own description of the document) that it "does not discuss its contents" and its attachment "[does not] discuss North Korea's [redacted] [redacted] Opp. at 38.

circulated prior to publication of the article. Then, after being pressed, on November 30, 2012, the government produced a listing as its source document that was circulated well in advance of the publication of the article. Similarly, during the early stages of discovery, the government also represented that the referred to by Mr. Russel in his June 11 email (discussed above) was based on the report. That, of course, proved to be impossible, as Mr. Russel did not even view the report until almost three hours *after* he sent the email in question.

As the defense explained in its motion, told the FBI that the 2:41 p.m. contained information derived from , the same document that Mr. Kim is accused of disclosing to Mr. Rosen. also indicated that the 2:41 p.m. draft had been distributed by email to a group , any of whom could have shared its contents. On that basis, and in the absence of anything but conclusory assertions from the government, the defense moves to compel the production of the 2:41 p.m. and related materials described by [7]

2. **June 12, 2009 Email from**

The defense moved to compel the production of a June 12, 2009, email provided to the FBI by , "in which the topic because First Mot. at 23.

In its opposition, the government quotes the same passage from FBI-302 but then denies that the June 12th email "discusses the relationship between the information in

[7] The defense also notes, as it did with that will likely be called as a witness at trial, and the defense has the right to prepare for his testimony. The defense cannot do so without having access to the documents that provided to the FBI.

the Rosen article and the information contained in the [redacted]." Opp. at 38. That response defies logic. An email stating that the [redacted] contained the same information as the charged article draws a clear relationship between the article and [redacted] – it says that they contain the same information, and that inclusion of the information in the one caused the termination of the other. That relationship supports the defense's theory that the charged article might have been based on a leak of the [redacted] (to which Mr. Kim did not have access), rather than [redacted]. The June 12th email, even as described by the government, is relevant and helpful to the preparation of Mr. Kim's defense and should be produced.

3. [redacted] Publication [redacted]

The defense moved to compel the production of a [redacted] addressing North Korea's [redacted], which was also provided to the FBI by [redacted]. *See* First Mot. at 24-25. In its opposition, the government accuses the defense of engaging in "erroneous guesswork" and argues that "the fact that [redacted] chose to bring the report to his interview" does not make the report discoverable. Opp. at 39.

The "erroneous guesswork" cited by the government is set out in the defense's motion as a hypothetical of what the [redacted] may contain, given that the defense has never seen the document. The defense does not know the contents of the report because the government refuses to produce it, and even now the government offers nothing but assertions regarding what the report does *not* contain. The defense does know, however, that [redacted] who finally discovered the [redacted] for the government three years into its investigation, reviewed his own emails from the date of the alleged disclosure (June 11, 2009) and brought all of the documents that he felt were relevant with him to his interview with the FBI. *See* First Mot., Ex. 14 at 1. The [redacted] report was one of the documents selected by [redacted]. It is therefore

relevant and helpful to the preparation of the defense to demonstrate why a [REDACTED] would conclude that this other document was relevant to the alleged leak. The government may believe that [REDACTED] is the only source document, but the defense is entitled to obtain evidence demonstrating that this was not the case, and that people within the intelligence community reached the same conclusion. The Court should therefore order production of the [REDACTED] report.

C. The [REDACTED] Reports

The defense moved to compel [REDACTED] intelligence reports specifically identified by two government analysts, [REDACTED] and [REDACTED], as potential source documents for the Rosen article. *See* First Mot. at 25-29. In its opposition, the government admits 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." Opp. at 40. The government argues, however, that [REDACTED] and [REDACTED] were "mistaken" and that the defense cannot "take[] mistakes made by these witnesses to manufacture a discovery argument."[8] *Id.*

Whether [REDACTED] and [REDACTED] were "mistaken" is a question for the jury, or perhaps for the Court during CIPA proceedings. But the government cites no authority for the proposition that it gets to decide, on its own, that a witness was "mistaken" in identifying potential source documents in order to avoid producing those documents. Whether a document is discoverable does not turn on whether the government chooses to credit a witness's statement to the FBI.

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[8] In support of this claim, the government states that, "[a]fter later reviewing the documents in question, both witnesses corrected their error." Opp. at 40. The government glosses over the suggestive circumstances surrounding these "corrections," which are described in the defense's motion. *See* First Mot. at 26 n.17, 27-28.

The defense also has the right to prepare for the testimony of [REDACTED] and [REDACTED] at trial, and it cannot meaningfully do so without reviewing the reports that those witnesses identified as source documents for the Rosen article. One of the central issues in the case is whether the Rosen article was based on [REDACTED] (which Mr. Kim accessed), or some other document (which Mr. Kim did not access). The defense cannot evaluate the statements of [REDACTED] and [REDACTED] on this issue without having access to the [REDACTED] reports identified as source documents by these witnesses. The [REDACTED] reports are thus relevant and helpful to the preparation of Mr. Kim's defense.

D. Government Employee Emails

The defense moved to compel the production of emails from June 10 and June 11, 2009, of the government employees who had accessed [REDACTED] prior to publication of charged article, discussing the same topics as the article. *See* First Mot. at 29-31. At the government's request, the defense also provided a list of topics that it considered the same or similar to the topics contained in the charged article. *See* Dkt. 80, Ex. 10, at 10. That list of topics was first provided to the government over 14 months ago, on February 9, 2012. *See* Dkt. 80, Ex. 5.

In its opposition, the government complains about the scope of the emails sought by the defense and claims that it has produced at least one email from each of the missing categories. Opp. at 40-42. The government also asserts that reviewing "two full days" of emails from the employees and contractors involved in this case "would require an unwarranted and exorbitant expenditure of time and resources." *Id.* at 42. According to the government, it "has already conducted a broad search through government employee and contractor email for potentially-discoverable email." *Id.*

The defense finds the government's response unavailing for two reasons. First, the defense respectfully disagrees that reviewing "two full days" of emails from 168 individuals would require an "unwarranted and exorbitant expenditure of time and resources." This is not a large quantity of email, and is a far narrower demand than that routinely made by the Department of Justice in its grand jury subpoenas. It is warranted by the fact that these are the very 167 people who accessed [redacted] along with Mr. Kim on June 11.

Second, although the government claims that it has "already conducted a broad search through government employee and contractor email for potentially-discoverable email," the government fails to describe the contours of its search. At the government's request, the defense provided a list of proposed topics over 14 months ago. The government does not state which of those topics have been searched for, and which have not. The defense stands by the list of topics referenced in its motion. The government has provided no basis from which the Court could conclude that emails related to any of those specific topics are not relevant and helpful to the defense, as it does not address -- let alone object to -- any of those specific topics in its opposition.

E. Additional Intelligence Reports on the Same Subject Matter

The defense moved to compel the production of intelligence reports created between April 1, 2009, and June 11, 2009, addressing any of the topics discussed in the charged article. First Mot. at 6-8. At the *government*'s request, the defense provided a list of eleven topics that, in its view, tracked the content of the charged article. The purpose of the request was straight-forward: the defense sought any intelligence reports, in addition to [redacted] and its "predecessor documents," containing the same or similar information to the contents of the charged article,

i.e., any reports that, individually or in combination, could have been the source of the Rosen article.

As with its discussion of government employee emails, the government's opposition to this section of the motion consists primarily of broad assertions that do not correspond to the specific items sought by the defense. Ignoring the list of topics provided at its request, the government claims that it has already conducted a "broad and time-consuming search" for "any intelligence reports concerning any of the specific topics discussed in the Rosen article, namely North Korea's ██████ ██████" but that it has found none.[9] Opp. at 33. The government then criticizes the defense's list of eleven topics produced at its request, claiming that they are "untethered to the actual intelligence information at issue in this case." Opp. at 33-34.

Although the government first received the defense's list of topics over 14 months ago, *see* Dkt. 80, Ex. 5, at 2-3, the government does not do what would be most helpful to the Court and to the defense: review the list of eleven topics and identify those to which it objects, and those that have already been included in its search. One of the topics, for example, was any intelligence report discussing "North Korea's ██████ ██████ ██████ First Mot. at 6-7. Far from being "untethered" to the intelligence information at issue in this case, that is the precise topic of the charged article. Any intelligence report discussing that topic would be relevant and helpful to the preparation of Mr. Kim's defense for several reasons, whether as another potential source document, or as a means of understanding the

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[9] The wording of this response is vague. The government does not specify whether it searched for other intelligence reports addressing ██████ North Korean ██████, or whether it only searched for reports mentioning ██████

discrepancies between ████ and the news article, or as one of the many facts known to Mr. Kim at the time of the alleged disclosure that would inform whether he had "reason to believe" that the information could be used to the injury of the United States or to the advantage of a foreign nation. The government does not indicate whether it objects to producing intelligence reports discussing this topic, nor does it explain why such reports would not be relevant and helpful to the preparation of Mr. Kim's defense for the reasons described above. The government thus provides the Court with no reasoned basis to deny the defense's motion to compel the production of additional intelligence reports on the listed topics.[10]

II. Second Motion to Compel Discovery

In its second motion to compel discovery, the defense moved to compel the production of materials related to other individuals who accessed the intelligence report at issue prior to the publication of the charged article. These materials are relevant and helpful on the question of whether there was a source for the alleged leak other than Mr. Kim. In its opposition to the second motion, the government complains about the amount of time that it would supposedly take to track down the information sought by the defense. The time needed is not a reason to deny discovery if the information meets the "relevant and helpful" standard, particularly if it is information that the government could have acquired before it charged this case. The specific items raised in the defense's motion are addressed in turn below.

[10] In its first motion, the defense also moved to compel the production of certain intelligence reports identified by ████ *See* First Mot. at 15-17. As the government notes in its opposition, *see* Opp. at 37 n.16, the parties resolved this request at a meet-and-confer session on March 13, 2013. The defense thus withdraws that portion of its first motion to compel discovery.

A. Document Control Records

The defense moved to compel the production of document control records for thirteen hard copies of the intelligence report printed by (or for) various government employees and contractors.[11] Second Mot. at 6-7. In the event that such hard copies no longer exist, the defense asked the government to so notify the defense and the Court.

In its opposition, the government acknowledges that it has "now searched for the requested material related to the thirteen employees" and "found no responsive material." Opp. at 43. On that basis, the defense withdraws that portion of its motion seeking to compel the production of document control records.

B. Other Leaks of Intelligence [REDACTED]

The defense moved to compel the production of materials related to any other investigations of the leak of intelligence [REDACTED] during the same time period. *See* Second Mot. at 8-10. The defense sought these materials based on the statements of several government witnesses, who told the FBI that the charged article was merely one in a series of contemporaneous leaks of intelligence [REDACTED] *Id.* at 8 & n.5.

In its opposition, the government lists a parade of horribles that would occur if the defense's motion were granted. The government complains that the defense seeks "voluminous" discovery in support of a "broad third-party perpetrator theory" that would "expand exponentially" its discovery obligations and "significantly delay the trial." Opp. at 44-45. The government also argues that any such evidence "would not exculpate the defendant" because there could be more than one "miscreant who is unlawfully disclosing such information," and

[11] In its opposition, the government notes that only nine of the thirteen individuals identified by the defense printed hard copies of the report. *See* Opp. at 43 n.19. That is correct. The other four individuals had hard copies printed for them, but did not print copies themselves.

urges the Court to hold that such evidence is not admissible as "reverse 404(b) evidence" under the Federal Rules. *Id.* at 45-48.

To take the latter point first, the government completely misses the mark in its discussion of the legal standards applicable to so-called "reverse 404(b) evidence." The case law cited by the government addresses, in the government's own words, whether such evidence can be "introduced" or "presented" at trial. Opp. at 46. But questions regarding the "use, relevance, or admissibility" of evidence are properly resolved during CIPA § 6 proceedings, not at the discovery stage. *See* CIPA § 6, 18 U.S.C. App. III § 6. "The decisions made herein with respect to such discovery [on defendant's motion to compel] should obviously not be regarded as rulings that the documents so produced are necessarily material or otherwise admissible evidence at trial. Determinations in that regard will be made at a later time, either in connection with the review required by CIPA or at the trial itself (when decisions will be governed by the Federal Rules of Evidence)." *United States v. Poindexter*, 727 F. Supp. 1470, 1473 (D.D.C. 1989).

The government argues that, before it can present evidence of the other alleged disclosures to the jury, the defense must "show the requisite similarity to the charged crime."[12] Opp. at 46. But in order to show "the requisite similarity," the defense must first have access to the documents necessary to determine whether the disclosures are similar or dissimilar. An initial, specific discovery request, followed (if necessary) by a motion to compel, is the means by which the defense gathers such evidence, to evaluate whether it wishes to present such a defense

[12] The defense does not agree that any such showing is necessary, for the reasons stated in the text below. Moreover, the government's assertion that there is no connection between the charged disclosure and other disclosures of intelligence [redacted] during the same time period is flatly contradicted by the government's own witnesses. Mr. Russel, for example, told the FBI that the news article in question was [redacted] drawing a clear connection between the charged disclosure and [redacted] Second Mot. at 8 n.5. Several other government witnesses made similar statements to the FBI.

at trial. To say that the defense is not entitled to discovery because it cannot show the "requisite similarity" in fact demonstrates exactly why discovery is necessary, as the defense has no other way of obtaining the evidence necessary to evaluate whether the disclosures are similar or dissimilar.

Moreover, even if the Court were to consider the government's "reverse 404(b)" argument, the case law cited by the government makes clear that "[t]he majority of circuits have rightly held that Rule 404(b) primarily exists to protect a criminal defendant from the prejudice of propensity taint and should *not* be applied in cases where, as here, the defendant offers prior-act evidence of a third-party to prove some fact relevant to his defense." *Wynne v. Renico*, 606 F.3d 867, 872-73 (6th Cir. 2010) (Martin, J., concurring) (emphasis added). Thus, even if the Court were to accept the government's invitation to address this issue now, Rule 404(b) would not bar the introduction of evidence regarding third-party disclosures.

The government also complains that the defense seeks "voluminous" discovery regarding additional leaks, but fails to substantiate this concern by informing the Court how many other leaks of intelligence [redacted] occurred between June 2008 and June 2010. The defense expressly limited its motion to the topics addressed in the charged article, plus four specific instances described by government witnesses during the investigation. *See* Second Mot. at 8 n.4. If the government is representing that dozens of leaks related to those topics occurred during the relevant time period, that fact supports the defense's motion, since it demonstrates that the charged leak may be part of a broader pattern.[13]

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[13] If the government had some concern about the scope of the defense's original request, the parties also could have agreed on a narrower timeframe during the 14 months that passed between the defense's first request for this information and the filing of the government's opposition. *See* Dkt. 870, Ex. 5 at 6-7. But the government failed to raise any such concern over

C. Other Investigations of NSC Officials

The defense moved to compel the production of information regarding any other investigation for the unauthorized disclosure of national defense information of three National Security Council officials, John Brennan, Mark Lippert, and Denis McDonough. *See* Second Mot. at 10-12. As the defense explained in its motion, the defense sought such discovery based on these individuals' positions in the NSC and clear evidence (a phone record) that someone from the NSC called the reporter from Mr. McDonough's extension on the afternoon of June 11, 2009. The discovery sought by the defense was the same discovery the government had already provided with respect to 167 other government employees.

In its opposition, the government accuses the defense of relying on "rank speculation" to "drag three former senior White House officials into this matter." Opp. at 48-51. The government claims that, in addition to the three named individuals, there are "at least four other NSC employees [who] also had access to the NSC office phone that had contact with the reporter's phone on June 11th." Opp. at 50. In the government's view, the fact that none of the seven NSC employees admitted to speaking with the reporter on June 11 in the midst of a criminal investigation apparently means that all seven employees are exempt from discovery because their involvement remains "speculative."

The government's response is not persuasive. Messrs. Brennan, Lippert and McDonough were all senior officials in the same White House office in which several unaccounted-for copies of the intelligence report were circulating on June 11th. Messrs. Brennan, Lippert, and McDonough also had access to the phone extension that received and returned a call from the reporter on the afternoon of June 11th. That phone extension was associated with Mr.

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the past 14 months, and cannot be heard to complain now that the discovery sought is unreasonably burdensome.

McDonough, not one of the other four people mentioned by the government. If any one of the three named individuals has been investigated for leaking intelligence information, the defense moves to compel that information for the same reasons that it requested that information regarding the other 167 government employees who had access to the intelligence on June 11 and may have been in contact with the reporter. Indeed, the defense finds it peculiar that the government has insisted on special treatment for these three individuals, when it agreed to provide the same information with respect to the other 167 known government employees and contractors who had access to [redacted] prior to publication of the charged article.

D. Other Investigations of John Herzberg

The defense also moved to compel the production of information regarding any other investigation for the unauthorized disclosure of national defense information of John Herzberg. *See* Second Mot. at 12-14. As the government acknowledges, a search of Mr. Herzberg's emails revealed dozens of emails between Mr. Herzberg and the reporter during the same time period as the alleged disclosure in this case. Opp. at 51. Several of those email exchanges involved "sensitive but unclassified" State Department information, a fact which Mr. Herzberg denied in his earlier interviews with the FBI.

In its opposition, the government argues that this portion of the motion should be denied because "there is no evidence showing that Mr. Herzberg had access to the intelligence at issue prior to its publication in the Rosen article." Opp. at 51. The government also claims that the same rationale cited in support of the defense's motion to compel Mr. Herzberg's records "sweeps across the Executive Branch" to apply to "any employee who worked at the State Department on June 11, 2009." *Id.* at 51-52.

Neither of the government's responses withstands scrutiny. First, as the defense explained at length in its motion, the government has no foolproof way of determining whether someone did or did not have access to the intelligence at issue, as it lacks adequate controls over hard copies of the report and cannot account for word-of-mouth transmission of the information. The fact that there is "no evidence showing that Mr. Herzberg had access to the intelligence" is not determinative, particularly when one considers the location of Mr. Herzberg's office and his close relationship with the reporter

Second, the government's statement that the defense's rationale "sweeps across the Executive Branch" is sheer hyperbole. Not every member of the Executive Branch exchanged dozens of emails with the reporter in question in the days leading up to the alleged disclosure. Not every member of the Executive Branch routinely shared sensitive information with the reporter in question and then lied about it to the FBI. These are the central facts addressed in the defense's motion, but the government barely acknowledges them in its opposition, stating only that it finds Mr. Herzberg's correspondence with the reporter "not surprising[]."[14] Opp. at 51. The defense's request should be granted.

III. Third Motion to Compel Discovery

In its third motion, the defense moved to compel the production of materials related to whether the information allegedly disclosed to the reporter was "national defense information" ("NDI") and whether the alleged disclosure was willful. The specific items discussed in the defense's motion are addressed in turn below.

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[14] The fact that the FBI interviewed Mr. Herzberg at least three times and confronted him with his emails and misstatements undermines any assertion that the government was "unsurprised" by the volume and nature of his communications with the reporter.

The defense moved to compel these materials based on the accepted definition of NDI, which requires the government to prove, *inter alia*, that disclosure of the information would be potentially damaging to the United States or helpful to a foreign nation. That definition is well-established in the case law, and derives from the need to construe the Espionage Act so as to avoid vagueness concerns. *See United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988). The government claims that it need not satisfy this definition, arguing that the Court should reject the leading cases of the past 25 years and rely solely on the definition of "national defense" set forth in the Supreme Court's 1941 decision in *Gorin v. United States*, 312 U.S. 19 (1941). *See* Opp. at 52-60.

The Court should decline the government's invitation to reject the leading Espionage Act cases of the past quarter century. The requirement that disclosure of the information be "potentially damaging" is "implicit in the purpose of the statute and assures that the government cannot abuse the statute by penalizing citizens for discussing information the government has no compelling reason to keep confidential." *United States v. Rosen*, 445 F. Supp. 2d 602, 619-22 (E.D. Va. 2006); *see also United States v. Kiriakou*, 2012 WL 3263854, at *5-*6 (E.D. Va. 2012). The "potentially damaging" requirement is also consistent with the statute's scienter elements, which require the government to prove that the defendant knew not merely the information was connected to the national defense, but rather that the information "could be used to the injury of the United States or to the advantage of any foreign nation." 18 U.S.C. § 793(d). Notably, the government cannot point to a single case holding that *Morison*'s requirements should not apply.[15] Indeed, this Court cited *Morison* and its progeny approvingly in its prior

[15] The government cites the Second Circuit's decision in *United States v. Abu-Jihaad*, 630 F.3d 102 (2d Cir. 2010), in support of its claim. While the court in that case cited *Gorin*, the parties did not dispute the NDI element, and thus the question of how to define NDI was not before the

decision in this case addressing the defense's First Amendment concerns. *See United States v. Kim*, 808 F. Supp. 2d 44, 53 (D.D.C. 2011).

A. **Damage Assessment**

In its motion, the defense moved to compel the production of any "damage assessment" or other document addressing the effects of the alleged disclosure on national security interests. *See* Third Mot. at 5-6. Relying on its erroneous statutory argument, the government argues in opposition that "even if classified, after-the-fact damage assessments by the Intelligence Community 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."[16] Opp. at 53 (emphasis added). The government also argues that it "might never discover the actual harm that a given unauthorized disclosure has caused," and that it should not be forced "to delay prosecution until such time as an actual harm arising from the unauthorized [sic] is discovered or realized." *Id.* at 54. This argument fails, for several reasons.

First, as discussed above, the leading cases on the NDI element require the government to prove that disclosure of the information at issue could be damaging to the United States or helpful to a foreign nation. Discovery tending to show whether that element can be satisfied is relevant and helpful to the preparation of Mr. Kim's defense.

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court. *Id.* at 135. *Abu-Jihaad* did not discuss, let alone reject, the Fourth Circuit's decision in *Morison*.

[16] As the phrase "use them at trial" demonstrates, the government once again puts the cart before the horse in its discussion of the discoverability of damage assessments. While the government may object to *specific uses* of the information contained in a damage assessment at trial, such arguments are properly raised during CIPA § 6 proceedings on the use and admissibility of classified evidence, not in opposing a motion to compel. The only question currently before the Court is whether the defense is entitled to review the document to help prepare a defense and to search for other admissible evidence. *See Poindexter*, 727 F. Supp. at 1473.

Second, the government's argument that it should not be forced to wait to prosecute a defendant until "an actual harm … is discovered or realized" is a red herring, as no one has suggested that the government is required to show *actual* harm under the Act. To the contrary, *Morison* held that the government "must prove that the disclosure of the [information] would be *potentially* damaging to the United States or *might* be useful to an enemy of the United States." 844 F.2d at 1071 (emphasis added). In its efforts to craft a solution in search of a problem, the government mischaracterizes the standards applicable under existing law.

Third, the government relies on an overly simplistic view of the relevance of a damage assessment to resist disclosure. While it may be true, as the government noted, that a "damage assessment" is the "end result of a long-term, multi-disciplinary process" that "post-dates the disclosure at issue," the fact that a damage assessment is created after the fact does not transform otherwise discoverable factual information contained in the assessment into non-discoverable information. For example, if a damage assessment concluded that the alleged disclosure did not harm national security because the same information contained in the report previously had been reported in documents X, Y, and Z, that information is discoverable, as it is likely to lead to the discovery of other admissible evidence (reports X, Y, and Z, containing the same intelligence). Similarly, if a damage assessment discussed other intelligence reports or documents that were also known to Mr. Kim at the time of the alleged disclosure, such information would be discoverable even under the government's own construction of the statute, which requires the fact-finder to consider the "facts actually known by the accused" to determine whether he reasonably believed that disclosure could be damaging. Opp. at 59.

The government treats damage assessments monolithically, overlooking the fact that they may contain a host of factual information that is both relevant and helpful to the preparation of

Mr. Kim's defense. This is partially the result of the government's misreading of the statute, which provides no reasoned basis for denying the defense's motion to compel production of these materials.

B. Government Requests to Fox News

The defense moved to compel the production of any materials related to any requests made by a government official to Mr. Rosen, Fox News, or any entity affiliated with Fox News to remove or withhold publication of the charged article from the Fox News website. *See* Third Mot. at 7-9.

In its opposition, the government affirms that "it has produced all discoverable material responsive to this request," although it remains unwilling to formally admit that no such requests were made. Opp. at 60-61. Although the defense expressly disagrees with the rest of the government's response (which relies on the same erroneous interpretation of the Espionage Act addressed above), the opposition provides a clear enough picture of the government's reaction to the alleged disclosure to negate the need for additional evidence. The defense withdraws that portion of its motion seeking to compel materials related to any requests made to Fox News

C. [redacted] of the Intelligence

The defense moved to compel the production of information regarding the [redacted]

[redacted]

confidence level in the reporting contained in the report. *See* Third Mot. at 9-11. As the defense explained in its motion, the defense sought this information based on both the content of the report itself (which expressly states that the information [redacted]

[redacted] as well as several emails [redacted]

[redacted] *Id.*

In its opposition, the government once again relies on its faulty interpretation of the NDI element of the Espionage Act, arguing that the defendant has somehow conceded that the information contained in the report is "national defense information." Opp. at 63-65. The defendant has made no such concession and rejects the government's novel interpretation of the Act, for the reasons set forth above.

The government also argues that the defense is not entitled to information regarding the [redacted] the intelligence because "the defendant cannot be shown to have had knowledge at the time of the unauthorized disclosure of the documents that he seeks." Opp. at 63. This response assumes its own conclusion. The government has repeatedly denied the defense's requests for documents viewed by Mr. Kim in the weeks leading up to the alleged disclosure. *See infra*, Section III-F. The government has also refused to disclose what additional information exists regarding the [redacted]. The government fails to explain how the defense could possibly be expected to demonstrate that Mr. Kim had access to the requested documents when it refuses to identify which documents exist regarding the [redacted] and also refuses to produce the documents to which Mr. Kim had access

As the defense explained in its motion, whether the disclosure of the information allegedly leaked by Mr. Kim could be damaging to the United States or helpful to a foreign nation, and whether that information was closely held, are questions to be determined by the jury. *See* Third Mot. at 3. As part of his defense, Mr. Kim intends to introduce evidence that the information contained in [redacted] was not closely held, that it was already the subject of public conjecture, and that the purported "intelligence" contained in the report [redacted]

could have been based on open source materials or speculation.[17] The documents sought by the defense go directly to these issues, as they appear to substantiate Mr. Kim's contentions regarding the origin of the information and may lead to the discovery of other admissible evidence. The defense thus moves to compel their production.

D. The Situation Room Meeting

The defense moved to compel the production of materials from a June 12, 2009, Situation Room meeting during which the alleged disclosure was discussed. *See* Third Mot. at 11-13. In its opposition, the government states that it has reviewed these materials and that they do not discuss potential perpetrators of the alleged disclosures or contain any other exculpatory information. *See* Opp. at 65-66. The defense withdraws that portion of its motion seeking to compel the production of materials related to the June 12, 2009, Situation Room meeting.

E. Electronic Security Profiles

The defense moved to compel the production of electronic security profiles or other documents demonstrating that the individuals who were permitted to access the intelligence at issue had the security clearances necessary to view the report. *See* Third Mot. at 13-14. This request was apparently based on a misunderstanding of the FBI's interview with Darlene Bartley, a document control officer at the NSC. Ms. Bartley stated that she provided the intelligence report at issue to at least two NSC officials who were "not read-in" to the necessary compartments, which the defense interpreted to mean that those individuals lacked the clearances necessary to view the report. In its opposition, the government clarifies that those individuals "possessed TS//SCI clearances" but had not signed certain non-disclosure agreements. Opp. at

[17] The government criticizes the defense for failing to provide it with publically-available, open source materials containing information similar to [redacted]. Any such material that the defense intends to use at trial will be identified in the defendant's CIPA § 5 notice.

67-68. Based on the government's representation that the individuals in question had the necessary security clearances, the defense withdraws that portion of its motion seeking to compel the production of electronic security profiles.

The defense notes, however, that in this section of its opposition, the government expressly relies on Fourth Circuit precedent regarding the meaning of "closely held." *See* Opp. at 67. Whether information is "closely held" is the second part of the test for "national defense information" established by the Fourth Circuit in *Morison, see* 844 F.2d at 1071-72, the same case that the government urges the Court to ignore elsewhere in its brief. *See* Opp. at 52, 55-56. Like the phrase "potentially damaging," the term "closely held" does not appear in the text of the Espionage Act, but rather is a requirement imposed by the courts for the past quarter century to ensure that the Act is not applied unconstitutionally. *See, e.g., United States v. Abu-Jihaad*, 600 F. Supp. 2d 362, 386 (D. Conn. 2009) (explaining that the statutory term NDI is "cabined by two limitations"). The government offers no means of reconciling its apparent acceptance of this requirement (and its reliance on Fourth Circuit precedent) with its unprecedented rejection of *Morison*'s other requirements.

F. Other Intelligence Reports Accessed by Mr. Kim

The defense moved to compel the production of other intelligence reports accessed by Mr. Kim during the same time period. *See* Third Mot. at 14-16. As the defense explained in its motion, the defense sought these reports for two reasons: first, to rebut the government's contention that he acted with a bad purpose (i.e., allegedly to curry favor with Fox News); and second, to permit the defense to reconstruct the universe of facts known to Mr. Kim at the time of the alleged disclosure. *Id.*

In its opposition, the government claims that the defense confuses willfulness with motive, arguing that Mr. Kim's access to other intelligence reports is irrelevant to the question of willfulness. Opp. at 69-70. The government also argues that it should not be required to produce additional intelligence reports to refresh Mr. Kim's recollection because the events and discussions taking place during this time period are not relevant to the charged disclosure. *Id.* at 72.

The government misses the mark, for two reasons. First, although the defense does not agree with the government's narrow conception of "willfulness," the Court need not even reach that issue unless the government is representing that it does not intend to offer evidence of motive at trial. In its motion, the defense noted that "several of the interviews conducted by the FBI as part of its investigation indicate that the government believes Mr. Kim provided information to Mr. Rosen in an attempt to curry favor with Fox News." Third Mot. at 14-15. The government carefully avoids this issue, claiming that willfulness and motive are separate concepts without actually denying that it intends to offer evidence of Mr. Kim's alleged motive. If the government intends to offer motive evidence, the defense has the right to prepare for such testimony and to seek evidence necessary to rebut the government's proof. The defense seeks such evidence in its motion, and the government has not disclaimed the line of questioning regarding Fox News that has been repeatedly employed by the FBI in its interviews.

Second, in the section of its brief addressing Mr. Kim's "reasonable belief" that disclosure of the information could be damaging, the government essentially admits (but does not concede) that the defense is entitled to other intelligence reports accessed by Mr. Kim during the same time period that related to North Korea. According to the government, "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*.'" Opp. at 59 (emphasis added). Whether the reasonableness of Mr. Kim's belief is to be determined subjectively or objectively as the government proposes, that inquiry turns on the facts known to him at the time of the alleged disclosure. The facts known to Mr. Kim at the time of the alleged disclosure necessarily include the facts that Mr. Kim learned from the other intelligence reports that he viewed during the same time period [REDACTED]

[REDACTED] The content of the various reports that Mr. Kim accessed during that same time period is necessary, objective evidence of what Mr. Kim knew on June 11, 2009.[18] Thus, even under the government's own interpretation of the statute, the defense is entitled to the other intelligence reports accessed by Mr. Kim to determine whether he reasonably believed that disclosure of the information at issue was not potentially damaging.

IV. Fourth Motion to Compel Discovery

In its fourth motion, the defense objected to the government's use of substitutions and redactions without the Court's authorization and moved to compel the disclosure [REDACTED]

[REDACTED] In its opposition, the government states that it has now submitted its substitutions and redactions to the Court for approval under CIPA § 4. *See* Opp. at 73-74, 78. That representation

[18] The government also offers no other way for Mr. Kim to prepare for his own testimony, in the event he chooses to do so, by reviewing the information that he was dealing with almost four years ago.

satisfies the procedural issue, but leaves open the question of whether the redacted or substituted information is itself discoverable.[19]

The government has thus far refused to disclose [REDACTED] *See* Fourth Mot. at 3. As the defense explained in its motion, [REDACTED] are relevant and helpful to the preparation of Mr. Kim's defense, as the defense cannot investigate [REDACTED] *Id.* at 7-10.

In its opposition, the government argues that the defense is not entitled to the production [REDACTED] "[a]bsent some basis to believe that any of these individuals had [REDACTED]" Opp. at 75. But the government fails to explain how the defense could possibly be expected to provide "some basis to believe that [REDACTED]" when it refuses to tell the defense [REDACTED] The very purpose of the defense's motion is to obtain [REDACTED] in order to determine whether [REDACTED] a task that is impossible [REDACTED]

The government also argues that the defense is trying to "force the United States to choose between [REDACTED] and the potential dismissal of

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[19] The government characterizes this procedural issue as a "frivolous process point" to "belittle" the government's approach to discovery. The government's substitution [REDACTED] without Court approval, for the reasons set forth in the Fourth Motion, is not a frivolous point. Whether the government was agreeable to an expedited classified discovery process or not, it has still refused to provide [REDACTED] and has done so without Court approval. Nothing in the discovery process to date precluded the government from seeking a ruling from the Court, and the willingness to engage in expedited discovery does not excuse the government from seeking Court approval for any substitutions, which it may now have done after the fact.

the indictment." Fourth Mot. at 76-77. The defense is trying to force no such choice. The defense did not choose ██████ The fact that ██████ does not obviate the defendant's right to determine if ██████ The government's suggestion that the defense has some other motive is without support and is irrelevant to the issue. The government's further commentary on the defense's decision to interview government witnesses only *after* it has received all relevant documents is similarly beside the point. It is the defense's choice whether to interview before or after receiving all of the discovery in a case. Indeed, discovery thus far has proven that witnesses interviewed earlier may have to be re-interviewed on the basis of new information. With respect to ██████ the defense cannot be fairly criticized for postponing ██████ The defense is not trying to force the government to do anything other than produce the evidence to which Mr. Kim is entitled to prepare his defense.

CONCLUSION

For the foregoing reasons, the defendant's motions to compel discovery should be granted.

Respectfully submitted,

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/s/ Abbe David Lowell

Abbe David Lowell (DC Bar No. 358651)
Keith M. Rosen (DC Bar No. 495943)
Scott W. Coyle (DC Bar No. 1005985)
CHADBOURNE & PARKE LLP
1200 New Hampshire Ave NW
Washington, DC 20036

Counsel for Defendant Stephen Kim