

REDACTED / CLEARED FOR PUBLIC RELEASE



UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

vs.

STEPHEN JIN-WOO KIM,

Defendant.

Criminal No. 10-225 (CKK)

Filed with Classified  
Information Security Officer

CISO Carli Rf

Date 10/10/2013

**ORDER**  
(October 9, 2013)

Under separate cover today the Court shall address the Defendant's [116] Motion for Reconsideration of the Court's Ruling on His Third Motion to Compel, the Defendant's [125] Fifth Motion to Compel Discovery, and the Government's [150] Fourth *Ex Parte* Motion for a Protective Order Pursuant to CIPA Section 4 and Federal Rule of Criminal Procedure 16(d)(1). This Order briefly addresses two outstanding discovery issues: (1) the Defendant's request for damage [redacted] assessments based on information known to the Defendant at the time of the purported leak; and (2) the adequacy of the Government's email search protocol.

*A. Damage [redacted] Assessments Based on Information Known to the Defendant at the Time of the Purported Leak*

In connection with the Defendant's Third Motion to Compel, the Court ruled that the Defendant was entitled to receive damage [redacted] assessments based on information known to the Defendant at the time of the alleged leak, even if the Defendant did not have access to the damage [redacted] assessments themselves. Mem. Op. re Third Mot. to Compel at 14-15, 17. Since the Court's ruling, the parties have conferred regarding a procedure for identifying what information was known to the Defendant at the time of the release, and as a result what, if any, damage [redacted] assessments must be produced. After the parties reached an impasse,



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the Court held a closed hearing on September 27, 2013, to discuss potential solutions. During the hearing, the Court ordered the parties to adhere to the procedures set forth below.

With respect to the Defendant's request for damage assessments, the Government will gather all intelligence reports relating to North Korea with electronically accessible dates (e.g., the date on which the document was created, modified, or last accessed) between May 1 and June 11, 2009. The Government will also gather all intelligence reports relating to North Korea that the Defendant accessed on the [REDACTED] databases between May 1 and June 11, 2009. The Government shall then compare the information in any of the gathered reports to damage assessments---to the extent any exist---to determine if there is any overlap between the information in the collected reports and the information on which the damage assessments are based. The Government shall produce any damage assessments found to overlap with the information in the collected reports as expeditiously as possible, but in any event by no later than November 8, 2013.

In terms of the Defendant's request for [REDACTED] the Government shall gather all intelligence reports accessed by the Defendant since June 1, 2008, from the same source as the [REDACTED] regardless of [REDACTED]. The Government will then compare the information in the collected reports to [REDACTED] [REDACTED] to determine if there is any overlap between the information in the collected reports and [REDACTED]. The Government shall produce any [REDACTED] found to overlap with the information in the collected reports as expeditiously as possible, but in any event by no later than November 8, 2013.

*B. Email Search Protocol*

In his First Motion to Compel, the Defendant sought “[a]ny emails sent or received during the period June 10 to June 11, 2009, in which any government employees and/or contractors who accessed [REDACTED] prior to publication of the Rosen article discussed any of the topics addressed in the Rosen article.” Def.’s First Mot. to Compel, Proposed Order ¶ 14. The Defendant had previously asked the Government to search for eleven specific topics related to North Korea, as well as any emails discussing [REDACTED] [REDACTED] “[t]he relationship, if any, between the alleged disclosure of information in the June 11 Rosen article and any prior leak of ‘intelligence related to North Korea,’” and “[t]he effect, if any, of the alleged disclosure of information in the June 11 Rosen article on national security.” 6/22/12 Ltr A. Lowell to J. Malis. The Court was unable to determine from the Government’s response whether it had performed email searches for the relevant individuals regarding *all* fourteen topics identified in the Defendant’s original discovery request. *See* Gov’t’s Opp’n at 42 (“[W]ithout 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.”) Thus, the Court ordered the Government to indicate which, if any, of the fourteen topics the Government has *not* included in its searches, and articulate why such emails would not be helpful to the defense.

The Government provided the requested clarification in a June 6, 2013, Response, ECF No. [109]. The Government detailed the process undertaken for searching email records in connection with the purported leak to Mr. Rosen. In response to the Defendant’s request, the Government asked every department or agency with employees and/or contractors on the Access

Lit to conduct electronic searches of all available Government email for each employee or contractor, on both classified and unclassified systems for June 10, 2009, and June 11, 2009, until 3:24 PM. *Id.* at 5. The Government asked the relevant departments/agencies to conduct searches using thirteen search terms: [REDACTED]

[REDACTED] *Id.* at 5-6. The Government then reviewed the search results for any emails reflecting a variety of topics, including any evidence of contact with James Rosen or Fox News and the identity of any potential source of the leak to Mr. Rosen. *Id.* at 6-7.

The Defendant responded to the Government's filing by way of a letter dated June 14, 2013, a copy of which was provided to the Court, which the Government responded to in a June 19, 2013, Supplement and *ex parte* Addendum to its Supplement. The Defendant raises three objections worth addressing. First, the Defendant takes issue with the Government's search terms insofar as the Government omitted terms such as "Rosen," "Fox News," [REDACTED]

[REDACTED] The Government indicated that it searched for email contact between employees and contractors with James Rosen and Fox news. Moreover, the other terms suggested by the Defendant would like return a large number of hits with little or no connection to the issues relevant to this case. The Government's search terms were reasonably calculated to uncover potentially discoverable emails, and thus satisfied the Government's burden.

Second, the Defendant notes that the defense and the Government take different approaches to what may be considered a potential source document. To the extent there is any ambiguity as to what may or may not constitute a potential source document, the Government is required to seek relief under CIPA section 4, and the Court trusts that the Government has sought such relief as necessary. Third, the Defendant argues that it is entitled to any analysis of the

██████████ reflected in email correspondence. To the extent any such ██████████  
██████████ exist in the email search results, the Government must review ██████████ for  
discoverability consistent with the Court's prior rulings. Otherwise, the Court finds the  
Government has satisfied its burden to search for potentially responsive emails.

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COLLEEN KOLLAR KOTELLY  
UNITED STATES DISTRICT JUDGE