



C. Protective Orders/MoUs

On October 13, 2010, the Court entered the first CIPA Protective Order pursuant to the Government's Unopposed Motion for Protective Orders. Pursuant to the Court's October 13, 2010 Order, Abbe D. Lowell, Esq., executed the memorandum of understanding ("MoU") that was appended to the Court's Order and filed it with the Court on October 29, 2010. Once the other members of the defense team receive their security clearances, they will execute separate MoUs and file the forms with the Court.

On November 18, 2010, the Court entered the First Supplemental CIPA Protective Order pursuant to the Government's Unopposed Motion for First Supplemental CIPA Protective Order. As stipulated by the Court's Order of November 18, 2010, Mr. Kim has executed the MoU that was appended to the Court's Order. Mr. Kim, through undersigned defense counsel, has filed executed originals of his MoU with the Court and the Court Security Officer and has served an executed original of that document upon the United States. Mr. Kim, through undersigned defense counsel, has also filed his MoU electronically through the Court's ECF system.

**II. Unclassified Discovery**

To date, the government has made three separate productions of unclassified materials to the defense pursuant to its disclosure obligations and the defense's requests for discovery. Specifically, the government has produced in electronic format over 14,500 pages of documents including phone, bank, email, badge, passport, and security records, as well as video recordings collected during the investigation. As for electronic media, the government has produced duplicate images of Mr. Kim's hard drives from his personal computers, duplicate images of Mr. Kim's unclassified Department of State hard drive, duplicate images from Mr. Kim's unclassified Department of Energy hard drive, unclassified screenshots from Mr. Kim's

Department of State computer, and duplicate images of the .pst files of the contents of Mr. Kim's unclassified email account at the Department of State. The Parties are engaged in ongoing discussions on the special software programs and platforms required to view some of the electronic data produced by the government.

### **III. Classified Discovery**

To date, the government has produced what it terms the "core" classified documents to the defense (specifically, to defense counsel and to the defendant). Nearly all of these materials are marked at the TOP SECRET/SCI level.

The government is in the process of retrieving, reviewing and preparing for production in classified discovery to the defense other classified materials regarding individuals identified in this investigation as having accessed the classified national defense information at issue prior to the unauthorized disclosure charged in the Indictment. The government expects these classified materials to include electronic audit material from multiple classified computer systems. The government expects to produce these classified materials to the defense notwithstanding the fact that the government believes that such production would exceed its discovery obligations at this time.

During the course of this investigation, the government has also collected various items of classified electronic media from the SECRET and TOP SECRET computer systems of the Department of State (DoS). These items include three images each of Mr. Kim's work hard drives on DoS's SECRET and TOP SECRET computer systems (the hard drives were imaged on two separate dates and then the originals were collected and subsequently imaged); an image of Mr. Kim's shared server space on DoS's TOP SECRET computer network; .pst files of the contents of Mr. Kim's email accounts on both of those classified systems; and screenshots of

Mr. Kim's usage of his work hard drive on DoS's SECRET computer system. These items contain voluminous classified electronic records:

- The three images of the DoS SECRET hard drive collectively are approximately 223 gigabytes in size and contain information presumptively classified at the SECRET level. These drives contain approximately 34,639 non-duplicative electronic items (e.g., documents, images, presentations, spreadsheets, and system files). These drives also contain an additional 372 electronic items (note that this total most likely reflects duplicates). On these drives there is collectively 202.8 gigabytes of unallocated space that contains electronic information.
- The three images of the DoS TOP SECRET hard drive collectively are approximately 111.9 gigabytes in size and contain information presumptively classified at the TOP SECRET level. These drives contain approximately 40,584 non-duplicative items. These drives also contain an additional 1,676 electronic items (note that this total most likely reflects duplicates). On these drives there is collectively 76.2 gigabytes of unallocated space that contains electronic information.
- The image of the DoS TOP SECRET shared server space contains approximately 579 megabytes of information presumptively classified at the TOP SECRET level. The shared server space contains approximately 2,160 electronic items (note that this total most likely reflects duplicates). There is no unallocated space on the shared server space.
- There are approximately 1,936 email messages/scheduled items, 942 documents, 376 images, 13 presentations, and 3 spreadsheets in Mr. Kim's DoS SECRET.pst (email) files, all presumptively classified at the SECRET level.
- There are approximately 1,732 emails/scheduled items, 545 documents, 214 images, 9 presentations, and 2 spreadsheets in the Mr. Kim's DoS TOP SECRET .pst (email) files, all presumptively classified at the TOP SECRET level.
- There are approximately 3,450 screenshots of Mr. Kim's usage of the DoS SECRET computer system presumptively classified at the SECRET level.

Since the last status conference, the Parties have been negotiating the methodology and manner in which the government will search for, retrieve, and review, and possibly produce additional discoverable materials to the defense from this classified electronic media. Because of the enormous volume of electronic records in the classified electronic media, the Parties agree that the search for discoverable materials in this media will need to be made by electronic search

criteria (including by keyword or term, title, author, recipient, and/or date). To protect the various equities of the government and the defense, and to facilitate the production of discoverable material to the defense, if any, the Parties have reached an agreement regarding the methodology for review of this presumptively classified material for discoverable information. The Parties finalized their agreement concerning the review of these materials on December 8, 2010. In short, the Parties have agreed that the defense will submit electronic search terms to a filter team to run against the classified electronic media. The prosecution team will then review the results of the electronic search based on the defense-generated search criteria for classification and discoverability.

Because the Parties have only just been able to reach an agreement on the methodology from the retrieval of potentially-discoverable material from this classified electronic media, it is uncertain how long it will take to complete the search for, retrieval, review, and possible production of classified materials from this classified electronic media. As mentioned, prior to any of this material being produced to the defense, it will need to be reviewed for both discoverability and for classification. To begin the agreed-upon process, the Parties have agreed that the defense will provide their initial search terms (other terms may follow depending on the success of the first set of terms or the review of additional discovery) to the filter team by no later than January 7, 2011.. Given the volume of the material at issue, the Parties believe that the review process will take not less than 60 days and may, depending on the volume of material responsive to the defense-generated search criteria, take even longer. Accordingly, the Parties request that this Court set the next status in this matter in 60 days. The Parties believe that the scheduling of discovery motions and/or CIPA proceedings should follow completion of the review of the classified electronic media.

#### **IV. Witness Issues**

##### a. Fact Witnesses

Defense counsel has attempted to interview former government colleagues of Mr. Kim and has been asked by the Department of State (DoS) to provide DoS with a Touhey regulation request to have that done. The prosecution team has stated that the Department of Justice has no objection to defense counsel's pending request to have access to, and to interview, such DoS witnesses.

##### b. Expert Witnesses

Neither Party has indicated a decision to use any expert witnesses nor has identified any such witnesses. Defense counsel will seek a procedure where potential expert witnesses may have access to the classified materials in the case.

#### **V. Motions**

##### a. Dispositive Motions

The defense suggests that it file any dispositive motions based on the face of the indictment by January 31, 2011. The government defers to the Court on the timing of dispositive motions. If the Court is inclined to receive dispositive motions as proposed by the defense, the government requests 30 days to respond to the defense's dispositive motions.

##### b. Discovery Motions

The Parties believe that discovery motions should follow completion of classified discovery in this case.

#### **VI. CIPA**

Once the government has completed classified discovery, the Parties can address with the Court the various CIPA procedures and schedule for addressing classified material.

Dated: December 13, 2010

Respectfully submitted,

/s/ Abbe D. Lowell

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 13, 2010, I caused a true and correct copy of the foregoing be served via the Court's ECF filing system to all counsel of record in this matter.

/s/ Abbe D. Lowell