UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT STEPHEN KIM'S REVISED SECOND CIPA § 5 NOTICE

Defendant Stephen Kim, by and through undersigned counsel, respectfully submits his revised second notice pursuant to Section Five of the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. 3 § 5, and this Court's Memorandum Opinion of December 9, 2013. Pursuant to this Court's prior orders, this notice addresses several, but not all, of the core classified documents and information that defendant reasonably expects to disclose at trial as part of his defense. Defendant anticipates filing additional CIPA § 5 notices as described during the January 7th Status Hearing that will address classified information that has not been included in his first two notices, particularly in light of the fact that classified discovery remains ongoing in this case.

CIPA § 5 provides that if the defendant "reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with any trial or pretrial proceeding," the defendant shall "notify the attorney for the United States and the court in

writing." 18 U.S.C. App. 3 § 5(a). The notice shall include a "brief description" of the classified information the defendant reasonably expects to disclose.[1]

In its December 9th Memorandum Opinion, the Court set forth the following four-part definition for when a defendant "reasonably expects to disclose" information for CIPA § 5 purposes: (1) based on information presently available; (2) it is the defendant's present intention; (3) to present the information at trial; (4) with no expectation of later narrowing the information. Op. at 8. The defense respectfully objects to the fourth prong of this definition, which places an unfair burden on a defendant in a CIPA case – particularly a case such as this one in which the government has classified the vast majority of potentially relevant information provided during discovery. At this stage of the proceedings, the government has not provided the defendant with its witness list, its exhibit list, or even its Jencks material. The defendant does not know how the government intends to present its case, who it intends to call as witnesses, and what the testimony of those witnesses will entail. As a result, the defense does not know which of the documents provided in classified discovery it will need to cross-examine these witnesses, or which documents it will need with other witnesses to rebut the government's testimony. As a result, the defense cannot know whether it will need to use one document, ten documents, or

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[1] If the government objects to the disclosure, it may ask the Court to conduct a hearing under CIPA § 6(a) regarding "the use, relevance, or admissibility" of the classified information. 18 U.S.C. App. 3 § 6(a). Prior to that hearing, the government must "identify the specific classified information at issue whenever that information previously has been made available to the defendant by the United States." 18 U.S.C. App. 3 § 6(b). If the Court determines that disclosure of the classified information is warranted under Section 6(a), the government may file a motion under Section 6(c) to permit "a statement admitting relevant facts that the specific classified information would tend to prove" or "a summary of the specific classified information" as a substitute for disclosure of the information. 18 U.S.C. App. 3 § 6(c).

dozens of documents during cross-examination. Nor can the defendant yet know whether he will need to call particular witnesses in his case-in-chief, or take the stand in his own defense in order to rebut the government's evidence.[2]

Because CIPA requires the defendant to provide notice of any classified information that he reasonably expects to disclose at trial or risk forfeiting his right to use that information, see 18 U.S.C. App. 3 § 5(b), at this stage of the proceedings the defendant must notice information that may be narrowed or removed at a later time, once trial begins and the government's case is known. This does not mean that the defense is attempting to burden the Court or the government; rather, it is a function of the CIPA process and the government's decisions to classify the vast majority of evidence produced in this case and to refuse to disclose the particular witnesses, exhibits, and testimony that it intends to introduce at trial. The fourth prong of the Court's definition of "reasonably expects" appears to preclude the defense from noticing classified information that may be subsequently narrowed or removed, depending on the government's case-in-chief and defendant's decisions at trial. The defense respectfully submits that such a requirement draws no support from CIPA and infringes on his Fifth and Sixth Amendment rights. Accordingly, the defendant objects and submits that the Court should revise its definition of "reasonably expects" by removing the fourth prong.

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[2] It is well-established that a defendant in a criminal case bears no burden of proof. As a result, the notice requirements placed on a defendant by the rules of criminal procedure are very limited. While CIPA creates such a limited intrusion, it does make the disclosure obligations on the parties equal. Unlike the government in a criminal case or a plaintiff in a civil case, the defendant has no obligation to present a case-in-chief or any affirmative evidence whatsoever.

Based on defendant's understanding of CIPA § 5's requirements and the foregoing, defendant provides notice that he reasonable expects to disclose or to cause the disclosure of the classified information contained in the following items:[3]

1. Investigative questionnaires completed by [redacted] on the "List of 118"[4] who accessed the intelligence report at issue, as well as accompanying FBI cover memoranda and notes. (CLASS 334-39, 346-69, 375-553, 566-76, 580-600, 604-07, 612-17, 621-32, 636-63, 673-760, 1394-99)

2. Badge records for [redacted] on the "List of 118" who accessed the intelligence report at issue. (CLASS_1412, 1419, 1422, 1424, 1428, 1430, 1454, 1463, 1468, 1473, 1475, 1479, 1482, 1489, 1493, 1508, 1512, 1518, 1524, 1529, 1533, 1537, 1540, 1551, 1554, 1558, 1560, 1564, 1569, 1573, 1586, 1603, 1610, 1618, 1629, 1639, 1645, 1649, 1657, 1660, 1666, 1673, 1682, 1692)

3. Electronic document access records, including "drafting emails," for [redacted] on the "List of 118" who accessed the intelligence report at issue. (CLASS_1413-15, 1420-21, 1423, 1425-27, 1429, 1431-53, 1455-62, 1464-67, 1469-72, 1474, 1476-78, 1480-81, 1483-88, 1490-92, 1494-1507, 1509-11, 1513-17, 1519-23, 1525-28, 1530-32, 1534-36, 1538, 1539, 1541-50, 1552-53, 1555-57, 1559, 1561-63, 1565-68, 1570-72, 1574-85, 1587-89, 1604-09, 1611-17, 1619-1626, 1627, 1628, 1630-38, 1640-44, 1646-48, 1650-56, 1658-59, 1661-65, 1667-72,[5] 1674-81, 1683-91, 1693-96, 2884-88)

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[3] Throughout classified discovery, the government has produced revised or corrected versions of some documents bearing an "A," "B," or "C" suffix at the end of the Bates number (e.g., CLASS_3210A is a revised version of CLASS_3210). During the course of discovery alone, the government has altered the classification status of well over 100 documents that were originally produced "with incorrect classification markings." See Dkt. 153, Ex. 9. This does not include the hundreds of pages originally produced with the "treat as classified" header, without proper classification markings. To be clear, when the defendant cites a Bates range in his CIPA § 5 notices, he intends to include whatever revised versions of those documents have also been produced by the government.

[4] During the course of classified discovery in this case, the list of individuals who accessed the alleged intelligence at issue has expanded to 170 individuals.

[5] Two pages from this Bates range (CLASS_1668-69) were included in defendant's first CIPA § 5 notice as "drafting emails" or predecessor documents for the intelligence report at issue. See

(Cont'd on following page)

4. Phone records for [redacted] on the "List of 118" who accessed the intelligence report at issue. (CLASS_1385-87, 2878-81, 2920)

5. FBI 302s reflecting interviews of [redacted] on the "List of 118" who accessed the intelligence report at issue, with attachments.[6] (CLASS_370-74A, 577-79, 601-03, 608A-11, 618-20, 633-35, 1377-84, 1388-93, 2839-54, 2869-77, 2882-83, 2910-11, 2912-17)

6. The "List of 78" shown to [redacted] during an FBI interview. (CLASS_2893-2909)

(Cont'd from preceding page)

First CIPA § 5 Notice, Item 1. These pages have been included in defendant's second notice for consistency purposes, as CLASS_1667-72 also comprise the electronic document access records for [redacted].

[6] In its December 9th Memorandum Opinion, the Court urged – but did not require – the defense to narrow the amount of classified information noticed in this item. See Op. at 7-9. The defense does not know which of these potential witnesses will be called at trial, and therefore cannot know which of these reports will be necessary to refresh the recollection of a witness, to impeach a witness with a prior inconsistent statement, or to rehabilitate a witness with a prior consistent statement. For that reason – and because the government has marked all the FBI 302s as classified – the defense has noticed these reports in their entirety, as failing to do so would risk a subsequent argument by the government that the reports could not be used for these common evidentiary purposes because they had not been noticed.

If the government were to provide a witness list, it is possible that this item could be narrowed. To date, the government has not done so. The defense also notes that, in many instances, the actual reports contained in defendant's second CIPA § 5 notice consist of nothing more than a recounting of a witness's answers to the questions posed in the government's investigative questionnaires, which several employees and contractors refused to complete. The government did not object to the sufficiency of defendant's notice with respect to the written investigative questionnaires, and fails to explain why an FBI-302 containing the exact same information as the questionnaires should be treated any differently. Under CIPA § 6(b), it is the government's obligation to identify the specific classified information contained in these documents to which it objects. The government could therefore lessen the burden on the Court by identifying the specific classified information contained in these FBI 302s to which it actually objects, rather than issuing a blanket objection to the sufficiency of this section of defendant's notice. The government is certainly aware of the information contained in these documents, as they are the products of the government's own investigation in this case.

7. With respect to a [redacted] being drafted on June 11, 2009:[7]

   a. The [redacted] provided in discovery and email correspondence relating to the [redacted]. (CLASS_3085-3125, 3205-18)

   b. [redacted] classified statements to the FBI on July 12, 2012 (CLASS_3077-81).

   c. The factual basis for [redacted] statement in his 8:51 a.m. email on June 11, 2009, that he was aware that [redacted] "should be out in minutes" (i.e., the document, conversation, email, or other thing that caused [redacted] to believe that [redacted] would be "out in minutes."). The government has not provided the defendant with any discovery (including any Jencks material) indicating the basis for [redacted] assertion. Accordingly, the defense cannot at this time identify a specific classified document, e-mail, conversation, or other item that will be disclosed. The defense reasonably expects to elicit testimony at trial as to how [redacted] knew that [redacted] would be "out in minutes" as of 8:51 a.m. on June 11, and the defendant reasonably expects that such testimony may cause the disclosure of classified information.

   d. Any documents, classified communications, or classified information already known to [redacted] upon which he relied for the statement in the email that [redacted]." As with item 7(c), the government has not provided the defendant with any discovery which would indicate whether (or to what extent) [redacted] relied on (i) classified documents or information other than [redacted] for this statement, or (ii) information contained in [redacted] (or its precursor intelligence reports) prior to the time of first access identified by the government in discovery. Accordingly, the defense cannot at this time identify a specific classified document, e-mail, conversation, or other item that would be disclosed. The defense reasonably expects to elicit testimony at trial as to how [redacted] knew the topics of [redacted] before it was released, and thus identified the list of topics that would need to be discussed. If [redacted] relied on documents, communications, or other classified information already

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[7] Per the Court's December 9th Opinion, the defense expressly reserves its right to elicit additional classified testimony regarding these topics and documents at trial. See Op. at 11.

known to him, the defense reasonably expects that those items will be disclosed in the testimony that is elicited. The defendant thus reasonably expects that that testimony may cause the disclosure of classified information.

e. Any documents, classified communications, or classified information already known to [redacted] upon which he relied for the statement in the email that "[redacted]." As with item 7(d), the government has not provided the defendant with any discovery which would indicate whether (or to what extent) [redacted] relied on (i) classified documents or information other than [redacted] for this statement, or (ii) information contained in [redacted] (or its precursor intelligence reports) prior to the time of first access identified by the government in discovery. Accordingly, the defense cannot at this time identify a specific classified document, e-mail, conversation, or other item that would be disclosed. The defense reasonably expects to elicit testimony at trial as to how [redacted] knew the topics of [redacted] before it was released, and thus identified the list of topics that would need to be discussed. If [redacted] relied on documents, communications, or other classified information already known to him, the defense reasonably expects that those items will be disclosed in the testimony that is elicited. The defendant thus reasonably expects that that testimony may cause the disclosure of classified information.

f. The existence and contents (as they relate to [redacted], the intelligence therein, or [redacted] of a "planning meeting" [redacted] at 10:30 am on June 11, during which [redacted] of the information contained [redacted] were discussed and the [redacted] was questioned [redacted].[8]

[8] The Court's December 9, 2013, Memorandum Opinion directs the defense to provide a more specific notice about the identifiable classified information that would be disclosed by this item. *See* Memorandum Opinion at 23. The only information provided by the government in discovery concerning this meeting is a singular, one-paragraph email (CLASS_0003110) that reveals the existence of the meeting and the fact that [redacted]." Because the government has not produced any notes from the meeting or other information concerning the participants, topics, etc. the defendant cannot detail the classified information with any greater specificity than that provided. The defense submits that the revised language is sufficient to provide the government

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g. The intended and actual distribution of [redacted]

h. Electronic document access and badge records for all authors and recipients of (a) the [redacted] or (b) the email correspondence relating to [redacted]. (CLASS_3126-77, 3219-27).

i. The fact that [redacted] on June 11, 2009, that included information relating to the content of the intelligence report at issue.

j. The content of the [redacted] prepared on June 11, 2009, as they relate to the content of the intelligence report at issue.

k. The method by which the individuals who drafted or commented on the June 11 [redacted] communicated with each other (e.g. by email, through handwritten comments on hard copy drafts).

l. Whether any hard copy drafts [redacted] were created during June 11, 2009, and, if so,

   i. Who created the hard copies;
   ii. The distribution of those hard copies;
   iii. The existence of any records reflecting what happened to the hard copies, who reviewed the hard copies, and the retention or disposal of the hard copies.

m. To the extent classified, the identity of all authors and recipients of (a) the [redacted] or (b) the email correspondence relating to [redacted]

n. A general description of:

   i. What a [redacted] is;
   ii. The function and purpose of a [redacted]
   iii. How and when a [redacted] is prepared;
   iv. Who determines when a topic is included in a [redacted]

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with its required notice – particularly given that the government knows (or has access to) what was discussed at the meeting, but has refused to provide that information to the defense.

v. The intended audience of [redacted], including [redacted]

8. With respect to the [redacted] email concerning North Korean [redacted]:[9]

a. An [redacted] describing North Korean [redacted] "[redacted]" (CLASS_1368-69).

b. [redacted]

c. Whether [redacted] transmitted the email to the various distribution lists identified in the header (#SUITE, #CPS-NSC, #DEEFENSE-NSC, #EAST-ASIA) over a classified email system.

d. Whether [redacted] was informed at any time prior to, during, or after he drafted and distributed his email that the information contained in the unredacted portions of the email was classified, or, alternatively, whether he submitted the information in the unredacted portions of the email for classification review prior to its distribution [redacted].

e. Whether the information concerning the North Korean [redacted] appeared in a classified report prior to [redacted].

f. Whether the information concerning the North Korean [redacted] appeared in a classified report after [redacted]

9. With respect to a [redacted], email from [redacted] concerning North Korea's [redacted]".[10]

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[9] Per the Court's December 9, 2013, Memorandum Opinion, the defense expressly reserves its right to elicit classified testimony relating to these topics and documents that may arise during testimony at trial. See Op. at 11.

a. [redacted] email. (CLASS_3204)

b. [redacted]

c. Whether [redacted] transmitted the email (to the redacted recipient list) over a classified email system).

d. Whether [redacted] marked the email as classified at the time it was created, or, alternatively, whether he submitted the email for classification review prior to its distribution at [redacted]

e. Whether the information contained in the email appeared in a classified report prior to [redacted].

f. Whether the information contained in the email appeared in a classified report after [redacted].

10. With respect to Daniel Russell's June 11, 2009, email concerning the "[redacted] [redacted]:[11]

a. Russel's email. (CLASS_1370)

b. Russel's classified statements to the FBI on August 10, 2009. (CLASS_1360-65)

c. Electronic document access records for Russel. (CLASS_1832-44)

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[10] Per the Court's December 9, 2013, Memorandum Opinion, the defense expressly reserves its right to elicit classified testimony relating to these topics and documents that may arise during testimony at trial. See Op. at 11.

[11] Per the Court's December 9, 2013, Memorandum Opinion, the defense expressly reserves its right to elicit classified testimony relating to these topics and documents that may arise during testimony at trial. See Op. at 11.

d. The meaning of the reference by Russel in the email to "[t]oday's [REDACTED] [redacted]

e. If the source document or information described by Russel using the term [redacted] (identified in (d), above) is something other than [redacted]."

f. If the [redacted]" is [redacted] or its predecessor reports, the manner by which Russel accessed the information described in the email prior to 8:59 a.m. on June 11, 2009.

g. The identity and/or contents of any documents or other information that formed the basis for Russel's statement that the [redacted]."

h. The identity and/or contents of any documents or other information that formed the basis for Russel's statement that North Korea [redacted]

11. With respect to the distribution of copies of [redacted] to persons within the White House:[12]

a. The distribution of hard copies of [redacted] by Darlene Bartley to Matt Spence and Thomas Donilon.

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[12] The Court's December 9, 2013, Memorandum Opinion directs the defense to provide a more specific notice about the identifiable classified information that would be disclosed by this item. See Memorandum Opinion at 23. The only information provided by the government in discovery concerning this email is the email itself. The government has thus far not been ordered to provide any discovery on [redacted]" referred to in the email, as well as what [redacted]" contains. Accordingly, the defendant cannot detail the classified information with any greater specificity than that provided. The defense submits that the revised language is sufficient to provide the government with its required notice – particularly given that the government knows the identity and content of [redacted]

[13] Per the Court's December 9, 2013, Memorandum Opinion, the defense expressly reserves its right to elicit classified testimony relating to these topics and documents that may arise during testimony at trial. See Op. at 11.

b. Building access or badge records for June 11, 2009, for Bartley, Spence, Donilon, Russel, and Lutes. (CLASS_1306)

c. Darlene Bartley's investigative questionnaire. (CLASS_1298-1304)

d. Electronic document access records for Darlene Bartley. (CLASS_1824-30)

e. A June 11, 2009, email from Daniel Russel asking that a hard copy of [redacted] be provided to Thomas Donilon and Matt Spence. (CLASS_1305, 1371)

f. The use, existence (or lack thereof), destruction, and/or current location of any classified cover sheets, distribution logs, or other document control mechanisms reflecting the distribution of hard copies of [redacted] as well as the reasons why these sheets were (or were not) created or used.

g. Darlene Bartley's classified statements to the FBI during interviews on August 3, 2009, August 4, 2009, and February 3, 2011. (CLASS_1288-91, 1292-94, 1295-97) The defense specifically notices the following paragraphs of the first (August 3) FBI 302: ¶¶ 2, 4, 8, 9, 10. The defense specifically notices the following paragraphs of the second (August 4) FBI 302: ¶¶ 2, 8. The defense specifically notices the following paragraphs of the third (February 2011) FBI 302: ¶¶ 1, 2, 3, 4, 5, 6, 7.

h. Charles Lutes' classified statements to the FBI during an interview on January 28, 2011. (CLASS_1324-29) The defense specifically notices the following paragraphs of the FBI 302: ¶¶ 1, 2, 3, 4, 5, 6, 7, 8, 9, 10.

i. Charles Lutes' emails from June 11, 2009, with Darlene Bartley and Christine Clark. (CLASS_1340-43)

j. Charles Lutes' investigative questionnaire. (CLASS_1333-39)

k. Matthew Spence's classified statements to the FBI during interviews on August 19, 2009, and April 3, 2012. (CLASS_1373-74, 2891-92) The defense specifically notices the following paragraphs of the first (August 2009) FBI 302: ¶¶ 3, 4, 5. The defense notes that every substantive paragraph of the second (April 2012) FBI 302 is marked "U" for unclassified, yet the document itself is marked [redacted]." The defense objects to having to notice this document through the CIPA process. The government's failure to declassify this

document places a burden on the defendant that he does not have under the law. In an abundance of caution, defendant has no choice but to notice this document.

l. Electronic document access records for Matthew Spence. (CLASS_1845)

m. Thomas Donilon's classified statements to the FBI during interviews on September 25, 2009, and August 1, 2012. (CLASS_1307-09, 3045-49) The defense specifically notices the following paragraphs of the first (September 2009) FBI 302: ¶¶ 2 (only as to the charged article), 3, 4. The defense specifically notices the following paragraphs of the second (August 2012) FBI 302: ¶¶ 1, 2, 7, 9, 10, 12, 13, 14, 15.

n. Electronic document access records for Thomas Donilon. (CLASS_1831)

12. With respect to all contacts between White House/NSC officials and Fox News on June 11, 2009:[14]

    a. The substance of any discussion concerning [redacted], the information contained in [redacted], or the Rosen article.

    b. The method or means by which the government acquired the McDonough-Major Garrett emails produced in discovery. (See CLASS_1110-11)[15]

13. The "Eleven Questions" document relating to the alleged disclosure. (CLASS_27-30) Per the Court's December 9, 2013, Memorandum Opinion, the defense reasonably expects to disclose the following classified questions and answers from this document:[16]

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[14] Per the Court's December 9, 2013, Memorandum Opinion, the defense expressly reserves its right to elicit classified testimony relating to these topics and documents that may arise during testimony at trial. See Op. at 11.

[15] The government has since determined that the McDonough-Garrett emails are unclassified.

[16] Question/answer #1, 6, 7, 8, 9, and 10 are marked unclassified, and are thus not subject to CIPA. In its December 9 Memorandum Opinion, the Court notes the government's assertion that this document includes information relating to an uncharged disclosure. See Mem. Op. at 16. The document appears to contain only one paragraph that fits this description, within the 4-page

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a. Question/answer #2, except for the paragraph at the top of page CLASS_000028 beginning with the phrase "[redacted]...";
b. Question/answer #3;
c. The classified portion of question/answer #4;[17]

14. [Withdrawn]

15. With respect to (i) any office, component or unit of [redacted] that had personnel who accessed [redacted] or its underlying intelligence reports on June 11, 2009; (ii) any office, component, or unit of [redacted] whose personnel made classification decisions regarding the discovery produced in this case (including the classification review of the "treat as" documents); and (iii) any office, component, or unit of the FBI whose personnel have been involved in the investigation and prosecution of the defendant, during the period from 2009 (the time of the alleged disclosure) through December 2013 (the period of the investigation of the defendant):

a. The process by which original classification decisions, including determinations of classification level, were made concerning intelligence reports involving North Korea.

b. The process by which classification decisions, including determinations of classification level, were made and/or changed concerning any emails, documents, investigative reports (such as FBI 302s) and memoranda provided to the defendant in discovery in this case.

c. The process by which individuals within the agency offices described above determine what information can be shared with members of the media (whether through formal public statements or informal (e.g. "off the record") conversations, such as the communications between John Hertzberg and James Rosen).

16. During 2009, the process by which components of the State Department (such as EAP and VCI) prepared a public or media statement that was derived from or relates to classified information, or otherwise communicates or discusses information with the

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document. That paragraph has now been removed from the defendant's notice, see item 13(a), above.

[17] The majority of question/answer #4 is marked unclassified, and is thus not subject to CIPA.

media that is derived from classified information. The defendant reasonably expects to elicit testimony describing the preparation of unclassified press guidance documents that contain proposed answers to media questions and "background" discussions of the facts and circumstances underlying the proposed answers. The defendant reasonably expects to elicit testimony concerning the extent to which the drafters of these unclassified press guidance documents review any classified reports concerning the topics of the press guidance documents and/or otherwise determine whether the information contained in the unclassified press guidance documents otherwise exists in a classified report.

In the Court's December 9 Memorandum Opinion, the defense was directed to provide an example of the types of documents/communications with the media referred to in this notice item. As the press guidance documents are unclassified, they are not subject to the CIPA process, and thus the defense has not provided formal notice to the government of its intent to use any particular guidance document at trial. Per the Court's direction, however, the defense provides the following example for illustrative purposes.

On April 27, 2009, an unclassified EAP press guidance document was prepared. This document discussed the U.S. reaction to an April 14, 2009, announcement by North Korea of the "countermeasures" that it would take in response to U.N. condemnation of its April 5 missile launch. The press guidance contained a statement that the U.S. "cannot confirm" the report that North Korea had begun work on a facility to reprocess spent fuel rods. It also contained a statement that, despite reports to the contrary, "[i]t is more likely that work on the reprocessing facility has begin and actual reprocessing is still some time off." The defense will elicit testimony as to whether (a) these statements are based on information that appears in classified reports; (b) regardless of whether such reports were reviewed by the EAP personnel who prepared the press guidance, whether these statements did, in fact, appear in classified reports that existed on or before April 27, 2009; and (c) how drafters of the press guidance would determine whether these statements could be included in an unclassified press guidance document and shared with the media.

Dated: January 13, 2014

Respectfully submitted,

/s/

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