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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

DEFENDANT STEPHEN KIM'S FIRST MOTION TO COMPEL DISCOVERY
(REGARDING ADDITIONAL SOURCE DOCUMENTS)

Defendant Stephen Kim, by and through undersigned counsel, hereby moves[1] this Honorable Court for an order compelling the government to produce the discovery materials described herein, relating to additional source documents for the charged disclosure in this case. This motion is made pursuant to Rule 16 of the Federal Rules of Criminal Procedure as well as Mr. Kim's right to exculpatory information as set forth in *Brady* and its progeny. *See Brady* v. *Maryland*, 373 U.S. 83 (1963).

I. Introduction and Relevant Facts

Mr. Kim is charged with one count of disclosing national defense information to one not entitled to receive it in violation of the Espionage Act, 18 U.S.C. § 793(d), and one count of making false statements to a federal official in violation of 18 U.S.C. § 1001(a)(2). The Indictment alleges that "in or about June 2009," Mr. Kim disclosed the contents of a classified report "concerning intelligence sources and/or methods and intelligence about the military

[1] The defense is filing three separate motions to compel discovery corresponding to the categories of requests previously made to (and denied by) the government. The defense is also filing a separate motion regarding the government's practice of redacting and substituting discoverable information without seeking the Court's authorization.

capabilities and preparedness of a particular foreign nation" to "a reporter for a national news organization." Dkt. 3 at 1.

During discovery, the government clarified that the "classified report" referenced in the Indictment is [redacted]3630-09,[redacted] reporting that [redacted] The government also confirmed that the "reporter" referenced in the Indictment is Fox News correspondent James Rosen. At approximately 3:16 p.m. on the afternoon of June 11, 2009, Mr. Rosen reported that North Korea [redacted] In a nutshell, the government alleges that the Rosen article contained "national defense information" ("NDI"), [redacted] was the source document for the Rosen article, and Mr. Kim was the one who disclosed the information contained in [redacted] to Mr. Rosen.

Although the government alleges that Mr. Kim communicated the contents of [redacted] to Mr. Rosen on June 11, 2009, Mr. Kim is not charged with providing a hard copy of the intelligence report, or any other document, to Mr. Rosen. Mr. Kim is not charged with disclosing classified information to an agent of a foreign government, or to anyone else seeking to harm the United States. Mr. Kim is not charged with accepting money, or anything else of value, from Mr. Rosen in exchange for the information. Mr. Kim is not alleged to have stolen any material from the government. Rather, it appears that the allegation against Mr. Kim is that

[2] As used throughout this Motion, the phrase [redacted] refers to both the actual [redacted] accessed by Mr. Kim as well as prior iterations of the same intelligence produced by the government in this case, such as the underlying [redacted] and earlier versions of the intelligence report.

he orally disclosed the contents of [redacted] to Mr. Rosen on June 11, 2009, and that he did so willfully.

To prove that this disclosure took place, however, the government will not rely on a recording or videotape, or any other record demonstrating the content of the alleged communications between Mr. Kim and Mr. Rosen on June 11, 2009. Instead, the government will contend that only a limited number of government employees and contractors had access to [redacted] on June 11, that Mr. Kim and Mr. Rosen were in contact with one another on June 11, and that the content of the Rosen article mirrors the content of [redacted][3] In fact, to convict Mr. Kim, the government must prove that [redacted] was the source document for the Rosen article, because [redacted] is the only intelligence report containing the relevant information that the government alleges Mr. Kim accessed on June 11, 2009. For that reason, any evidence tending to show that the Rosen article was based on some document other than [redacted] is exculpatory, as the government does not allege that Mr. Kim accessed or disclosed any other document containing the same or similar information.

On that basis, the defense asked the government to produce any other intelligence reports or other documents existing as of June 11, 2009, containing the same or similar information as that contained in [redacted] and the June 11 Rosen article. The existence of such documents is not merely a hypothetical concern. As described more fully below, several of the documents already produced by the government in this case demonstrate that government employees were aware of, and had relied upon, intelligence materials other than [redacted] containing the same or similar information. These documents are "relevant and helpful" to the defense not only because they tend to disprove the government's theory that [redacted] was the only possible source document for

[3] The defense does not agree that the Rosen article mirrors the content of [redacted] There are significant discrepancies between the two documents.

the Rosen article, but also because anyone who accessed the information reflected in the Rosen article – whether in [redacted] or some other intelligence product – could have provided that information to Mr. Rosen.

The specific discovery requests denied by the government are described in detail below. The government's refusal to produce these documents has left the defense with no choice but to move this Court to compel their production.

II. Legal Standard

This motion to compel discovery is made pursuant to both Mr. Kim's right to exculpatory information as set forth in *Brady* and its progeny and Rule 16 of the Federal Rules of Criminal Procedure.

Under *Brady*, the defense is entitled to any information "that is 'favorable to the accused, either because it is exculpatory, or because it is impeaching' of a government witness." *United States v. Mejia*, 448 F.3d 436, 456 (D.C. Cir. 2006) (quoting *Strickler v. Green*, 527 U.S. 263, 281-82 (1999)). The prosecution's *Brady* obligations include not only a duty to disclose exculpatory information, but also a duty to search for such information. *See United States v. Brooks*, 966 F.2d 1500, 1502 (D.C. Cir. 1992); *United States v. Safavian*, 233 F.R.D. 12, 15 (D.D.C. 2005).

Under Rule 16, the defense is entitled to any information that is material to the preparation of the defense. *See United States v. Marshall*, 132 F.3d 63, 67 (D.C. Cir. 1998). Documents are material to the preparation of the defense if they help the defense ascertain the strengths and weaknesses of the government's case or aid the defendant's efforts to (1) prepare a strategy for confronting damaging evidence at trial, (2) conduct an investigation to discredit the government's evidence, or (3) avoid presenting a defense that would be undercut by the

government's evidence. *Id.*; *see also Safavian*, 233 F.R.D. at 15. "[T]he documents need not directly relate to the defendant's guilt or innocence. Rather, they simply must play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony or assisting impeachment or rebuttal." *United States v. George*, 786 F. Supp. 11, 13 (D.D.C. 1991) (internal quotation omitted). "The language and the spirit of [Rule 16] are designed to provide to a criminal defendant, in the interest of fairness, the widest possible opportunity to inspect and receive such materials in the possession of the government as may aid him in presenting his side of the case." *United States v. Poindexter*, 727 F. Supp. 1470, 1473 (D.D.C. 1989).

Because the government's case against Mr. Kim involves classified information, the defense expects the government to assert a national security privilege as to some of the material described in this Motion. A defendant seeking classified information is entitled to any information that is both relevant and "at least 'helpful to the defense of the accused.'" *United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989) (quoting *Roviaro v. United States*, 353 U.S. 53 (1957)). To demonstrate that the information is "at least helpful" to the preparation of the defense, the defendant must show that the information is not just theoretically relevant but also "useful to counter the government's case or to bolster a defense." *United States v. Aref*, 533 F.3d 72, 80 (2d Cir. 2008). "To be helpful or material to the defense, evidence need not rise to the level that would trigger the Government's obligation under *Brady*." *Id.*; *see also Mejia*, 448 F.3d at 456-57 ("[I]nformation can be helpful without being 'favorable' in the *Brady* sense.")

In a case such as this one involving cleared defense counsel, courts traditionally "err on the side of granting discovery to the defendant" and "resolve[] close or difficult issues in his favor," for two reasons. *Poindexter*, 727 F. Supp. at 1473. First, in light of the procedures yet to take place under the Classified Information Procedures Act ("CIPA"), the only question

presently before the Court is whether the information sought by the defense should be disclosed to cleared defense counsel, not whether the information will be used at trial. "[B]ecause of the CIPA process, the Court will have an opportunity to address once again the issue of the materiality of classified documents that have been produced and their use as evidence" before trial. *Id.*; *see also George*, 786 F. Supp. at 16 n.9. Second, the Court has already entered a protective order in this case, which mitigates any concerns about the potential for any unauthorized disclosure of classified information. *See George*, 786 F. Supp. at 16 & n.7. For these reasons, any close question should be resolved in Mr. Kim's favor.

III. Specific Items Requested

A. Additional Intelligence Reports on the Same Subject Matter

The defense previously requested any intelligence reports created between April 1, 2009, and June 11, 2009, addressing the same topics as those described in [redacted] and the Rosen article. *See* Dkt. 80, Ex. 10, at 1-3.[4] This request was based on a series of documents produced by the government (described in further detail in the sections below) plainly indicating that [redacted] was not the only intelligence report discussing [redacted] of June 11, 2009.

In an effort to narrow this request for the government, the defense provided a list of topics related to North Korea that it considered "relevant and helpful" to the preparation of Mr. Kim's defense. This list closely tracked the contents of [redacted] and the Rosen article. The defense requested, for example, intelligence reports created between April 1, 2009, and June 11, 2009, discussing "North Korea's [redacted]

[4] The defense's June 22, 2012, discovery letter is listed as Exhibit 10 in the government's notice of filing of discovery correspondence with the Court. *See* Dkt. 80. However, if the Court has any difficulty finding the letter, the defense notes that in its copy of that filing (and perhaps the Court's as well), the June 22 letter actually appears under tab 9.

[redacted] *Id.* at 3. That, of course, is the subject of the Rosen article. The defense also requested any intelligence reports created between April 1, 2009, and June 11, 2009, discussing [redacted] *Id.* at 2-3, [redacted] described in the Rosen article.

Without any substantive explanation, the government denied this request, stating that it "calls for the production of classified material to which the defense is not entitled." Dkt. 80, Ex. 16, at 2. The defense now moves the Court to order the production of the specified reports.

The relevance and helpfulness of these additional intelligence reports to Mr. Kim's defense are obvious. As described above, the government's theory of the case is that the Rosen article was based on the contents of [redacted] accessed by Mr. Kim, and that Mr. Kim was the only person who both accessed [redacted] and communicated with Mr. Rosen on June 11, 2009. For that reason, the government's investigation has focused on those individuals who accessed [redacted] prior to publication of the June 11 Rosen article.[6] Any evidence that the Rosen article was based on intelligence reports other than [redacted] is therefore exculpatory, as the government has not alleged that Mr. Kim disclosed the contents of any intelligence report other than [redacted]

[5] The specific topics that the defense considers "relevant and helpful" to the preparation of Mr. Kim's defense can be found on pages 2-3 of the June 22 letter. *See* Dkt. 80, Ex. 10, at 2-3. The topics are listed as sub-items (a) through (k) in the defense's first discovery request. The defense specifically moves the Court to compel production of all intelligence reports created between April 1, 2009, and June 11, 2009, discussing any of the listed topics.

[6] The government was forced to expand its investigation when it recently acknowledged, after multiple defense requests, that the intelligence contained in [redacted] had also been included in a [redacted] circulated on June 11, 2009. From what little has been provided to the defense to date, the [redacted] appears to have been based on [redacted]

to Mr. Rosen. Such evidence would also likely expand the universe of individuals who may have disclosed classified material to Mr. Rosen, as anyone with knowledge of the information contained in the article could have been Rosen's source. The defense cannot prepare this case for trial without having access to any additional intelligence reports concerning any of the specific topics discussed in the Rosen article, namely North Korea's [redacted]

[redacted]

B. The Daniel Russel and Jeffrey Bader Materials

In addition to requesting any intelligence reports from the relevant time period discussing the topics addressed in the Rosen article, the defense also requested specific intelligence reports and related documents referenced by government witnesses during the investigation. These specific requests are described in the sections below.

1. June 11, 2009 Email from Daniel Russel and Related Source Materials

The defense requested production of additional information regarding an email provided to the FBI by Daniel Russel, the National Security Council ("NSC") Director for Japan and Korea. During his August 10, 2009, interview with the FBI, Mr. Russel provided agents with an email that he sent to three NSC colleagues (Tom Donilon, Matthew Spence, and Jeffrey Bader) at 8:59 a.m. on June 11, 2009, more than six hours before the Rosen article was published. *See* Ex. 3 (6/11/09 Russel Email). Mr. Russel's email [redacted]

[7] The defense speaks in terms of additional intelligence "reports" concerning any of the topics discussed in the Rosen article because there is no reason to assume that the article was based on one, and only one, intelligence report. The government may seek to prove at trial that the article was based on [redacted] But there is nothing about the Rosen article itself or the discovery provided in this case indicating that the article was based on one, and only one, intelligence report. [redacted]

[redacted] *Id.* Yet Mr. Russel sent this email almost three hours before he first accessed [redacted] meaning that the email must have been based on some document other than [redacted] *See* Ex. 4 (Excerpt of Access Records for Daniel Russel).

[redacted], the defense requested an unredacted copy of the Russel email, as well as any intelligence reports or other materials relied upon by Mr. Russel (or anyone working at his direction) to identify and discuss the [redacted] *See* Dkt. 80, Ex. 10, at 8-9. The government denied this request, stating that it "calls for the production of classified material to which the defense is not entitled." *See* Dkt. 80, Ex. 16, at 3-4. The defense now moves the Court to order production of these materials.

The fact that the June 11 Russel email is "relevant and helpful" to the defense should be plain. On its face, the email discusses [redacted]. The email was transmitted by Mr. Russel almost three hours before he first accessed [redacted] demonstrating that [redacted] referred to some document other than [redacted] Moreover, Mr. Russel states that [redacted] In light of its content, there is no credible basis for the government's refusal to produce an unredacted copy of this email, as well as any intelligence reports or other documents upon which it was based.

The requested documents are also "relevant and helpful" to the defense in rebutting the government's claim that the information contained in the Rosen article was "national defense

information." Mr. Russel states in the June 11 email that [redacted] That statement suggests that there was nothing particularly surprising or damaging about the information allegedly disclosed to Mr. Rosen, *i.e.*, that North Korea [redacted] Mr. Russel also describes North Korea's [redacted] – contrary to the allegations in the Indictment – that North Korea's [redacted] rather than "intelligence about the military capabilities and preparedness of a particular foreign nation," as alleged in the Indictment. Any intelligence reports or documents reviewed by Mr. Russel that tend to substantiate this view are thus "relevant and helpful" to the defense, as they undermine the government's claim that the information allegedly transmitted to Mr. Rosen was "national defense information."

2. Jeffrey Bader Materials

Based on the content of the June 11, 2009 Russel email, the defense also requested "any additional emails to or from Mr. Russel, Mr. Donilon, Mr. Spence, and Mr. Bader on June 11, 2009, replying to, forwarding, or discussing North Korean [redacted] Dkt. 80, Ex. 10, at 9. On August 27, 2012, the government advised the defense that it had "identified only one additional email" satisfying this criteria. *See* Dkt. 80, Ex. 16, at 4. A heavily redacted copy of this email – a message from Jeffrey Bader to Mr. Russel, Mr. Donilon, and Mr. Spence at 10:05 a.m. on June 11, 2009 – was produced to the defense on August 24, 2012. *See* Ex. 5 (6/11/09 Bader Email).

Like the Russel email, Mr. Bader's email appears to address the [redacted] referred to by Mr. Russel. Mr. Bader states, "Danny had captured it

very well. Only thing I'd add is…" The rest of the email is redacted. For the same reasons discussed above with respect to the June 11 Russel email, the defense therefore moves to compel the production of an unredacted copy of the June 11 Bader email, as well as any intelligence reporting or other materials relied upon by Mr. Bader, or anyone working at Mr. Bader's direction, to draft this email.

The June 11 Russel email also states that it "reflects [Jeffrey Bader's] thinking as well as mine." Ex. 5. The defense therefore moves to compel the production of any intelligence reports or other documents accessed by Mr. Bader to analyze or assess the [redacted] referred to in the Russel email. The discovery provided to the defense makes clear that the government maintains records reflecting the various intelligence reports accessed by each individual government employee. If necessary, the defense moves the Court to require the government to examine those records to determine which intelligence reports related to North Korea were accessed by Mr. Bader and Mr. Russel during the relevant time period.

3. [redacted] **Emails from** [redacted]

During his August 11, 2009, interview with the FBI, [redacted] also indicated that [redacted] in an email sent on [redacted] *See* Ex. 6 (FBI-302 for [redacted]. On that basis, the defense requested production of the [redacted] email, as well as a list of all recipients of that email, a list of all recipients of a related email sent by [redacted] on [redacted] and an unredacted copy of [redacted]

email.[8] *See* Dkt. 80, Ex. 10, at 7. The government denied this request, stating that it "calls for the production of material to which the defense is not entitled." Dkt. 80, Ex. 16, at 3 (emphasis added). Notably, the government did not claim that this request calls for the production of *classified* material to which the defense is not entitled (as it did for several other requests), so any heightened standard of discoverability applicable to classified information does not apply to this request. The defense now moves the Court to order the production of these documents.

The [redacted] materials are "relevant and helpful" to the preparation of Mr. Kim's defense for many of the same reasons as the June 11 Russel and Bader materials. During his interview with the FBI, [redacted] stated that [redacted] Ex. 6. [redacted] indicated, in other words, that the same information contained in [redacted] was also contained in an [redacted] email from [redacted]

Mr. Russel then provided the interviewing agents with a copy of an email [redacted] several email distribution lists at [redacted] which was apparently [redacted] the email from [redacted] *See* Ex. 7. [redacted] email stated that [redacted] -- a fact not lost on Mr. Russel himself. According to the FBI Agent's Notes from the interview, Mr. Russel

[8] On June 22, 2012, the defense withdrew its request for an unredacted copy of [redacted] email "pending our review of the materials requested above." Dkt. 80, Ex. 10, at 7. Because the government has denied our requests for the related [redacted] materials, the defense now moves to compel production of an unredacted copy of the [redacted] email as well.

stated that the [redacted] NSC would have received email from [redacted] and the information contained in [redacted] therefore "would be info already known to them." Ex. 8 at 3 (Agent's Notes for Interview of Daniel Russel). Mr. Russel (and others) had thus already learned the same information allegedly leaked to Mr. Rosen by [redacted] almost two months before [redacted] at issue in this case was written.

The [redacted] email and the underlying documents upon which it was based (such as the [redacted] are therefore "relevant and helpful" to the defense in that they tend to show that the same information contained in [redacted] was also contained in at least two widely-distributed emails from [redacted] Such information points not only to the existence of additional source documents, but also to other potential leakers, as anyone who received [redacted] could have disclosed their contents to Mr. Rosen.[10] The [redacted] was not damaging to the United States or helpful to a foreign nation, as [redacted] widely known almost two months prior to publication of the Rosen article. The [redacted] materials are thus also "relevant and helpful" to the defense in demonstrating that the information contained in [redacted] was not "national defense information," as the government alleges.

[9] By producing the [redacted] email (albeit in redacted form) but refusing to produce the [redacted] email, the government appears to have taken the position that the [redacted] email is discoverable but [redacted] email is not. There is no principled or logical basis for this distinction, as the [redacted] email appears to quote directly from the [redacted] email, and the content of the two emails is presumably similar.

[10] For this reason, the defense also requested lists of all recipients of the [redacted] emails, as the extent of their distribution goes directly to whether the information contained therein was "closely held."

4. Additional Daniel Russel Materials

In addition to the June 11 [redacted] Mr. Russel also appears to have identified another potential source document during his interview with the FBI, although the copy of the FBI-302 for that interview provided to the defense is heavily redacted. Given the various statements made by Mr. Russel and the importance of those statements to Mr. Kim's defense, the defense requested unredacted copies of the FBI-302 and FBI Agent's Notes from Mr. Russel's August [redacted] 2009 interview. *See* Dkt. 80, Ex. 10, at 11. The government denied this request, stating that it "calls for the production of classified and unclassified material to which the defense is not entitled." Dkt. 80, Ex. 16, at 5. The defense now moves this Court to order the production of unredacted copies of these documents.

According to the FBI-302, "Russel indicated [redacted] Ex. 6. The next several lines of the 302 are redacted. The 302 then discusses the [redacted] email described above. The entire paragraph following that discussion is redacted. The accompanying FBI Agent's Notes for the interview are also littered with redactions. *See* Ex. 8.

The unredacted portion of the 302 plainly indicates that Mr. Russel identified another document from [redacted] containing information [redacted]. Any description by Mr. Russel of that document, as well as the underlying document itself, is therefore "relevant and helpful" to the defense, as it tends to disprove the government's contention that [redacted] was the only source document for the information contained in the Rosen article. The defense thus moves to compel the production of

an unredacted copy of the FBI-302 and corresponding Agent's Notes as well as a copy of the report from [redacted] identified by Mr. Russel.[11]

5. **Additional Reports Identified by** [redacted]

The defense requested the production of three potential "source documents" for the Rosen article identified at the request of Mr. Russel by [redacted] at the time of the alleged disclosure. *See* Dkt. 91, Ex. 3, at 2. This request was based on the FBI-302 for an interview with [redacted] on September 16, 2010, during which [redacted] stated that "on the day of the leak" Mr. Russel showed him "a printout of the article which contained the classified information" and requested that he "attempt to identify the source document for the article." Ex. 9 (FBI-302 for [redacted] said that he [redacted] the same day as the leak and conducted a search for [redacted] he had already provided to Russel, as Russel felt he already reviewed [redacted]." *Id.* [redacted] then claimed that he "identified three reports" that he felt "had similar information" to the article, but could not remember during the interview whether [redacted]. *Id.* On the basis of [redacted] statements, the defense requested [redacted] he identified as containing information similar to the Rosen article.

In response, the government stated that it considered this request resolved, despite the fact that it has yet to produce any of the three reports identified by [redacted]. *See* Dkt. 91, Ex. 6, at 2. Citing the FBI-302, the government stated that "any source material [redacted] identified

[11] The defense has no way of knowing what has been redacted from the Agent's Notes or the paragraph following the discussion of the [redacted] email in the FBI-302, but generally objects to the government's repeated practice of redacting large portions of discoverable documents without seeking authorization from the Court pursuant to CIPA § 4. This issue is addressed in a separate motion filed with the Court today.

would have been destroyed consistent with policy." *Id.* The government then noted that, on July 17, 2012, it had produced a classified email string "reflecting [redacted] efforts to identify the source material for the classified information contained in the June 11, 2009, [redacted] *Id.* According to the government, "[t]hat email indicates that the only source document identified for the intelligence information at issue in this matter … is [redacted] *Id.*

Contrary to the government's response, the email string provided on July 17, 2012, does not resolve the defense's request. For one thing, the emails produced by the government are dated June 16, 2009 -- five days after the alleged disclosure. *See* Ex. 10 (6/16/09 [redacted] Email). The FBI-302 for [redacted] interview, by contrast, states quite clearly that [redacted] identified the three reports "the same day as the leak." Ex. 9. The FBI-302 also says nothing about any efforts to identify source documents [redacted] To the contrary, according to the 302, [redacted] was tasked with identifying source documents for "the article" (singular). *Id.* And, perhaps most importantly, the discovery provided to the defense to date indicates that [redacted] could not have been one of the three reports identified as a potential source document by [redacted] According to the 302, [redacted] "conducted a search for the reports he had already provided to Russel, as Russel felt he already reviewed the source report earlier in the day [the day of the leak]." *Id.* (emphasis added). Yet [redacted] was not one of the reports that [redacted] had already provided to Mr. Russel, as Mr. Russel accessed [redacted] himself electronically via a computer program called [redacted] *see* Ex. 6, and there is no record of [redacted] electronically accessing [redacted] prior to the publication of the Rosen article. *See* Ex. 11 (Access Records for [redacted]

The defense thus moves the Court to order the production of the three intelligence reports identified by [redacted] as containing similar information to that contained in the Rosen article, as well as any additional email correspondence or other documents related to [redacted] efforts to identify the source document that have not already been produced. These documents are "relevant and helpful" to the defense, as they tend to show that [redacted] was not the only possible source document for the Rosen article. In the event that the government is unable to retrieve the three hard copy reports provided to Mr. Russel by [redacted] the defense notes that the government maintains records tracking the various intelligence reports accessed by each individual government employee. If the hard copies are no longer available, the defense moves to compel the production of an access log documenting the intelligence reports viewed by [redacted] on June 11, 2009, as well as copies of the reports related to North Korea that were accessed by [redacted] on that date.

C. [redacted]

1. The 2:41 p.m. [redacted] and the Prosecution's Manipulation of the "Cut-Off Time"

On November 30, 2012, the government acknowledged for the first time that a [redacted] containing the same information allegedly disclosed to Mr. Rosen had been circulated to dozens of previously-undisclosed government employees prior to the publication of the Rosen article on June 11, 2009. *See* Dkt. 91, Ex. 4. The history of the defense's request for any [redacted] containing the same information as the Rosen article was the subject of a separate discovery letter from the defense. *See* Dkt. 93, Ex. A. In brief, the government previously denied the existence of any such [redacted], and the FBI went so far as to try to convince [redacted], that he was mistaken when he asserted in his interview that [redacted] had been drafted based on the contents of [redacted]

> Interviewing agents advised [redacted] the United States Intelligence Community has reviewed all available intelligence reports and open source reporting and determined the only place the intelligence contained in [redacted] can be found is in [redacted] or its drafted forms and in the Fox News article.

See Ex. 12 at 3-4 (FBI-302 for [redacted]). As it turned out, however, both of these assertions were false. On November 30, 2012, after repeated defense requests, the government finally produced a [redacted] containing the same information as the Rosen article. *See* Ex. 13 (12:16 p.m. [redacted])

As one might imagine, the sudden production of a [redacted] to which Mr. Kim did not have access containing the same information as the Rosen article prompted a number of additional discovery requests. On December 10, 2012, the defense requested additional documents related to the [redacted] including a "longer" version of the [redacted] that [redacted], brought with him to an interview with the FBI concerning the alleged disclosure in this case.[12] *See* Dkt. 93, Ex. A. According to [redacted], this longer version of the [redacted] was circulated to several members of the intelligence community at 2:41 p.m. on June 11, 2009, over half an hour before the Rosen article was posted on the Internet. Ex. 14 at 2 (FBI-302 for [redacted]). The 2:41 p.m. [redacted] reportedly contains a more thorough discussion of "information derived from [redacted] and other sources," another clear indication

[12] [redacted] role in the discovery of the [redacted] is actually quite instructive regarding the inadequacy of the government's discovery procedures to date. Despite multiple defense requests for any intelligence report, [redacted], or other document discussing the same information as [redacted] and the Rosen article, the government apparently failed to discover that a [redacted] expressly based on [redacted] was circulated to several dozen government employees by email on the afternoon of the alleged disclosure. As the government explained in its most recent discovery letter, it only became aware of the [redacted] because [redacted] happened to bring a copy of it with him to his July 12, 2012, interview with the FBI. *See* Dkt. 94. The fact that a key, exculpatory document in this case was only discovered by sheer fortuity more than two years into discovery raises serious concerns about whether the government has adequately searched for and produced all exculpatory materials in its possession, custody, and control.

that [redacted] was not the only document in existence on June 11, 2009, discussing North Korea's [redacted]. *Id.* (emphasis added).

On that basis, the defense requested production of the 2:41 p.m. [redacted] as well as the email circulating that draft, the "other sources" upon which the draft was apparently based, the identity of anyone "who drafted, edited, viewed, or received this version of [redacted] prior to 3:16 p.m. on June 11, 2009," and any related correspondence. Dkt. 95, Ex. A, at 3. The day after receiving these requests, the government denied them, stating that they called for "the production of classified material to which the defense is not entitled." Dkt. 94, at 5.

The government's refusal was based on its claim that the 2:41 p.m. [redacted] and related materials are not discoverable because they "post-date" the "cut-off time." As used by the government during discovery in this case, the "cut-off time" refers to the latest time at which an individual could have accessed the intelligence and served as a source for Mr. Rosen's article. The government has attempted to use the "cut-off time" as a means to limit discovery throughout this case, because the government does not have any direct proof of the time at which Mr. Rosen actually obtained the information reported in his article.

Since the beginning of discovery through November 29, 2012, the government consistently maintained that the relevant "cut-off time" was defined as the first known time of publication of the Rosen article on the Internet, which was originally determined to be 3:24 p.m. *See* Dkt. 58, Ex. 1-3, at 1-2. The government confirmed this definition as recently as October 2, 2012, when it explained that it was changing the "cut-off time" of 3:24 p.m. to 3:16 p.m. "based on new records which show that the Fox News article containing [the intelligence at issue] was published on the Internet no later than that time." Dkt. 91, Ex 2, at 2. Defense counsel did not dispute the fact that, absent direct proof as to the time that Mr. Rosen obtained the specific

information at issue in this case, the only time that one could be certain Mr. Rosen had the information would be the time of publication of his article. Anything else would be speculation.

Yet, when the government produced [redacted] and related materials on November 30, it abruptly shifted course and invoked a new theory. For the first time, the government claimed the "cut-off time" should be 2:21 p.m., based not on the publication time of the article, but on a alleged one-line email sent at 2:21 p.m. from Fox News reporter Mayo Garrett to Denis McDonough at the National Security Council. *See* Dkt. 91, Ex. 4, at 2. In this alleged email, Garrett advised McDonough that he should expect a phone call from his colleague, James Rosen, who has some "very good stuff on North Korea." Ex. 15 (6/11/09 Garrett-McDonough Email). Mr. Garrett did not state what this information was, nor did he indicate whether it related to U.N. sanctions, a nuclear test, Kim Jong Il's health, or any of the other North Korea topics that Mr. Rosen was pursuing at the time.

The government's abrupt decision to change the "cut-off time" from 5:00 p.m. (before its current discovery of [redacted] to 2:21 p.m. (after [redacted] became a discovery issue) is a transparent attempt to avoid producing plainly discoverable documents in this case. The government's revision and manipulation of the "cut-off time" to limit discovery cannot be sustained, and the Court should order the production of [redacted] circulated at 2:41 p.m. on June 11, 2009, as well as the related documents described above. This is for three reasons.

First, the alleged 2:21 p.m. email cited by the government as the basis for its revised "cut-off time" falls well short of establishing that Mr. Rosen had obtained the information that Mr. Kim is charged with disclosing by that time. The alleged 2:21 p.m. email does not specifically mention – let alone seek comment on – the specific information contained in [redacted] the Rosen article, or any one of a number of

other North Korea-related stories that Rosen was apparently working on during the same time period.[13] There is no other evidence to corroborate the government's speculation about the content of this email, despite numerous interviews of NSC personnel by the FBI. At trial, the government may well argue that the 2:21 p.m. Garrett-McDonough email demonstrates that Mr. Rosen had already obtained the specific information that Mr. Kim is charged with disclosing by that time. But this fact will be contested, and the government cannot unilaterally impose the very facts that it will have to prove in order to limit discovery.

Second, the timing of the government's decision to revise its "cut-off time" is highly suspect. The government first produced the 2:21 p.m. Garrett-McDonough email almost two years ago, on March 14, 2011. *See* Dkt. 58, Ex. 14. During the various rounds of discovery and meet-and-confer sessions between March 14, 2011, and November 30, 2012, the government never once intimated that the "cut-off time" should be moved up from 5:16 p.m. to 2:21 p.m. based on that email. To the contrary, the government did not cite the 2:21 p.m. email as evidence of the appropriate "cut-off time" in this case until November 30, 2012 – the same day that it produced a FBI-302 confirming the existence of a "longer" [redacted] circulated at 2:41 p.m., which the government has refused to produce.[14] The 2:41 p.m. version of the [redacted]

[redacted] Mr. Rosen regularly reported on developments in North Korea for Fox News, and there is no indication in any of the documents produced by the government in this case that the "very good stuff" referred to in the 2:21 p.m. email meant the contents of [redacted] as opposed to any of the other topics that Mr. Rosen regularly covered during this time period.

[14] Based on emails produced by the government with the [redacted], the "longer" version of the [redacted] circulated at 2:41 p.m. may contain statements regarding [redacted] "confidence level" in the intelligence reporting contained in [redacted]. These topics are addressed in the defense's separate motion to compel.

was plainly discoverable under the government's prior "cut-off time" of 3:16 p.m., but conveniently falls just outside the newly-revised "cut-off time" of 2:21 p.m.[1]

Third, even if the Court were to accept the government's revised "cut-off time," the mere fact that the "longer" version of the [redacted] was not circulated until 2:41 p.m. does not mean that the content of the document is not "relevant and helpful" to the preparation of Mr. Kim's defense. Based on related email correspondence produced by the government, there is reason to believe that the 2:41 p.m. [redacted] contained statements regarding [redacted] "confidence level" in the intelligence reporting contained [redacted]. *See* Ex. 16 (6/11/09 [redacted] Email). Such statements go directly to whether the information contained in [redacted] was "national defense information," a topic addressed more fully in the defense's separate motion to compel discovery regarding NDI and willfulness. *See* Third Motion to Compel at 9-11. Moreover, the time that a document was circulated is not a proxy for relevance, as the government seems to assume. If someone other than Mr. Kim sent an email to James Rosen tomorrow requesting a favor "in exchange for the information I provided to you on June 11, 2009," no one would deny that the email was discoverable even though it was sent over three years after the alleged leak. For the same reason, merely stating that the "longer" version of the [redacted] was not circulated until 2:41 p.m. does not make that document non-discoverable.

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discovery regarding whether [redacted] contained "national defense information." *See* Third Motion to Compel at 9-11.

[1] The government attempted to address this concern in its December 11, 2012, discovery letter, claiming that it had been "overly generous in using the time of publication of Mr. Rosen's article at [sic] the cut-off time" throughout the first two years of discovery in this case. Dkt. 94. The government did not explain its reason for suddenly deciding to be less "generous" in providing discovery in this criminal case, nor did it dispute the connection between its decision to revise the "cut-off time" and its discovery of a [redacted] circulated at 2:41 p.m. on June 11, 2009.

Aside from the government's objection to its own previously-established "cut-off time," the government does not otherwise appear to contest the fact that the [redacted] circulated at 2:41 p.m. is "relevant and helpful" to the preparation of Mr. Kim's defense. Indeed, the government implicitly admitted as much by producing another version of the [redacted] created before its newly-revised "cut-off time" of 2:21 p.m. The defense thus moves the Court to order the production of the 2:41 p.m. [redacted], as well as the related materials described above.[16]

2. June 12, 2009 Email from [redacted]

The defense previously requested another document provided to the government by [redacted] during his July 12, 2012, interview with the FBI concerning the [redacted]. *See* Dkt. 93, Ex. A, at 4. According to the FBI-302 for that interview, [redacted] provided agents with a June 12, 2009, email "in which the topic [redacted]" because [redacted]." Ex. 14 at 2. The government denied the defense's request, stating, "there is no basis for the production of a classified email that was sent the day after the publication of Mr. Rosen's article." Dkt. 94 at 3. The defense now moves the Court to order production of this document.

The government's objection to the defense's request rests on the same faulty premise described above with respect to the 2:41 p.m. [redacted], namely that a document is not discoverable if it was sent after, rather than before, the alleged disclosure in this case. The fact that the requested email was sent the day after publication of the Rosen article provides no basis,

[16] In addition, the defense notes that the government also applied its newly-revised "cut-off time" to limit the production of documents related to the [redacted] that it did produce on November 30, 2012. *See* Dkt. 91, Ex. 4, at 2. The defense therefore also moves the Court to order the production of any documents related to dissemination of the earlier [redacted] between 2:21 p.m. (the government's revised "cut-off time") and 3:16 p.m. (the government's previously-established "cut-off time")

in and of itself, for withholding the document. The proper analysis hinges on the email's content, not just its timing.

The June 12, 2009, [redacted] email is "relevant and helpful" to the preparation of Mr. Kim's defense because, according to the FBI-302, it discusses the relationship between the information contained in the Rosen article and the information contained in the [redacted]. The email apparently states that the Rosen article contained the same intelligence information as the [redacted] which supports the defense's theory that the Rosen article may have been based on documents, including the [redacted] other than [redacted]. The defense thus moves the Court to order production of the July 12, 2012, email provided to the FBI by [redacted].

3. [redacted] Publication [redacted]

In addition to the [redacted] and the June 12, 2009, email, the defense also requested a [redacted], "publication [redacted]" that [redacted] provided to the FBI during his interview on July 12, 2012. *See* Dkt. 93, Ex. A, at 4. According to the FBI-302, the report discussed North Korea's [redacted] described in the Rosen article. Dkt. 94 at 3. The government denied this request, stating that it "calls for the production of a classified report dated [redacted] after the publication of Mr. Rosen's article." Dkt. 94, at 3-4. The defense now moves the Court to order production of this [redacted] publication.

As an initial matter, the defense notes that the government's response proceeds from the same faulty premise described above. The mere fact that the report is dated after the publication of the Rosen article says nothing about whether the report contains discoverable information. If the report completely debunked the alleged intelligence contained in [redacted], for example, such information would go directly to whether the information contained in [redacted] was "national

[redacted] information," as opposed to mere speculation. Similarly, if the report was being drafted prior to the publication of the Rosen article and contained similar information, anyone involved in the drafting process could have disclosed that information to Mr. Rosen.

It is also noteworthy that [redacted] responsible for finally alerting the government to the existence of a [redacted] containing the same information as the Rosen article, himself chose to bring the [redacted] publication to his interview with the FBI. According to the FBI 302, [redacted] "advised Agents that he had reviewed his e-mail from the 6/11/2009 time frame and had brought some printed hard copy e-mail to the interview in which he was the sender." Ex. 14 at 1. That statement certainly implies that, whatever its final date of publication, the report was the subject of correspondence between [redacted] and others during the "6/11/2009 time frame," *i.e.*, the date of the alleged disclosure. The defense thus moves the Court to order the production of the [redacted], "publication [redacted]" identified for the FBI by [redacted], as well as any email correspondence or related documents upon which the report was based.

D. The [redacted] Reports

1. The [redacted] Report Received By [redacted] on June 11, 2009

The defense requested an intelligence report identified as [redacted]" which was faxed to [redacted], at 7:55 a.m. on June 11, 2009. *See* Dkt. 91, Ex. 3, at 2. This request was based on the FBI-302 for [redacted] interview with the FBI and supporting documents, which indicate that on June 11, 2009, [redacted] "briefed her unit [on] a [redacted] document, [redacted]," and that she was "surprised by the news report in which the classified information from [redacted] was disclosed." Ex. 17 at 1, 2 (FBI-

302 for [redacted]). Given the direct connection made by [redacted] between the [redacted] report and the Rosen article, the defense requested the report referenced by [redacted]. The government denied this request, stating that it "calls for the production of classified material to which the defense is not entitled." Dkt. 91, Ex. 6, at 2. The defense now moves the Court to order the production of this [redacted] report.

The [redacted] report faxed to [redacted] over three and a half hours before Mr. Kim first accessed [redacted] is "relevant and helpful" to the defense for one simple reason: in her initial interview with the FBI, [redacted] stated that she briefed her unit on the [redacted] report on the morning of June 11, and that she was surprised to see the information contained in that report disclosed in a news article the same day. [redacted] told the FBI, in other words, that the [redacted] report contained the information subsequently disclosed in the Rosen article, but the [redacted] report is not the report that Mr. Kim is accused of disclosing to Mr. Rosen. [redacted] description of the [redacted] report thus directly contradicts the government's allegation that [redacted] accessed by Mr. Kim is the only possible source document for the Rosen article.[11]

2. The [redacted] Report Identified By [redacted]

The defense also previously requested another [redacted] which was identified by [redacted] as a source document for the Rosen

[11] In an attempt to address this issue, the government re-interviewed [redacted] on March 1, 2011, over a year and a half after her initial interview (and almost 21 months after the events at issue). This time the FBI showed her a copy of [redacted] at the beginning of the interview and, with this document placed before her in a suggestive and leading manner, [redacted] reportedly stated that she "inadvertently referred to [redacted] in previous interviews as [redacted]." Ex. 18 at 3 (Second FBI-302 for [redacted]). [redacted] explanation is dubious, as she had not actually been provided a copy of [redacted] when she repeatedly referred to [redacted]" in her initial interview. Moreover, based on the FBI-302 for her re-interview, [redacted] still did not deny that the separate [redacted] report contained the same information as the Rosen article. At worst, the confusion surrounding [redacted] receipt of both the [redacted] report and [redacted] on the morning of June 11, 2009, confirms that it is "relevant and helpful" to the defense to review both documents to evaluate whether they were the source documents for the Rosen article.

article. *See* Dkt. 80, Ex. 10, at 7. This request was based on [redacted] responses to an investigative questionnaire, in which he expressly stated that the Rosen article was based on [redacted] of 5/21/09 and reports on which it was based, esp. [redacted] Ex. 19 at 4 [redacted] Investigative Questionnaire). Based on [redacted] response, the defense requested the production of [redacted] The government denied this request, stating that it "calls for the production of classified material to which the defense is not entitled." Dkt. 80, Ex. 10, at 3. The defense now moves the Court to order the production of this [redacted] report.

As with the [redacted] report identified by [redacted], the report identified by [redacted] is "relevant and helpful" to the defense for one simple reason: [redacted], identified [redacted] as the source document for the Rosen article in an investigative questionnaire completed "under penalty of perjury." Ex. 19 at 4-5. That report is therefore "relevant and helpful" to the defense, as it contradicts the government's allegation that [redacted] was the only possible source document for the Rosen article.

After the defense requested production of [redacted] in its initial discovery letter of October 6, 2011, *see* Dkt. 58, Ex. 24, at 9, the government responded not by producing the report but by re-interviewing [redacted] *See* Ex. 20 (Second FBI-302 for [redacted]). According to the FBI-302 for that re-interview, agents went to great lengths to convince [redacted] that his memory of the source documents for the Rosen article was incorrect.[18] After

[18] This was not the first time that the FBI attempted to convince [redacted] that his independent recollection was wrong. During an earlier interview on September 21, 2011, interviewing agents questioned [redacted] response regarding the source documents for the Rosen article. According to the FBI-302 for that interview, "Interviewing agents advised [redacted] the United States Intelligence Community has reviewed all available intelligence reports and open source reporting and determined the only place the intelligence contained in [redacted] can be found is in [redacted] or its drafted forms and in the Fox News article where it was

and [redacted] about a "discrepancy" in the dates of the source materials identified in his questionnaire, the interviewing agents suggestively provided him with a copy of [redacted] accessed by Mr. Kim (a document that [redacted] had not identified on his own) and asked "if he would assess it to be the source material" of the Rosen article. *Id.* Not surprisingly, [redacted] answered in the affirmative.[9]

During the same re-interview, however, the agents also asked [redacted] why he listed [redacted] as a source document for the Rosen article. [redacted] responded by explaining that he "must have logged into [redacted] in an attempt to find the intelligence reporting" on which the Rosen article was based, "found [redacted] and "concluded it was related to the publications." Ex. 20 at 1. If [redacted] found that the information contained in [redacted] was "related to" the information contained in the Rosen article, it is certainly "relevant and helpful" to the defense to review that report to determine for itself whether it was an additional source document for the

disclosed without authorization." Ex. 12 at 3-4. This assertion ultimately proved incorrect, as the government recently acknowledged that the same information had in fact been included in a draft [redacted] on June 11, 2009, that was circulated prior to publication of the Rosen article. The agents' statement also did not deter [redacted], who instead left the interview (likely not wanting to continue arguing over whether his memory was right).

[9] [redacted] apparently reached this conclusion because [redacted] discussed North Korean [redacted], whereas the other intelligence reports that he had reviewed discussed North Korean [redacted]. If that is in fact the sole distinction between the two intelligence reports, then the earlier report discussing [redacted] is nonetheless "relevant and helpful" to the defense, as it tends to show that North Korea [redacted] The defense will argue that disclosing North Korea's [redacted] does not constitute the disclosure of "national defense information," as North Korea's [redacted] was already well known to the general public and was not "closely held."

Rosen article. The government can attempt to prove otherwise at trial, but it cannot cherry-pick the self-serving portions of [redacted] various statements in order to limit discovery.

E. Government Employee Emails

Finally, the defense also requested production of any emails from June 10 or June 11, 2009, in which those government employees and contractors who accessed [redacted] prior to publication of the Rosen article discussed the topics addressed in the article.[28] *See* Dkt. 80, Ex. 16, at 6-11. As the defense explained in its discovery letter, this request was prompted by the defense's concern that the government did not appear to have searched the email accounts of government employees to determine whether any of them shared the contents [redacted] with previously-undisclosed individuals, discussed the contents of [redacted] and any similar intelligence reports, or communicated with Mr. Rosen on June 11, 2009. *Id.* In response, the government stated that, in its view, the request "calls for the production of classified and unclassified material to which the defense is not entitled," but that it was nonetheless "in the process of processing classified and unclassified email sent or received on June 10 and 11, 2009 in the government's possession, custody, and control, for each of the individuals." Dkt. 80, Ex. 16, at 1.

Based on its review of government employee emails, on August 24, 2011, the government produced over 102 emails exchanged between Mr. Rosen and John Herzberg, the Director of Public Affairs in Mr. Kim's bureau at the State Department, from April 1, 2009, to July 2, 2009. *See* Dkt. 80, Ex. 15. The government also produced a handful of miscellaneous

[28] As with its request for additional intelligence reports, the defense provided the government with a list of sub-topics that it considered "relevant and helpful" to Mr. Kim's defense. *See* Dkt. 80, Ex. 10, at 10. The list closely tracked the content of the Rosen article, focusing on North Korea's [redacted]

emails discussing Mr. Rosen. *Id.* On November 30, 2012, the government notified the defense that it had "completed its review of the content of the classified and unclassified government email sent or received on June 10 or 11, 2009 ... for each of the 168 individuals identified to date in the government's investigation," and that its review "revealed no discoverable information beyond that produced with this letter or in prior discovery productions." Dkt.91-1, Ex. 4, at 5. Because the government and the defense have consistently disagreed on what qualifies as "discoverable" information in this case, the defense now moves the Court to order production of the requested emails.

Although the government suggests that it has searched for any email communications between Mr. Rosen and those government employees and contractors who accessed the alleged intelligence at issue in this case, the discovery provided to date does not include any additional substantive emails addressing the same topics as those discussed in [redacted] and the Rosen article. For example, the government has not produced emails in response to this request in which [redacted] comment on the content of [redacted] or discuss [redacted] this information contained therein. The government also has not produced emails discussing the alleged significance of [redacted] or emails in which one employee or contractor invited another employee or contractor to view the report.

Such emails are "relevant and helpful" to Mr. Kim's defense, for several reasons. First, as the June 11, 2009, email provided to the FBI by Mr. Russel demonstrates, emails discussing [redacted] inevitably point the way towards other documents containing the same or similar information. Absent the Russel email, the defense would not have known to request the information provided by [redacted], or any of the other intelligence documents that Mr. Russel apparently relied on to assess [redacted] The

requested emails are thus essential to the defense's efforts to identify other potential source documents for the Rosen article.

Second, any emails discussing the contents of [redacted] or the topics addressed in the report may also reveal additional government employees and contractors who accessed the information contained in the Rosen article on June 11, 2009 (and thus could have disclosed the information to Mr. Rosen). The government has relied on electronic document access records, intelligence community sign-in sheets to determine which employees and contractors accessed [redacted] but it does not appear to have reviewed email communications to determine whether any of those who accessed [redacted] shared its contents with other individuals. Until such a review is completed, neither the defense nor the government can be certain how many people obtained the information contained in [redacted] prior to publication of the Rosen article. The defense cannot investigate all individuals who accessed the information at issue without knowing who those individuals are.

Although the government appears to have reviewed the relevant government employee emails for all communications involving Mr. Rosen, the rest of the sub-topics originally identified by the defense do not appear to have been incorporated into this review. The defense thus moves the Court to compel the production of all emails sent or received on June 10 and June 11, 2009, by those government employees and contractors who accessed the information at issue prior to publication of the Rosen article, discussing any of the topics identified in the defense's discovery letter.[21]

[21] Presently pending before the Court is an *ex parte* motion by the government pursuant to CIPA § 4, the resolution of which could result in the production of additional discovery to the defense. On February 8, 2013, the government also advised the defense that it is still in the process of responding to several outstanding discovery requests, which the parties expect to resolve shortly.

WHEREFORE, for the reasons set forth above and any others appearing to the Court, the defendant seeks an Order compelling the government to produce the following materials forthwith:

[redacted]

The defense respectfully reserves the right to file a supplemental motion to compel discovery, if such a motion is warranted by any additional documents produced by the government.

[redacted]

7) An unredacted copy of the June 11, 2009, Daniel Russel email, as well as any intelligence reports or other material relied upon or reviewed by Russel (or anyone working at his direction) to identify and discuss [redacted]

8) An unredacted copy of the June 11, 2009, Jeffrey Bader email, as well as any intelligence reports or other material relied upon or reviewed by Bader (or anyone working at his direction) to draft said email.

9) Any email describing North Korea's [redacted], as well as:

a) a list of all recipients of any such email;

b) a list of all recipients of a related email sent by [redacted] on [redacted], and

c) an unredacted copy of [redacted] email

10) Unredacted copies of the FBI-302 and corresponding FBI Special Agent's Notes for the FBI interview of Daniel Russel on August 11, 2009.

11) A copy of the report from [redacted]" identified by Daniel Russel in his August 11, 2009, interview.

12) The three intelligence reports identified by [redacted]" as potential source documents for the Rosen article, as described by [redacted] in his interview with the FBI on or about September 16, 2010 (or, if such reports are no longer available, an access log documenting the intelligence reports viewed by [redacted] on June 11, 2009, as well as copies of the reports accessed by [redacted] on that date that relate to North Korea).

13) Any additional email correspondence or other documents related to [redacted] efforts to identify the source document(s) for the Rosen article.

14) The 2:41 p.m. [redacted], as well as:

a) the email(s) circulating tha[redacted]

b) the "other sources" upon which the [redacted] was apparently based;

c) the identity of anyone who drafted, edited, viewed, or received this version [redacted] prior to 3:16 p.m. on June 11, 2009, and any related correspondence; and

d) any documents related to dissemination of the earlier [redacted] between 2:21 p.m. (the government's revised "cut-off time") and 3:16 p.m. (the government's previously-established "cut-off time").

(9) The June 12, 2009, email provided to the FBI by [redacted] relating to the [redacted]

(10) The [redacted] "publication [redacted]" identified for the FBI by [redacted] as well as any email correspondence or related documents upon which that report was based.

(11) The intelligence report identified as [redacted]

(12) The intelligence report identified as [redacted]

(14) Any emails sent or received during the period June 10 to June 11, 2009, in which any government employee and/or contractor who accessed [redacted] prior to publication of the Rosen article discussed any of the topics addressed in the Rosen article.

Respectfully submitted,

DATED: February 11, 2013

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PROPOSED ORDER

For the reasons set forth in Defendant Stephen Kim's First Motion to Compel Discovery Regarding Additional Source Documents), the government is hereby ORDERED to produce:

(1) Any intelligence reports created between April 1, 2009, and June 11, 2009, addressing the following topics:

- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]
- [redacted]

[redacted]

(2) An unredacted copy of the June 11, 2009, Daniel Russel email, as well as any intelligence reports or other material relied upon or reviewed by Russel (or anyone working at his direction) to identify and discuss [redacted]

(3) An unredacted copy of the June 11, 2009, Jeffrey Bader email, as well as any intelligence reports or other material relied upon or reviewed by Bader (or anyone working at his direction) to draft said email.

(4) Any email describing North Korea's [redacted]; as well as:

(a) a list of all recipients of any such email;

(b) a list of all recipients of a related email sent by [redacted] on [redacted]; and

(c) an unredacted copy of [redacted], email.

(5) Unredacted copies of the FBI-302 and corresponding FBI Special Agent's Notes for the FBI interview of Daniel Russel on August 11, 2009.

(6) A copy of the report from [redacted]" identified by Daniel Russel in his August 11, 2009, interview.

(7) The three intelligence reports identified by [redacted]" as potential source documents for the Rosen article, as described by [redacted] in his interview with the FBI on or about September 16, 2010 (or, if such reports are no longer available, an access log documenting the intelligence reports viewed by [redacted] on June 11, 2009, as well as copies of the reports accessed by [redacted] on that date that relate to North Korea).

(8) Any additional email correspondence or other documents related to [redacted] efforts to identify the source document(s) for the Rosen article.

(9) The 2:41 p.m. [redacted] as well as:

(a) the email(s) circulating that [redacted]

(b) the "other sources" upon which the [redacted] was apparently based;

(c) the identity of anyone who drafted, edited, viewed, or received this version [redacted] prior to 3:16 p.m. on June 11, 2009 and any related correspondence; and

(d) any documents related to dissemination of the earlier [redacted] between 2:21 p.m. (the government's revised "cut-off time") and 3:16 p.m. (the government's previously-established "cut-off time").

(10) The June 12, 2009, email provided to the FBI by [redacted] relating to the [redacted]

(11) The [redacted], "publication [redacted]" identified for the FBI by [redacted], as well as any email correspondence or related documents upon which that report was based

(12) The intelligence report identified as [redacted]

(13) The intelligence report identified as [redacted]

(14) Any 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.

Hon. Colleen Kollar-Kotelly