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 REPLY TO THE GOVERNMENT'S OPPOSITION TO HIS FIFTH MOTION TO COMPEL DISCOVERY

Pursuant to the Court's July 9, 2013, Order, Defendant Stephen Kim, by and through undersigned counsel, files this reply to the government's opposition to his fifth motion to compel discovery.

I. Introduction

In its opinion on defendant's third motion to compel discovery, the Court ordered the government to notify the defense whether "the Government intends to offer evidence of the Defendant's motive at trial … so as to allow the Defendant sufficient time to seek discovery at least helpful to the defense in rebutting the Government's evidence of motive." Opinion on Third Motion at 18. After the government notified the defense of its intent to present three separate motive theories, the defense sought discovery as to each of those theories, as well as certain other items that remained pending following the Court's earlier rulings. *See* Fifth Motion to Compel Discovery. In its opposition, the government refuses to produce any further discovery on its new motive theories, treating its own evidence as if it is essentially irrebuttable. The government's response is plainly insufficient under this Court's prior rulings and the applicable law.

The government spends the first eighteen pages of its forty-three-page opposition attempting to convince the Court of two things: first, that there is not a "significant information asymmetry" in this case because the government has produced over 16,600 pages of unclassified material and over 3,500 pages of classified material, *see* Opp. at 6-9; and second, that it has such compelling evidence of each of its three motive theories that the Court should not order any further discovery, *see* Opp. at 9-18. Neither of these two points is persuasive, or even relevant.

With respect to the scope of the discovery provided to date, the government's statements are extraordinarily misleading. Although it has produced "over 16,600 pages of unclassified discovery," the government fails to mention that of that number, almost 7,300 pages consist of nothing more than non-content phone data (pen register and "trap and trace" results, US-2112 to 9402) and over 5,100 pages consist of nothing more than non-content email data (18 U.S.C. § 2703(d) orders, US-9403 to 14532). Three-fourths of the total cited by the government, in other words, lacks any content.

The government also states that it has produced "over 3,500 pages of classified discovery," but again that statement is misleading. Several hundred pages of classified discovery consist of nothing more than the same, six-page investigative questionnaire filled out by each of more than one hundred government employees and contractors who accessed the intelligence report at issue. Three hundred pages are the same documents that had already been produced to the defense once with a "treat as classified" header, but now bear classification markings. (CLASS_3239-3550). And the government fails to mention that, as the defense noted in its discovery letter of October 6, 2011, it actually did search the defendant's classified hard drive, which presumably would have contained at least some of the classified emails and intelligence reports accessed by Mr. Kim. *See* Ex. 1 at 2-3. Of more than 6,000 electronic items that were

responsive to a list of keywords provided by the defense, the government chose to produce *less than one percent* of those documents (37 out of more than 6,000 items). *Id.* The government has not produced defendant's classified email records, nor has it produced the classified intelligence reports that he accessed during the time period in question. The government's claim that it has been forthcoming with classified discovery, or that there is not a significant information asymmetry in this case, is sheer folly.

The government also discusses the "factual background" of its three motive theories at length, using a series of emails to argue that Mr. Kim had some motive to leak the intelligence report at issue. *See* Opp. at 9-18. The government's opinion of its own evidence does not change the fact that, as this Court previously recognized, the defense is entitled to discovery to rebut the government's claims. The motive theories described by the government in its opposition also differ materially from the broad, vague theories described in the government's June 12th letter. While the government's actual motive theories have become a moving target, the defense is still entitled to the discovery that it seeks. The specific items requested by the defense are addressed in turn below.

II. The Specific Discovery Items at Issue

A. Motive Evidence

1. The Government's Chosen "Fox News" Theory

By letter dated June 12, 2013, the government notified the defense of its intent to introduce evidence that Mr. Kim leaked the intelligence report to Mr. Rosen because he "wanted to resign from his government position and find a new job, including at Fox News as a specialist in Korean and East Asian affairs and national security issues." *See* Fifth Motion, Ex. 3. To rebut the government's theory that Mr. Kim leaked *the contents of* [redacted] in order to curry favor with

Fox News at the same time that he had access to other, more newsworthy documents, the defense requested the production of other classified intelligence reports accessed by Mr. Kim between May 1, 2009, and June 11, 2009. *See* Fifth Motion, Ex. 1, at 2.

In its response to the defense's discovery requests, the government stated that it was "working with the Intelligence Community to formulate a potential response to this request." *See* Fifth Motion, Ex. 2, at 4. When no such response was forthcoming, the defense moved the Court to set a deadline for the government to respond to the defense's request or to order the government to produce the requested materials. *See* Fifth Motion at 6.

In its opposition, the government objects to the defense's suggestion that the Court set a deadline for the government's response, arguing that it would be "premature" for the Court to set such a deadline before the meet-and-confer process is complete and the "scope" of the defendant's request has been determined. *See* Opp. at 20-21. In the government's view, the request is "not ripe for decision by the Court" because discussions between the parties remain "ongoing." *Id.* at 20. The government then proceeds to argue, however, that the defense's request is "overbroad and bears little relation to the government's motive theory" because it is not limited to additional intelligence reports satisfying "multiple criteria" contained in a May 22, 2009, email from James Rosen.[1] *Id.* at 20-24.

With respect to the scheduling issue, the defense respectfully submits that some deadline is necessary at this point. The defense submitted its request more than two months ago, on June

[1] Throughout the parties' discussions on this issue during the meet-and-confer process, the government never once mentioned Mr. Rosen's May 22, 2009, email, let alone argued that the "criteria" contained in that email somehow defines the universe of discoverable information. The meet-and-confer process is only productive if the parties make a genuine effort to resolve the discovery requests at issue. If the government truly believes that the May 22nd email sets forth certain relevant "criteria" (an argument addressed in turn below), it could have said so two months ago. Instead, as of the date of this filing, it still has yet to provide whatever response it is "formulating" to this request.

14, 2013. The request flowed naturally from the government's own decision to rely on motive evidence, and therefore could not have come as a surprise to the government. *See* Opinion on Third Motion at 18 (ordering the government to notify the defense if it intends to offer motive evidence "so as to allow the Defendant sufficient time to seek discovery at least helpful to the defense in rebutting the Government's evidence of motive"). It should not take over two months to "formulate a potential response" to a discovery request, particularly when the request itself was the result of the government's own decision to pursue its motive theory.

As to the government's argument that the request is overbroad, this is nothing more than an attempt to put the genie back in the bottle once the implications of the government's motive theory became clear.[2] In its notice, the government claimed that one of Mr. Kim's motives for allegedly leaking the intelligence report at issue was that he "wanted to resign from his government position and find a new job, including at Fox News as a specialist in Korean and East Asian affairs and national security issues." *See* Fifth Motion, Ex. 3. Notably, the government's motive theory was not limited to North Korea ("Korean and East Asian affairs and national security issues") or even to Fox News ("*including* at Fox News").

After reviewing the defense's discovery letter, however, the government decided to move the goal posts, claiming that its motive theory is limited to certain "criteria" contained in one specific email sent by James Rosen on May 22, 2009.[3] *See* Opp. at 21-23. On the basis of its

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[2] The government essentially acknowledges this is the case, stating, "The United States advises the Court that if the Intelligence Community's equities that are implicated by the defendant's requests for additional classified information and material regarding a given motive theory cannot be adequately protected in this case, then the government would expect to be required to abandon that theory for trial purposes." Opp. at 11 n.9.

[3] Even the government's sub-headings in its opposition demonstrate the changing nature of its motive theory. After notifying the Court and the defense of its intent to introduce evidence that Mr. Kim "wanted to resign from his government position and find a new job, *including* at Fox

own interpretation of a single email, the government asserts that the only intelligence reports that are "relevant and helpful" to Mr. Kim's defense are those that satisfy "multiple criteria" allegedly established by Mr. Rosen in the email. *Id.* This assertion is as illogical as it is unsupported by the discovery already produced in this case.

First, the government's argument proceeds from the flawed premise that the only way for Mr. Kim to curry favor with Fox News was to provide information responsive to a single email. Such a position defies common sense. To accept the government's argument, one would have to believe that if Mr. Kim had walked up to James Rosen and handed him a collection of documents detailing a secret domestic surveillance program called PRISM (a la Edward Snowden), Mr. Rosen would have refused the information because he was "focused solely on North Korea," Opp. at 22, or because PRISM was not one of "the actual intelligence topics concerning North Korea" that he had "expressly requested," *id.*, or because some of the PRISM slides did not have markings indicating that they were both "TOP SECRET" and "further compartmented," *id.* at 22-23. Nothing about the May 22nd email (or any other evidence relied upon by the government) lends any credence to such a fanciful assumption, which is a question for the jury in any event.

Second, the May 22nd email itself cannot bear the weight the government places upon it in its opposition. The government's strained reading of the email as containing "multiple criteria" is entirely inconsistent with the content of the email itself. The government claims, for example, that "Mr. Rosen [sic] inquiries to the defendant focused solely on North Korea." Opp. at 22. That is false. In fact, the email states, "What I am interested in … is breaking news ahead of my competitors. I want to report authoritatively, and ahead of my competitors, on *new*

News," the government now titles the relevant section of its opposition, "The Defendant Was Seeking Employment at Fox News." *See* Opp. at 10.

initiatives or shifts in U.S. policy, events on the ground in North Korea, *what intelligence is picking up, etc.*" Opp. at 17 (emphasis added). Only one of those three topics "focuses" on North Korea, and the list expressly ends with "etc." – a clear indication that the list was non-exhaustive. Put simply, neither Mr. Rosen's reporting assignments nor Mr. Kim's job responsibilities was limited to North Korea. The government therefore has no basis to assert that the only information that would interest Mr. Rosen involved North Korea, or that Mr. Kim was motivated by the same belief.

Similarly, the government asserts, as its second "criteria," that the email contains a discrete list of "actual intelligence topics concerning North Korea that Mr. Rosen expressly requested from the defendant on May 22, 2009." Opp. at 22. That, again, is false. Mr. Rosen describes the list of topics cited by the government as a list of "possible examples," a phrase that is about as far away from a finite list of requested topics as one can imagine. *See* Opp. at 17. The list of "possible examples" also reflects the list of topics addressed above, which expressly ends with "etc." To argue, as the government does, that discovery should be limited to the topics expressly mentioned in this list of "possible examples" is simply to ignore the actual content of the email itself.

The other "criteria" urged by the government fare no better. The government argues that intelligence reports accessed by Mr. Kim prior to the May 22nd email are not discoverable because Mr. Rosen had not provided "instructions" to Mr. Kim until that date.[4] Opp. at 22. This argument wrongly assumes that Mr. Kim was physically incapable of retaining or re-accessing information, *i.e.*, that for some reason the only information he possibly could have shared with Mr. Rosen on May 22nd was information that he first learned on that date. This is nonsensical.

[4] The defense obviously disagrees with the government's characterization of the May 22nd email as containing "instructions" from Mr. Rosen to Mr. Kim.

Individuals with access to classified information are aware of many things that they may have learned weeks or months ago, that still have not been publicly disclosed, and whose disclosure would certainly qualify as "breaking news." Judged by that standard, the defense's request for intelligence reports accessed by Mr. Kim between May 1, 2009, and June 11, 2009, is quite narrow.[5] The date of Mr. Rosen's May 22nd email cannot serve as a useful proxy for the date upon which Mr. Kim first accessed information that may have interested Fox News, as the human mind is not a dry erase board wiped clean every morning.[6]

The government also asserts that the specific classification markings on an intelligence report are somehow relevant to whether disclosure of the information contained therein would curry favor with Fox News. *See* Opp. at 22-23. The government does not explain why this is so, nor is it immediately apparent how this relates to the defense's request, which is limited to "intelligence reports" that are presumably classified, and thus contain the type of "sensitive" information referenced by the government. *See* Opp. at 22-23. In any event, the government's proposed "sensitivity" criteria is directly contradicted by the content of the May 22nd Rosen email, which states that "internal memos" and "internal State Department analyses" would be of

[5] The request is quite a bit narrower, in fact, than one would expect if the defense were truly trying to "graymail" the government, as the government repeatedly (and predictably) complains. These types of false and baseless accusations are entirely improper, particularly in a case where *the government* chose to bring a criminal case under the Espionage Act involving classified information and to pursue multiple theories of motive that further implicate classified information. If the government is so concerned about disclosing classified information to three cleared defense counsel working in a SCIF, perhaps it should have resolved this case administratively rather than criminally, as the Attorney General recently suggested. *See* Ex. 2 at 6.

[6] The government's proposed date "criteria" of May 22, 2009, is also inconsistent with its own description of Mr. Kim's alleged "deep interest" in joining Fox News. The government bases its motive theory in part on a cover letter sent to Fox News in March *2008*, over fifteen months prior to the alleged disclosure in this case. *See* Opp. at 11. If Mr. Kim's alleged desire to join Fox News in March 2008 is relevant, then the fact that he had access to information of significant value to Fox News during the same time period is also relevant. The government cannot have it both ways.

interest to him without once mentioning the classification level of the information at issue. *See* Opp. at 17. The government's purported fourth "criteria" is thus nowhere to be found in the May 22nd email, and appears to have been invented by the government.[7]

Finally, in addition to its attempt to recast the May 22nd email into a list of discovery "criteria," the government also improperly attempts to twist the defense's efforts to reach an accommodation on this issue into a "concession." *See* Opp. at 23. Based on the defense's offer during the meet-and-confer process to "review a list of the titles of the intelligence reports accessed by Mr. Kim during the requested time period" to "identify those reports that *best* satisfy the discovery request," *see* Fifth Motion at 7 (emphasis added), the government asserts that the defense "effectively concedes" that its request is "overbroad." Opp. at 23. The government then states – inaccurately – that the defendant "assert[ed]" that the government "must produce classified information so that he can determine whether it would be relevant and helpful to his defense." Opp. at 23 (emphasis in original). The defense never made any such assertion, and the government's statements to the contrary are entirely off-base.

During the meet-and-confer process, the government complained that Mr. Kim accessed a large number of intelligence reports, and that reviewing and producing those reports would be burdensome.[8] In an effort to reach a resolution, the defense offered in good faith (and as a first

[7] The government also claims that the intelligence report at issue in this case is [redacted] Opp. at 21. This assertion cannot be taken seriously. For one thing, the report [redacted] The government's claim [redacted] is therefore far from clear. Opp. at 21. Moreover, the government's claims are also contradicted by the statements of several of its own witnesses. John Herzberg, for example, described the information contained in the report as a "nothing burger." *See* CLASS_1200.

[8] The government has complained about this repeatedly, without once indicating how many intelligence reports Mr. Kim accessed during the relevant time period. The defense asked the government to substantiate its complaint by providing the number of intelligence reports at issue,

step) to review a list of the titles of the intelligence reports at issue to help determine which reports "*best* satisfy" the discovery request. Fifth Motion at 7. If the defense could quickly identify a set of reports that sufficiently satisfied the purpose of the request, the government could be spared the time and expense of producing other intelligence reports responsive to the request. The defense made this offer in an effort to accommodate the government and to resolve the issue quickly, not to "ameliorate the government's classified information privilege equities."[9] Opp. at 23. It is unfortunate that the government has chosen not only to reject the defense's offer, but to mischaracterize a settlement proposal as a concession.

When the defense offered this accommodation, it did *not* assert "that the United States must produce classified information so that he can determine whether it would be relevant and helpful to his defense." Opp. at 23 (emphasis in original). The term underlined by the government does not appear in the defense's motion, which states quite clearly that the defense offered to identify those reports that "best" satisfy the discovery request. Fifth Motion at 7. The question "whether" the requested reports are relevant and helpful cannot seriously be in dispute, in light of the Court's prior rulings and the government's subsequent decision to rely on motive evidence. The government had fair warning that, if it chose to present motive evidence, it would

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so that the parties and the Court can engage in something more than mere speculation (and find a way to resolve the issue, if necessary). *See* Fifth Motion at 6-7. It is telling that the government still has not done so.

[9] The government often repeats this phrase, as if it is the defense's or the Court's responsibility to protect its undefined "equities." To the contrary, the law is quite clear that even if the government establishes some privilege, privileged information that is "at least helpful to the defense of the accused" must be produced. *See United States v. Mejia*, 448 F.3d 436, 456 (D.C Cir. 2006); *United States v. Yunis*, 867 F.2d 617-621-23 (D.C. Cir. 1989); *United States v. Aref*, 533 F.3d 72, 80 (2d Cir. 2008). Moreover, the government fails to explain how its "equities" are threatened by disclosure of the information to three cleared defense counsel working in a SCIF. The CIPA process is designed to provide the government with advance notice of any classified information that may be disclosed when the case is tried, and to allow the government to propose substitutions and redactions when appropriate. Whatever "equities" exist, they are overcome if the *Yunis* standard is satisfied at this stage.

also be compelled to produce the intelligence reports requested by the defense in order to rebut the government's theory. Having decided to present such evidence, the government cannot now complain that it has opened itself up to discovery requests that threaten its "equities."[10]

2. The Government's Chosen [redacted] Theory

In its June 12th letter to the defense, the government also announced its intent to introduce evidence that Mr. Kim leaked the intelligence report because it "confirmed the accuracy of his view that North Korea [redacted] *See* Fifth Motion, Ex. 3. On that basis, the defense moved to compel the production of documents regarding Mr. Kim's alleged "view," as well as any intelligence reports regarding North Korea's [redacted] accessed by Mr. Kim between June 2008 (when he started working at the State Department) and June 11, 2009 (the date of the alleged disclosure). *See* Fifth Motion at 7-10.

In its opposition, the government argues that the information requested by the defense is irrelevant because the government's motive theory is "narrowly focused on the defendant's beliefs on June 11, 2009." Opp. at 25; *see also id.* at 28-29. On that basis, the government contends that documents reflecting Mr. Kim's views on North Korea's [redacted] prior to June 11, 2009, are irrelevant because they would not "rebut the government's evidence demonstrating that he believed (rightly or wrongly) that North Korea [redacted]

[10] At the end of this discussion, the government states that it is nonetheless "searching for intelligence reports that could be responsive" to the defense's request and that, if it identifies such reports, it will "seek the Court's direction under CIPA Section 4." Opp. at 24. The defense again objects to this process, as *ex parte* proceedings are to be employed only under the "rarest of circumstances." *United States v. Libby*, 429 F. Supp. 2d 18, 21-22 (D.D.C. 2006), *amended by* 429 F. Supp. 2d 46 (D.D.C. 2006). In this instance, there is no reason why a discussion of whether intelligence reports expressly requested by the defense are "relevant and helpful" to the preparation of Mr. Kim's defense would have to take place without defense counsel present.

[redacted]"[11] Opp. at 25. The government similarly argues that "[i]t is irrelevant whether [the defendant's] beliefs regarding the program at that time were right or wrong," or whether they "were supported or refuted by other classified North Korean intelligence reports," or whether the intelligence report at issue "was, in fact, [redacted] because "[a]ll that matters to the government's motive theory are the defendant's belief regarding [redacted] on June 11, 2009, and his belief that the [redacted] report confirmed his views." Opp. at 28. The government can obviously describe its own theory of motive however it would like, but its response to the defense's requests misses the point.

As the defense explained in its motion, the defense will argue that the mere fact that an intelligence report "confirms" one's view on a particular subject does not generally serve as a motive to leak the report unless there is something particularly noteworthy or unique about the alleged "confirmation." *See* Fifth Motion at 9-10. If Mr. Kim accessed a dozen reports in the months leading up to June 11, 2009, that similarly "confirmed" his alleged view that North Korea [redacted] the mere fact that the intelligence report at issue in this case also "confirmed" his view could hardly serve as a reason to leak *this* particular report, as opposed to any one of the dozen earlier reports containing the same information.[12] The

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[11] The defense cannot help but note the irony of this argument. As evidence of Mr. Kim's purported motive, the government cites emails and other documents from March 2008; February 4, 2009; March 18, 2009; April 16, 2009; May 11, 2009; May 20, 2009; May 22, 2009; June 4, 2009; June 12, 2009; June 13, 2009; June 14, 2009; and June 15, 2009. *See* Opp. at 11-18. Notably absent is a single email or other document from June 11, 2009, the date the government's motive theory is allegedly "narrowly focused on."

[12] The defense requested additional documents regarding Mr. Kim's alleged views on North Korea's [redacted] for the same reason. To rebut the government's theory, the defense would show both that Mr. Kim accessed earlier intelligence reports containing similar information regarding North Korea's [redacted] and that he held the same views at that time. In its opposition, the government states that it "has produced all discoverable classified

government fails to address this argument in its opposition, nor does it explain why evidence demonstrating that Mr. Kim accessed earlier intelligence reports confirming the same "view" would not undermine its motive theory. This concession by the government is itself sufficient to compel production of the reports requested by the defense.

The government similarly glosses over the defense's argument that there is a significant difference between North Korea's [redacted] and Mr. Kim's alleged view that North Korea [redacted] *See* Fifth Motion at 10. To determine whether Mr. Kim believed that an intelligence report [redacted] "confirmed the accuracy of his view that North Korea [redacted] the jury must be permitted to consider what else Mr. Kim knew about North Korea's [redacted] during the same time period. *Id.* If Mr. Kim had accessed information [redacted] the defense must be permitted to present that evidence to the jury to rebut the government's assertion that Mr. Kim [redacted] confirm his own views. *Id.*

The government responds that it has "evidence [that] would show that the defendant believed that *the intelligence information in the* [redacted] *report* ... confirmed his own view that North Korea [redacted] Opp. at 15 (emphasis added); *see also id.* at 14-16, 29. But that statement is demonstrably false. None of the emails or inadmissible out-of-court

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documents responsive to the defendant's request," that "any additional responsive classified material ... further demonstrates the defendant's belief that North Korea [redacted] and that the government "has also not identified any documents in the year prior to June 11, 2009, tending to show that the defendant believed that North Korea [redacted] Opp. at 25, 26, 27 n.26. Based on the government's representations, the defense agrees to withdraw its request for additional documents regarding Mr. Kim's alleged views. *See* Opp. at 27; Fifth Motion at 8-9 (Item III-A-2(a)).

statements cited by the government in its opposition addresses "the intelligence information in the [redacted] report," much less shows that Mr. Kim viewed the report as confirming his own views. *See* Opp. at 14-16. To the contrary, the evidence cited by the government in its opposition consists of emails and discussions that took place on June 13 and June 15, addressing the North Korean [redacted]

The chronology of the emails relied upon by the government casts further doubt on its attempts to avoid producing materials related to its [redacted] Despite the government's claim that its theory "is narrowly focused on the defendant's beliefs on June 11, 2009," *see* Opp. at 25, the emails relied upon by the government were sent on June 13 and June 15, not June 11. The government fails to explain why these emails from June 13 and June 15 would be relevant to the defendant's state of mind on June 11. Moreover, none of the emails cited by the government state that Mr. Kim or any of his colleagues viewed the intelligence report, or even the June 11 Rosen article, as confirming their views regarding [redacted] To the contrary, the email strings relied upon the government did not begin until two days later, [redacted] That two-day gap completely undermines the government's theory.

Ultimately, the decision to pursue this line of evidence was of the government's own making. Once that decision was made, the government must actually prove its motive theory, and must provide the defense with the discovery necessary to support or rebut its theory at trial.[13]

[13] In its opposition, the government relies on a decision from the Southern District of New York for the proposition that inculpatory information can never satisfy the *Yunis* standard. *See* Opp. at 19. That proposition is not correct in this Circuit. The D.C. Circuit has held that information "can be helpful without being 'favorable' in the *Brady* sense – a point to which we alluded in *Yunis I*." *United States v. Mejia*, 448 F.3d 436, 457 (D.C. Cir. 2006); *see also United States v.*

The fact that *the government* believes that a handful of emails establish the defendant's guilt is not an adequate reason to deny a request for the production of otherwise discoverable information.

3. The Government's Chosen "Disgruntled Employee" Theory

In its motive letter, the government also announced its intent to argue that Mr. Kim leaked the intelligence report because he "was a disgruntled government employee because he believed his insights regarding North Korea were being ignored or rejected by other government personnel." *See* Fifth Motion, Ex. 3. The government's motive letter did not state which government employees Mr. Kim believed were ignoring or rejecting his insights, nor did it state when Mr. Kim allegedly became disgruntled. *Id.*

During the meet-and-confer process, the defense sought clarification of the government's vague "disgruntlement" theory, but the government refused to provide any further explanation. The defense thus moved to compel the production of "any documents or other evidence tending to support or refute the government's claim that Mr. Kim was a 'disgruntled employee' and/or

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Aref, 533 F.3d 72, 80 (2d Cir. 2008). This makes sense, given that the Court of Appeals has long held that inculpatory evidence can satisfy the materiality standard for Rule 16 purposes. *See United States v. Marshall*, 132 F.3d 63, 68 (D.C. Cir. 1998) ("But this language does not mean that inculpatory evidence may never be material. To the contrary, a defendant in possession of such evidence may 'alter the quantum of proof in his favor' in several ways . . . ."). Evidence that is arguably inculpatory can be "at least helpful to the preparation of the defense," *see United States v. Yunis*, 867 F.2d 617, 621-23 (D.C. Cir. 1989), by allowing the defendant to prepare a strategy for confronting damaging evidence at trial, conducting an investigation to discredit that evidence, or by not presenting a defense which is undercut by such evidence. *Marshall*, 132 F.3d at 68; *United States v. Al Odah*, 559 F.3d 539, 545 (D.C. Cir. 2009) (holding that information not exculpatory on its face may still be material); *United States v. Libby*, 429 F. Supp. 2d 1, 7 (D.D.C. 2006) (holding that discovery of inculpatory evidence ensures that the defendant is aware of both the "potential pitfalls" and the strengths of his strategy). "Inculpatory evidence, after all, is just as likely to assist in the preparation of the defendant's defense as exculpatory evidence." *United States v. Safavian*, 233 F.R.D. 12, 15 (D.D.C. 2005) (internal quotation omitted).

that 'his insights regarding North Korea were being ignored or rejected by other personnel.'" *See* Fifth Motion at 11-12.

In its opposition, the government attempts to avoid a clear and straight-forward request by taking issue with the wording of that request. Latching onto the defense's use of an "and/or" clause, the government argues that the defense's request is overbroad because the government's motive theory "is more specific, i.e., that the defendant was disgruntled because he believed that his insights regarding North Korea were being ignored by senior government officials whom he derided in his emails, like Stephen Bosworth, Christopher Hill, Sung Kim, and Victor Cha." Opp. at 30 (emphasis in original). The government also complains that that the request is "unbounded by any time restriction," but assures the Court that "it believes it has met its obligations with respect to the government's motive theory." Opp. at 31. The government's response is inadequate, for several reasons.

First, the government's criticism of the "and/or" clause is inaccurate. The defense's motion was tied directly to the scope of the government's own motive theory. It sought to compel the production of "documents or other evidence tending to support or refute *the government's claim* that...." Fifth Motion at 11 (emphasis added). For that reason, the example provided by the government misses the mark. To our knowledge, the government has not claimed that Mr. Kim "was unhappy about his job because he believed his pay was too low." Opp. at 30. Such documents therefore are not responsive to the defense's request. If the government had made such a claim, then documents supporting or refuting that claim would be discoverable by virtue of the government's own theory. If the government finds the defense's

request vague or overbroad, that is a reflection of its motive theory, not the wording of the request.[14]

Second, after refusing to clarify its motive theory during the meet-and-confer process, the government states for the first time in its opposition that its theory is specific to "senior government officials ... like Stephen Bosworth, Christopher Hill, Sung Kim, and Victor Cha." Opp. at 30. Those names are nowhere to be found in the government's motive letter, which alluded only to "other government personnel," not even "senior government officials." *See* Fifth Motion, Ex. 3. If the government's theory is in fact limited to those four individuals, then it would be appropriate for the Court to order the production of any documents or other evidence tending to support or refute the government's assertion that Mr. Kim was disgruntled because he believed that his insights were being ignored or rejected by Mr. Bosworth, Mr. Hill, Mr. Sung Kim, or Mr. Cha. But, if that truly is the government's theory, it would be surprising, as the defense is unaware of any evidence that Mr. Kim ever worked for or discussed North Korean issues with any of the named individuals. It is therefore difficult to imagine how they could have "ignored or rejected" Mr. Kim's "insights," or how Mr. Kim could be "disgruntled because" they did so, *see* Opp. at 30, when there is no evidence that Mr. Kim's "insights" were ever presented to them in the first instance.[15] Opp. at 30.

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[14] The same is true of the government's complaint that the request is "unbounded by any time restriction." Opp. at 30. The government's motive letter does not state when Mr. Kim's views were rejected or ignored, or when he became disgruntled. The defense's request is therefore no more or less "unbounded" than the government's own motive theory.

[15] The only evidence cited in support of the government's Bosworth-Hill-Sung Kim-Cha theory is that Mr. Kim wrote emails allegedly "deriding" them. Opp. at 30. But "deriding" public figures whose views are unpopular is not the same thing as being "disgruntled" because one believes that those officials have rejected or ignored one's insights – particularly when there is no evidence that such "insights" were ever presented to them.

Third, although the government claims that it has "met its [discovery] obligations with respect to the government's motive theory," it proceeds to drop a footnote demonstrating that, in fact, it clearly has not done so. *See* Opp. at 31 & n.29. In its motion, the defense noted that – if the government really intends to argue that Mr. Kim leaked the intelligence report due to a belief that his insights were being ignored or rejected by government officials – any "any emails from his supervisors or colleagues acknowledging the usefulness of defendant's views or accepting his recommendations would be discoverable," as they refute the government's assertions regarding Mr. Kim's state of mind. Fifth Motion at 12 n.8. In its opposition, the government fails to address this argument, stating only – without explanation – that the defense's position is "not tenable."[16] To the contrary, emails and other documents demonstrating that, during the period of his alleged "disgruntlement," "senior government officials" actively solicited Mr. Kim's input and accepted his recommendations would be plainly discoverable, as they tend to show that Mr. Kim's "insights" were not being "ignored or rejected" as the government claims. In any event, the government concedes this point by failing to address the substance of the defense's argument, and should be ordered to produce the materials described in the defense's motion.

B. [redacted]

Defendant's motion to compel also seeks the production of certain categories of information for [redacted] the government refuses to disclose to three cleared defense counsel working in a government SCIF. *See* Fifth Motion at [redacted] Through the meet-and-confer process and in its opposition, the government agreed to produce six of the ten categories of information requested by the

[16] The government also states, incorrectly, that the argument was "seemingly abandoned in the defendant's motion to compel." Opp. at 31 n.29. To the contrary, the defense expressly cited such emails as an example of documents "that will be responsive and discoverable, based on the government's theory," in its motion. *See* Fifth Motion at 12 & n.8.

defense.[17] *See* Opp. at 32-34. The defense agreed not to pursue two of the ten categories of information at this time.[18] The only remaining items in dispute are the defense's requests for two days' worth of [redacted] records.[19] *See* Fifth Motion at [redacted]

Before addressing those requests, however, the defense must correct a misperception created by the government regarding the scope of discovery that it has provided [redacted] In its opposition, the government continues to insist that it has provided the defendant with "voluminous" discovery regarding [redacted] Opp. at 36. Nothing could be further from the case. Although the government has provided FBI-302s and related documents for [redacted] For example, Exhibit 3 is the government's entire production with respect to [redacted] The Court will note that the government has not disclosed [redacted] the intelligence report allegedly disclosed to Mr. Rosen. There are no [redacted] Exhibit 4 is the government's entire production with respect to [redacted] The Court will note that the government has not disclosed [redacted]

[17] The government inaccurately states that it has produced, or will shortly produce, discovery responsive to seven of the ten categories requested by the defense. The items from the defense's June 14th letter that the government has agreed to produce are items 6(a), 6(d), 6(e), 6(h), 6(i), and 6(j). *See* Fifth Motion, Ex. 1, at 2-3.

[18] The defense agreed not to pursue items 6(f) and 6(g) at this time.

[19] The items in dispute are items 6(b) and 6(c) from the defense's June 14th letter.

[redacted] In a normal case, the defense could utilize [redacted] and conduct further investigation as necessary. In this case, the defense cannot imagine how the government expects competent defense counsel to adequately investigate [redacted] based solely on what little discovery has actually been provided.

1. [redacted] Records

With respect to the defense's specific request for [redacted] records, the government states that it "will produce on or before August 23, 2013, [redacted] but that [redacted] This is so because those records could reflect [redacted] The government states, in other words, that it will produce records of [redacted] The latter category, of course, encompasses [redacted]

This response is troubling. The defense has only requested [redacted] records from June 10-11, 2009. [redacted]

[redacted] The only "anyones" who would see the [redacted] records are cleared defense counsel, who are prohibited from using classified information in that matter and would agree not to do so, in any event. Moreover, [redacted] could be redacted from the records while the discoverability [redacted] was litigated, so long as the [redacted] records still identified [redacted] All of these issues are easily addressed, and cannot possibly serve as an excuse to withhold otherwise discoverable information.

As to the merits of the defense's request, the government dismisses the request as a "fishing expedition" but fails to adequately explain why that is the case. *See* Opp. at 35-37. In its motion, the defense noted that [redacted] records are relevant and helpful to the preparation of the defense "to allow the defense to determine [redacted] Fifth Motion at [redacted] While the government paints this rationale as mere "speculation" from the "fertile imagination of counsel," *see* Opp. at 36-37, it is undisputed that [redacted] on June 11, 2009. Evidence that [redacted] [redacted] on the date in question. [redacted]

[redacted]

2. [redacted] Records

For the same reasons, the defense also requested [redacted] records for [redacted] *See* Fifth Motion at [redacted] In its opposition, the government states that any such emails were included in its "electronic search and review of [redacted] and that, in its view, all discoverable [redacted] have therefore been produced.[20] Opp. at 38. The adequacy of the government's [redacted] search protocol is presently pending before the Court, so the defense does not separately address that issue here.

The defense notes, however, that while the government represents that it has produced all "[d]ocuments reflecting [redacted] For the reasons described in the section above, [redacted] are plainly exculpatory. But they are unlikely to have been captured by the government's [redacted] search protocol, which failed to include [redacted]

[20] The government also lumps the defense's request for [redacted] records together with its request for [redacted] records, claiming that both requests are nothing more than a "fishing expedition," etc. *See* Opp. at 35-39. The defense responds to those arguments directly above in its discussion of [redacted] records.

[redacted] The adequacy of the government's search protocol remains pending before the Court.

C. Outstanding Items Addressed in the Court's Prior Rulings

The defense also moved to compel additional information regarding several items addressed in the Court's rulings on defendant's earlier motions to compel. *See* Fifth Motion at 18-23. In its opposition, the government accuses the defense of relitigating past issues, but does not squarely address the substance of the defense's requests. The relevant requests are discussed in turn below.

1. The Government's Representations Regarding Additional Reports

In its motion, the defense noted that the Court appeared to rely, in its prior ruling, on a representation by the government regarding its production of other intelligence reports that differed substantially from representations that had been made by the government during the meet-and-confer process. *See* Fifth Motion at 19; Fifth Motion, Ex. 1, at 3. To avoid any confusion, the defense thus moved to compel the production of any intelligence reports created between May 25, 2009, and June 11, 2009, [redacted] *See* Fifth Motion at 19.

The government could have resolved this request simply by confirming the representation that it apparently made to the Court at some prior time, *i.e.*, that it has searched for and produced [redacted] Opinion on First Motion at 6 (emphasis added). Strikingly, the government does not do so. Instead, the government vaguely alludes to its own *ex parte* CIPA Section 4 filings (which the defense obviously has not seen), and refuses to confirm that it has, in fact, searched for and

produced [redacted] [21] Opp. at 39.

The defense objected to the government's motion to proceed *ex parte* in this case precisely because the lack of adversarial proceedings leaves the government free to make representations to the Court that are untested, or that gloss over distinctions that are critical to the preparation of Mr. Kim's defense. In this particular instance, the defense hereby provides notice that, to its knowledge, the representation relied on by the Court on page six of its opinion on defendant's first motion to compel is not accurate. *See* Fifth Motion at 19. The fact that the government refuses to confirm its own prior representation serves as compelling evidence that it has not, in fact, searched for and produced all intelligence reports that are responsive to the request made by the defense.

2. The Report from [redacted]

In its motion, the defense also noted a similar discrepancy with respect to the Court's prior ruling on its request for a report from [redacted] described by Daniel Russel. *See* Fifth Motion at 19-21. In its opinion, the Court ruled that the issue was moot because "[t]he defendant has received the information referred to by Mr. Russel during his interview." Opinion on First Motion at 14. When the defense notified the government that it

[21] If the government has, in fact, moved to withhold from discovery additional intelligence reports [redacted] the defense cannot imagine how such reports would not be "relevant and helpful" to the preparation of Mr. Kim's defense. This case involves an oral disclosure, and there is no direct evidence of what was actually communicated to Mr. Rosen, or by whom. The question whether the intelligence information allegedly contained in the Rosen article came from one intelligence report or several different intelligence reports is plainly a question of fact for the jury. Moreover, the government's theory that the information about [redacted]

had not, in fact, received the report from [redacted] the government insisted that the "report from [redacted] email [redacted] *See* Fifth Motion at 20. In its motion to compel, the defense pointed out that the government's response was implausible, as the government had not produced the [redacted] email until July 2, 2013 – more than a month after the Court's ruling on defendant's first motion. The [redacted] email therefore was not an item that the defendant had already received at the time of the Court's ruling.

In its opposition, the government does not appear to grasp the issue, stating that it is "perplexed" by the defendant's position. Opp. at 41. The issue is actually quite simple. The [redacted] email [redacted] the "report from [redacted] addressed in the Court's earlier opinion, because the defense had not received the [redacted] email as of the time of that opinion and the opinion states quite clearly that the defendant had already received the information to which it referred. If the [redacted] email [redacted] the "report from [redacted] referenced by Mr. Russel (which the defense very much doubts, *see* Fifth Motion at 20), then the government's representation to the Court is not accurate, because the defense did not receive that email until July 2nd, more than a month after the Court's ruling.

The government's statement that the [redacted] email [redacted] " only further confuses this issue, as the defense requested production of "the report from [redacted] identified by Mr. Russel, [redacted] in Mr. Russel's 302. Opp. at 41 (emphasis added). To be clear, if there is a separate document containing a "report from [redacted] that has not been produced, the defense has moved to compel its production. If, on the other hand, the government simply misinformed the Court in prior briefings that it had already

provided a document to the defense when it had not, in fact, done so, the government could simply say so. The government's current response fails to address the specific request made by the defense.

3. The [redacted]

Finally, the defense also moved to compel the production of any [redacted] related to the intelligence report that was drafted or circulated prior to 3:16 p.m. on June 11, 2009, as well as unredacted copies of the [redacted] materials that the Court ordered the government to produce on July 2, 2013. *See* Fifth Motion at 21-23. In its opposition, the government claims that it has already produced all [redacted] materials and confirms, for the first time, that it has not produced any [redacted][22] *See* Opp. at 41-42. The government also states that it will submit its redactions to the materials produced on July 2 to the Court for *in camera* review under CIPA § 4. *Id.* at 42 n.40.

Because so much of the litigation regarding the [redacted] materials has already taken place *ex parte*, it is difficult to imagine what more the government can say about those materials to avoid its discovery obligations. As the defense explained in its motion, the government has produced documents expressly referring to [redacted] circulated sometime between [redacted] and the 3:16 p.m. (the applicable cut-off time). *See* Fifth Motion at 21-22 & Ex. 8. The defense has moved to compel the production of any such [redacted] but the government continues to represent that no such [redacted] exists.

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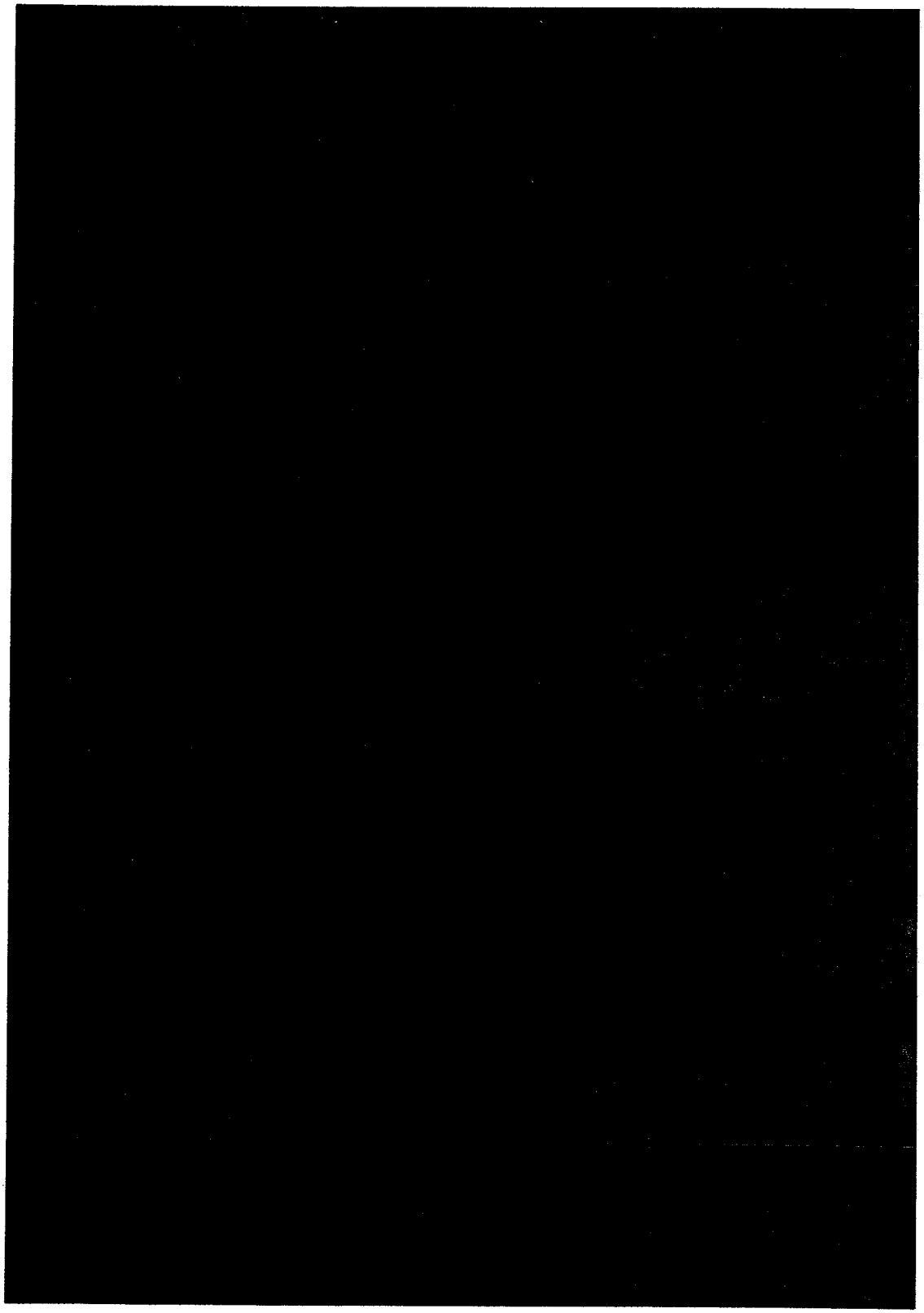
[22] After three separate requests, the government finally provided the Bates numbers of the actual [redacted] excerpts that have been produced to the defense. Only one of those Bates pages was produced to the defense following the Court's rulings on defendant's first set of motions, and that page (CLASS_3207) is simply a copy of the [redacted] attached to [redacted] email.

With respect to the Court's expected *in camera* review of the redacted [redacted] materials produced to the defense on July 2nd, it will be apparent to the Court during its review that there are at least three sets of [redacted] documents that exist, but that have not been produced to the defense: (1) a [redacted] (2) a separate [redacted] on the intelligence report; and (3) a series of revisions and comments [redacted] In particular, the defense requests that the Court consider the following when conducting its *in camera* review:[23]

[redacted]

[23] The emails cited below are attached as Exhibit 5.



III. Conclusion

For all of the foregoing reasons and any others appearing to the Court, defendant's fifth motion to compel discovery should be granted.

Respectfully submitted,

DATED: August 23, 2013

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

Counsel for Defendant Stephen Kim