

~~Treat as Classified~~ [REDACTED]; ~~Contents Subject to CIPA Protective Order~~

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

Filed with the Classified  
Information Security Officer  
CISO [Signature]  
Date 1/13/14

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

**DEFENDANT STEPHEN KIM'S THIRD CIPA § 5 NOTICE**

Defendant Stephen Kim, by and through undersigned counsel, respectfully submits his third notice pursuant to Section Five of the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. 3 § 5. Section Five requires the defendant to provide a "brief description" of any classified information that he "reasonably expects to disclose or to cause the disclosure of ... in any manner in connection with any trial or pretrial proceeding." 18 U.S.C. App. 3 § 5(a). Pursuant to that requirement, defendant provides notice that he reasonably expects to disclose or to cause the disclosure of the classified information contained in the following items:<sup>1</sup>

1. The Navy cover sheet for [REDACTED] 3630-09 provided to the FBI by William Farren. (CLASS\_943-45)

<sup>1</sup> Throughout classified discovery, the government has produced revised or corrected versions of some documents bearing an "A," "B," or "C" suffix at the end of the Bates number (e.g., CLASS\_340A is a revised version of CLASS\_340). During the course of discovery alone, the government has altered the classification status of well over 100 documents that were originally produced "with incorrect classification markings." See Dkt. 153, Ex. 9. This does not include the hundreds of pages originally produced with the "treat as classified" header, without proper classification markings. To be clear, when the defendant cites a Bates range in his CIPA § 5 notices, he intends to include whatever revised versions of those documents have also been produced by the government.

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2. Document control records for [REDACTED] at the State Department on June 11, 2009. (CLASS\_1001-03)
3. The "classified spreadsheet" containing the "List of 118" provided by the government during classified discovery. (CLASS\_1107-09)
4. "Security Briefing for Receipt of Logon ID and Password" document signed by John Herzberg. (CLASS\_2762)
5. Email sent by John Swegle to the defendant on June 11, 2009. (CLASS\_3053)
6. Email correspondence involving Robert Roesler and the defendant on August 8-12, 2008. (CLASS\_2100-03)
7. Email correspondence between Daniel Russel, Tom Donilon, Matthew Spence, and Jeffrey Bader on June 11, 2009 (CLASS\_3050-52). The defense notes that the government still has not produced portion-marked copies of this correspondence, despite the Court-imposed deadline of November 1, 2013. See Dkt. 151. The Court permitted the government over three months to identify and review all "treat as classified" documents and to produce portion-marked copies to the defense. See Dkt. 119, 144, 151. The Court should find that the government has waived any objection to the disclosure of information contained in documents that still do not bear proper classification markings. See 18 U.S.C. App. 3 § 1.
8. The PACOM cover sheet for the charged intelligence report. (CLASS\_2804)
9. The defendant's prior work product on North Korea. (CLASS\_208, 1860-65, 1870-94, 1895-1927, 1936-69, 1969-85, 2063-73, 2074-91, 2149-52, 2198-2229, 2230-42, 2243-64, 2265-84) The defense notes that the only classified information contained in these documents can be found on pages CLASS\_208, 1860, 1880, 1899, 1904, 1910, 1941, 1946, 1952, 1971, 1973, 2064, 2075-76, 2078, 2149-52, 2200, 2214, 2232, 2237-38, 2240-42, 2248, 2250, and 2270.
10. Email correspondence between the defendant and Debora Fisher on June 12, 2009, regarding intelligence information related to North Korea's nuclear program. (CLASS\_2104-12)
11. Email correspondence and attachments between the defendant and T.C. McCarthy on June 10, 2009, regarding intelligence information related to North Korea's nuclear program. (CLASS\_2153-97)
12. Email correspondence concerning a misclassified [REDACTED] briefing on June 19, 2009. (CLASS\_2115-17)
13. Email correspondence regarding the defendant's [REDACTED] access and screening responsibilities at the State Department. (CLASS\_2121-23, 2128-30, 2133)

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- d. Department of State Document Control Branch policies for the acceptance, release, and return of [REDACTED] documents.
22. FBI 302, agent's notes, and emails regarding a separate unauthorized disclosure of classified information [REDACTED].<sup>2</sup> (CLASS\_3232-38)

With respect to potential witnesses at trial:<sup>3</sup>

23. FBI 302 and agent's notes from a November 9, 2010, interview with Rajeev Wadhvani. (CLASS\_1257-58) The defense notes that every substantive paragraph of this 302 is marked "U" for unclassified, yet the document itself is marked [REDACTED]. The defense objects to having to notice this document through the CIPA process. The government's failure to declassify this document places a burden on the defendant that he does not have under the law. In an abundance of caution, defendant has no choice but to notice this document.
24. FBI 302 and agent's notes from a May 19, 2011, interview with Erica Thibault. (CLASS\_2734-35). The defense notes that every substantive paragraph of this 302 is marked "U" for unclassified, yet the document itself is marked [REDACTED]. The defense objects to having to notice this document through the CIPA process. The government's failure to declassify this document places a burden on the defendant that he does not have under the law. In an abundance of caution, defendant has no choice but to notice this document.
25. FBI 302 and agent's notes from an August 30, 2011, interview with Ambrose Sayles. (CLASS\_2763-65). The defense notes that every substantive paragraph of this 302 is marked "U" for unclassified, yet the document itself is marked [REDACTED]. The defense objects to having to notice this document through the CIPA process. The government's failure to declassify this document places a burden on the defendant that he does not have under the law. In an abundance of caution, defendant has no choice but to notice this document.

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<sup>2</sup> The defense notes that these documents are the subject of a pending discovery request. See Dkt. 242, Ex. 1, Item 2. As a result, this item will likely be modified.

<sup>3</sup> The defense notes that many of the 302s noticed below contain unclassified information (i.e., paragraphs portion-marked "U"). The defense assumes that the government does not object on CIPA grounds to the disclosure at trial of the information contained in these unclassified paragraphs, as well as disclosure of those portions of the documents themselves that contain such information. If the government disagrees, the defense reserves the right to notice the entire document.

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26. FBI 302 and agent's notes from an August 31, 2013, interview with Edgar Vasquez. (CLASS\_2775-78). The defense notes that every substantive paragraph of this 302 is marked "U" for unclassified, yet the document itself is marked "[REDACTED]" The defense objects to having to notice this document through the CIPA process. The government's failure to declassify this document places a burden on the defendant that he does not have under the law. In an abundance of caution, defendant has no choice but to notice this document.
27. FBI 302 and agent's notes from a September 14, 2011, interview with Henry Shin. (CLASS\_2766-74). The defense notes that every substantive paragraph of this 302 is marked "U" for unclassified, yet the document itself is marked "[REDACTED]" The defense objects to having to notice this document through the CIPA process. The government's failure to declassify this document places a burden on the defendant that he does not have under the law. In an abundance of caution, defendant has no choice but to notice this document.
28. FBI 302s from interviews on April 27, 2010, and May 26, 2010, with John Mee. (CLASS\_1180-82) The defense notes that every substantive paragraph of this 302 is marked "U" for unclassified, yet the document itself is marked "[REDACTED]" The defense objects to having to notice this document through the CIPA process. The government's failure to declassify this document places a burden on the defendant that he does not have under the law. In an abundance of caution, defendant has no choice but to notice this document.
29. FBI report from an August 10, 2009, interview with Patricia Parker. (CLASS\_1345-46) The defense notes that every substantive paragraph of this 302 is marked "U" for unclassified, yet the document itself is marked "[REDACTED]" The defense objects to having to notice this document through the CIPA process. The government's failure to declassify this document places a burden on the defendant that he does not have under the law. In an abundance of caution, defendant has no choice but to notice this document.
30. FBI 302, agent's notes, and attachments from a November 22, 2011, interview with Cindy Chang. (CLASS\_2833-38) The defense notes that this document contains a single paragraph marked "classified." That paragraph states, "Due to the nature of her job, Chang has talked to many members of the media, but has no memory of ever talking to James Rosen from Fox News. Chang stated she knew who Rosen was due to her interest in a variety of media outlets." (CLASS\_2833) This paragraph appears to have been classified solely because it refers to James Rosen and/or Fox News, and therefore should have been declassified. See Dkt. 153, Ex. 7. The government's failure to declassify this document places a burden on the defendant that he does not have under the law. In an abundance of caution, defendant has no choice but to notice this document.

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31. FBI 302, agent's notes, and attachments from a September 1, 2010, interview with John Herzberg. (CLASS\_1198-1229) The defense specifically notices the following paragraphs of the 302: ¶¶ 2, 11, 23.<sup>4</sup>
32. FBI 302, agent's notes, and attachments from an August 13, 2012, interview with John Herzberg. (CLASS\_2937-59)
33. FBI 302 and agent's notes from a January 24, 2012, interview with Denis McDonough. (CLASS\_2865-68) The defense notes that a single paragraph (¶ 2) of this 302 is marked classified.
34. FBI 302, agent's notes, and attachments from an August 22, 2012, interview with John Brennan. (CLASS\_3038-44) Consistent with his prior notices, the defendant does not intend to notice those portions of the attachments reflecting [REDACTED], which is not at issue in this case. The information contained in this 302 appears to have been classified solely because it refers to James Rosen and the charged article, neither of which should be classified at the time of trial.
35. FBI 302s and agent's notes from interviews on September 10, 2010, and September 8, 2011, with David Albright. (CLASS\_3178-99) The defense specifically notices the following paragraphs of the first (September 2010) FBI 302: ¶¶ 7, 8, 9, 10, 12. The defense specifically notices the following paragraphs of the second (September 2011) FBI 302: ¶¶ 5, 10, 11, 12, 13, 14, 24, 25, 29, 30, 31, 32, 33.
36. FBI 302, agent's notes, and attachments from a September 20, 2010, interview with Christine Clark. (CLASS\_1186-92) Consistent with his prior notices, defendant does not intend to notice those portions of the attachments reflecting [REDACTED] which is not at issue in this case.<sup>5</sup> The defense specifically notices the following paragraphs of the 302: ¶¶ 1, 2, 3, 4.
37. FBI 302 and agent's notes from a September 27, 2010, interview with David Foley. (CLASS\_1193-94) The defense specifically notices the following paragraphs of the 302: ¶¶ 3, 4.

<sup>4</sup> The defense has noticed specific paragraphs of the FBI 302s when possible. In some instances this was not possible, given the extent of classification of witness interviews in this case and the way in which certain 302s were marked. If the defense has not identified specific paragraphs, it intends to notice all of the classified information contained in the document.

<sup>5</sup> As the defense explained in its addendum opposition to the government's first CIPA § 6(a) motion, [REDACTED]

. See Add. Opp. at 16.

. Id.

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38. FBI 302 and agent's notes from a September 8, 2010, interview with Mi Young [REDACTED] (CLASS\_1112-1134) The defense specifically notices the following paragraphs of the 302: ¶¶ 1, 2, 3, 4, 6, 8, 13, 14, 15, 16, 17, 18, 19, 20, 21.
39. FBI 302 and agent's notes from a March 26, 2010, interview with Melanie Higgins. (CLASS\_1230-33) The defense notes that a single paragraph (¶ 5) of this 302 is marked classified.
40. FBI 302, agent's notes, and attachments from a September 30, 2010, interview with John Matthey. (CLASS\_1237-41) Consistent with his prior notices, defendant does not intend to notice those portions of the attachment reflecting [REDACTED], which is not at issue in this case.
41. FBI 302 and agent's notes from a September 1, 2010, interview with Todd Schwartz. (CLASS\_1248-53) The defense notes that a single paragraph (¶ 4) of this 302 is marked classified.
42. FBI 302 and agent's notes from a July 26, 2011, interview with Sara Horner. (CLASS\_2606-08) The defense notes that a single paragraph of this 302 is marked classified. Within that paragraph, the defense only intends to disclose the first sentence of that paragraph.
43. FBI 302 and agent's notes from an October 8, 2010, interview with Janey Wright. (CLASS\_1259-76)
44. FBI 302, agent's notes, and attachments from a September 21, 2010, interview with Paula DeSutter. (CLASS\_2524-37) The defense specifically notices the following paragraphs of the 302: ¶¶ 3, 6, 13.
45. FBI 302s and agent's notes from interviews with Jeffrey Eberhardt on May 25, 2011, and July 5, 2011. (CLASS\_2576-86) The defense specifically notices the following paragraphs of the first (May 2011) FBI 302: ¶¶ 3, 4, 6, 9, 14, 15 (only with respect to articles two and three), 16. The defense specifically notices the following paragraphs of the second (July 2011) FBI 302: ¶¶ 2, 3.
46. FBI report, agent's notes, and attachments from interviews with Mary Proctor on July 16, 2009, and August 2, 2010. (CLASS\_1347-59)
47. FBI 302s, agent's notes, and attachments from interviews with Gregory Cefus on September 14, 2010, and April 5, 2011. (CLASS\_2489-2523) The defense notes that the government still has not produced portion-marked copies of the attachments, despite the Court-imposed deadline of November 1, 2013. See Dkt. 151. The Court permitted the government over three months to identify and review all "treat as classified" documents and to produce portion-marked copies to the defense. See Dkt. 119, 144, 151. The Court should find that the government has waived any objection to the disclosure of information contained in

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documents that still do not bear proper classification markings. See 18 U.S.C. App. 3 § 1. The defense specifically notices the following paragraphs of the first (September 2010) FBI 302: ¶¶ 1, 2, 5, 6, 7, 8, 10, 12, 14, 15, 16, 17, 19. The defense specifically notices the following paragraphs of the second (April 2011) FBI 302: ¶¶ 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 16, 19, 20, 21.

48. FBI 302s, agent's notes, and attachments from interviews with T.C. McCarthy on September 14, 2010, April 5, 2011, and June 29, 2011. (CLASS\_2618-69) The defense notes that the government still has not produced portion-marked copies of the attachments, despite the Court-imposed deadline of November 1, 2013. See Dkt. 151. The Court permitted the government over three months to identify and review all "treat as classified" documents and to produce portion-marked copies to the defense. See Dkt. 119, 144, 151. The Court should find that the government has waived any objection to the disclosure of information contained in documents that still do not bear proper classification markings. See 18 U.S.C. App. 3 § 1. The defense specifically notices the following paragraphs of the first (September 2010) FBI 302: ¶¶ 1, 2, 3, 12, 14, 19. The defense specifically notices the following paragraphs of the second (April 2011) FBI 302: ¶¶ 1, 5, 6, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 22, 24, 26. The defense specifically notices the following paragraphs of the third (June 2011) FBI 302: ¶¶ 3, 4, 6, 7.
49. FBI 302, agent's notes, and attachments from an April 5, 2011, interview with Ronald Staggs. (CLASS\_2703-07) The defense specifically notices the following paragraphs of the 302: ¶¶ 1, 2, 3, 4, 5, 6, 7, 8, 9.
50. FBI 302s, agent's notes, and attachments from interviews with John Swegle on September 14, 2010, and April 5, 2011. (CLASS\_2708-33) The defense notes that the government still has not produced portion-marked copies of the attachments (CLASS\_2726-33), despite the Court-imposed deadline of November 1, 2013. See Dkt. 151. The Court permitted the government over three months to identify and review all "treat as classified" documents and to produce portion-marked copies to the defense. See Dkt. 119, 144, 151. The Court should find that the government has waived any objection to the disclosure of information contained in documents that still do not bear proper classification markings. See 18 U.S.C. App. 3 § 1. The defense specifically notices the following paragraphs of the first (September 2010) FBI 302: ¶¶ 1, 2, 3, 4, 5, 9, 16, 20. The defense specifically notices the following paragraphs of the second (April 2011) FBI 302: ¶¶ 1, 2, 3, 4, 7, 8, 9, 10, 11, 13, 14, 15.
51. FBI 302s, agent's notes, and attachments from interviews with Robert Roesler on September 28, 2010, and May 18, 2011. (CLASS\_2670-95) The defense notes that the government still has not produced portion-marked copies of the attachments (CLASS\_2683-95), despite the Court-imposed deadline of November 1, 2013. See Dkt. 151. The Court permitted the government over three months to identify and review all "treat as classified" documents and to produce portion-marked copies to the defense. See Dkt. 119, 144, 151. The Court should find that the government has waived any objection to the disclosure of information contained

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in documents that still do not bear proper classification markings. See 18 U.S.C. App. 3 § 1. The defense specifically notices the following paragraphs of the first (September 2010) FBI 302: ¶¶ 1, 2, 5, 7, 9, 11. The defense specifically notices the following paragraphs of the second (May 2011) FBI 302: ¶¶ 1, 2, 3, 4, 5, 6, 7, 9, 10, 14, 15, 17, 18.

52. FBI 302, agent's notes, and attachments from a July 12, 2012, interview with Anthony Gouge. (CLASS\_2927-34) The defense notes that the government still has not produced portion-marked copies of the attachments, despite the Court-imposed deadline of November 1, 2013. See Dkt. 151. The Court permitted the government over three months to identify and review all "treat as classified" documents and to produce portion-marked copies to the defense. See Dkt. 119, 144, 151. The Court should find that the government has waived any objection to the disclosure of information contained in documents that still do not bear proper classification markings. See 18 U.S.C. App. 3 § 1. The defense specifically notices the following paragraphs of the 302: ¶¶ 2, 3.
53. FBI 302 and agent's notes from a June 28, 2011, interview with Susan Hoff. (CLASS\_2598-2605) The defense specifically notices the following paragraphs of the 302: ¶¶ 2, 3, 4, 5, 6, 7, 8, 9, 10, 11.
54. FBI 302 and agent's notes from an August 8, 2011, interview with Edward Kim. (CLASS\_2612-13)
55. FBI 302, agent's notes, and attachments from a July 21, 2011, interview with Jennifer Urizar. (CLASS\_2855-59)
56. FBI 302 and agent's notes from a May 25, 2011, interview with Dora Kale. (CLASS\_2609-11) The defense specifically notices the following paragraphs of the 302: ¶¶ 1, 2, 3, 4, 5.
57. FBI 302 and agent's notes for a July 12, 2012, interview with [REDACTED] (CLASS\_3082-84) The defense specifically notices the following paragraphs of the 302: ¶¶ 2, 3, 4.

"Investigatory Materials"

58. Investigative questionnaires completed by government employees who accessed the intelligence report at issue, as well as accompanying FBI cover memoranda and notes. (CLASS\_340-45, 554-65, 764-70, 896-927, 935-41, 951-57, 961-67, 971-77, 990-95, 1006-12, 1024-30, 1037-43, 1048-54, 1078-84, 1281-87, 3061-67)
59. Badge and facilities access logs for government employees who accessed the intelligence report at issue. (CLASS\_771, 1310, 1344, 1372, 1376, 1596, 3202-03, 3229, 3231)
60. Electronic document access records for government employees who accessed the intelligence report at issue. (CLASS\_1416-18, 1590-95, 1597-1602, 1697-1800, 1809-23, 1846-52)

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61. Phone records for government employees who accessed the intelligence report at issue.<sup>6</sup> (CLASS\_946-48, 958-60, 968-70, 978-80, 2756-59, 2864, 3200-01, 3696-97, 3699-3749)
62. FBI 302s, agent's notes, and attachments from interviews of government employees who accessed the intelligence report at issue.<sup>7</sup> (CLASS\_814-15, 873, 928-31, 932-34, 942, 949-50, 987-89, 996-1000, 1004-05, 1019-23, 1034-36, 1044-47, 1074-77, 1277-80, 1311-23, 1330-32, 2862-63, 3054-57)

As the parties discussed at the January 7th Status Hearing, the defense has endeavored to include all classified discovery that defendant reasonably expects to disclose at trial in this third CIPA § 5 notice. This notice does not include any documents that the defense may request the government submit for final classification review no later than January 28, 2014. See Dkt. 119. This notice also does not include any documents provided by the filter team this afternoon (January 13, 2013). The defense intends to file additional CIPA § 5 notices for the reasons set forth at the January 7th hearing.

Dated: January 13, 2014

Respectfully submitted,

/s/

Abbe David Lowell  
Keith M. Rosen  
Scott W. Coyle

<sup>6</sup> The phone records contained in CLASS\_3699-3749 are the subject of a pending discovery request, as they were heavily redacted/substituted by the government. See Dkt. 242, Ex. 1, Item 5. Defendant intends to notice more detailed versions of CLASS\_3699-3749 once they are produced by the government.

<sup>7</sup> As defendant explained in his revised second CIPA § 5 notice, for those individuals who accessed the intelligence report at issue and were questioned by the FBI regarding their access, the defense intends to notice all of the classified information contained in their FBI 302s. See Revised Second CIPA § 5 Notice, Item 5. If the government were to provide a list of the witnesses that it intends to call at trial, the defense may be able to narrow this item. The government, however, has refused to do so.

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