Treat no Classified		Contents Subject 1	w ClFA Protectiv e Order
		DISTRICT COURT T OF COLUMBIA	Filed with Classified Information Security Officer CISO WROLC C Date 2/11/13
UNITED STATES OF AMERICA)	Criminal No. 10-22:	5 (CKK)
ν.)		FILED
STEPHEN JIN-WOO KIM,) })		JUL 2 4 2013
Defendant.)		Clerk, U.S. District & Bankruptcy Courts for the District of Columbia

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

Defendant Stephen Kim, by and through undersigned counsel, hereby moves¹ 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, 3/3/11,5/83 (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

Treat-as Circuitas Cubject to CIPA Protective Order

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.

- Free fit Charities
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 3630-09, reporting
that
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
In a nutshell, the government alleges that the Rosen article contained
"national defense information" ("NDP"), was the source document for the Rosen article,
and Mr. Kim was the one who disclosed the information contained in the Mr. Rosen.
Although the government alleges that Mr. Kim communicated the contents of
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
As used throughout this Motion, the phrase refers to both the actual accessed by Mr. Kim as well as prior iterations of the same intelligence produced by the government in this case, such as the underlying and earlier versions of the intelligence report.
Treat as Classified Contents Subject to CIPA Protective Order

he omily disclosed the contents of 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 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 the Rosen article, Kim, the government must prove that was the source document for the Rosen article, because its 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 its 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 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 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 was the only possible source document for

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

Guntants Subject to CIPA Protective Order

the Rosen article, but also because anyone who accessed the information reflected in the Rosen article—whether in the common 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.

H. 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. Mepia. 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. Sajavian, 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 controlting 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

- Treat as Classified Contents Subject to CIPA Prolective Order

government's evidence. Id.; see also Sajavian, 253 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. 1980).

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 - Fams, 8671, 2d 617, 623 (D.C. Cir. 1989) (quoting Roviero v. United States, 353 U.S. 25 (1927)). 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 "usseful to counter the government's case or to bolster a defense." United States v. 4ref, 533 F.36 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.36 at 456-57 ("[1])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

Confects Subject to CIPA Protective Under

presently before the Court is whether the information sought by the defense should be disclosed to observe detense 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

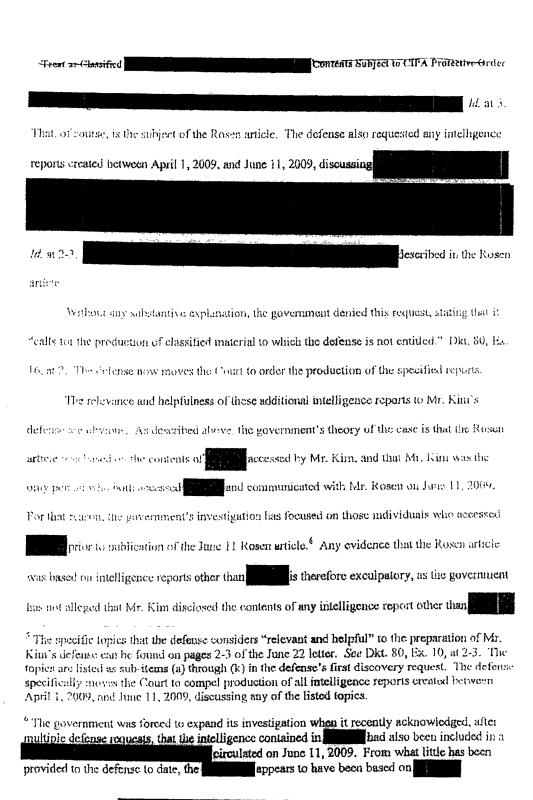
A. Additional Intelligence Reports on the Same Subject Matter

The defense previously requested any intelligence reports created between April 1, 2009, and June 11, 2009, addressing the same topics as those described in and the Rosen and the Rosen and 10th, So Tex. 10th 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) plainty indicating that was not the only intelligence report discussing.

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 and the Rosen article. The defense requested, for example, intelligence reports created between April 1, 2009, and June 11 2009, discussing "North Korea's

Treat as Glassified Country Subject to CIPA Protective Order

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.



Treat as Classified

Contents Subject to CIPA Protective Order

Contents Subject to CIPA Protective Order 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

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.

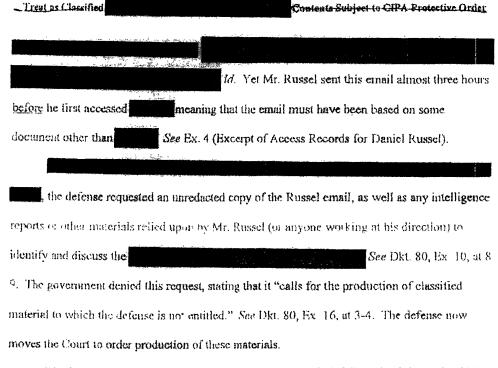
June 11, 2009 Email from Daniel Russel and Related Source Materials

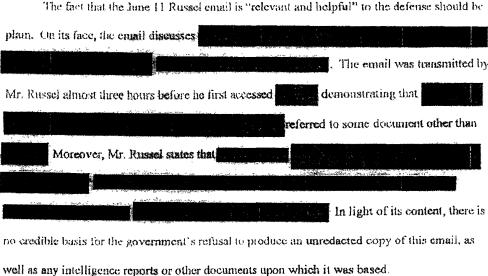
The defense requested production of additional information regarding an email provided to the PBI by Daniel Russel, the National Security Council ("NSC") Director for Japan and Kores. During his August 10, 2009, interview with the FBI, Mr. Russel provided agents with an email that he sent to three NSC 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 Fx. 3 (6/11/09 Russel Email). Mr. Russel's email

Trest as Classified

Contents Subject to CIPA Protective Order

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 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.

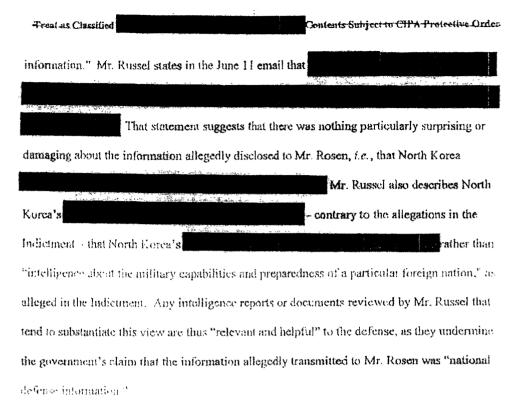




The requested documents are also "relevant and helpful" to the defense in rebutting the government's claim that the information contained in the Rosen article was "national defense

Trest as Classified

Goutents Subject to GIPA Protective Order



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. Badet on June 11, 2009, replying to, forwarding, or discussing North Korean.

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 reducted 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 34, 2012. Nee Ex. 5 (6/11/09 Bader Email).

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

Treat as Classified

Contents Subject to CiPA Protective Order

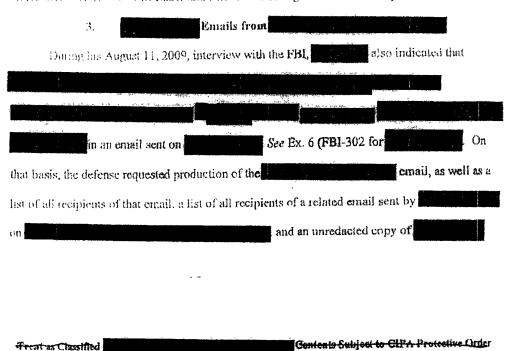
-Trent-us Classified

direction, to draft this email.

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 Buder email, as well as any intelligence reporting or other materials relied upon by Mr. Bader, or anyone working at Mr. Bader's

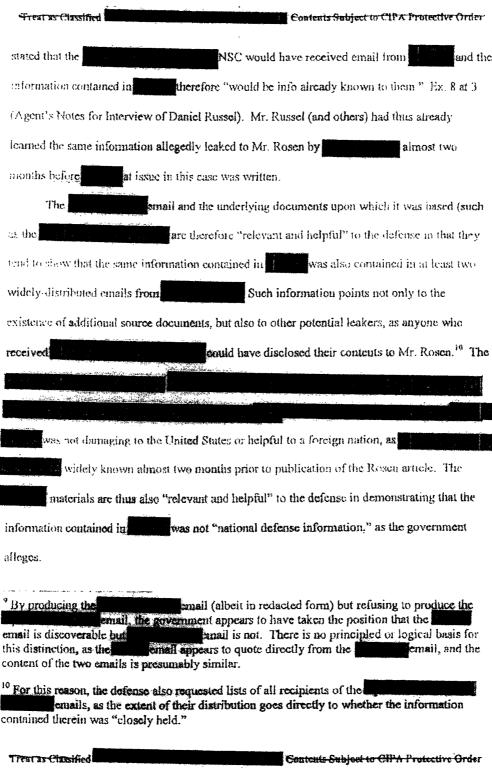
Contents Subject to CIPA Protective Order

The June 11 Russel email also states that it "reflects [Jeffrey Bader's] thinking as well as many." He is The defense therefore moves to compel the production of any intelligence reports or other documents accessed by Mr. Bader to analyze or assess the teferred 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 of securing those records to determine which intelligence reports related to North Hoper were accessed by Mr. Bader and Mr. Russel during the relevant time period.



 Π

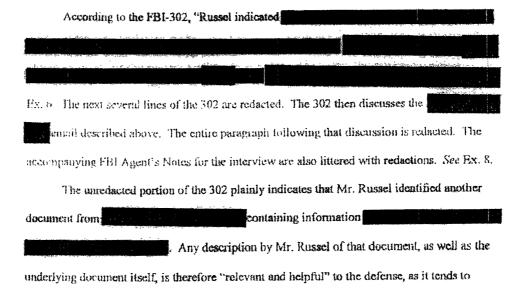
Treat as Chasified Contents Subject to CHA Protective Order cmail." See Dkt. 80, Ex. 10, at 7. The government denied this request, stating that it "calls for the production of material to which the defense is not entitled." Dkt. 80, lex. 16, at 3 (emphasis added). Notably, the government did not claim 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. materials are "televant and helpful" to the preparation of Mt. Kim's detense for many of the same reasons as the June 11 Russel and Bader materials. During his interview with the FBL stated that indicated, in other words, that the same information contained in vas aiso contained in an email from 11 Russel then provided the interviewing agents with a copy of an email several omail distribution lists at which was apparently the email from canail stated that See Ex. 7. lost on Mr. Russel himself. According to the FBI Agent's Notes from the interview, Mr. Russel E On June 22, 2012, the defense withdrew its request for an unredacted copy of email "pending our review of the materials requested above." Dkt. 80, Ex. 10, at 7. materials, the defense Because the government has denied our requests for the related email as well. now moves to compel production of an unredacted copy of the Contents Subject to CIPA Protective Order Arcat as Classified



Treates Classified Government of Contents Subject to CIPA Protective Order

4. Additional Daniel Russel Materials

In addition to the June 11 Mr. Russel also appears to have identified another potential source document during his interview with the FBI, although the copy of the FBI-307 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 12, 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 unreducted copies of these documents.



information contained in the Rosen article. The defense thus moves to compel the production of

disprove the government's contention that

was the only source document for the

Treat as Classified Contents Subject to GIPA Protective Order
on unreducted copy of the FBI-302 and corresponding Agent's Notes as well as a copy of the
report from a contract of the identified by Mr. Russel. 11
5. Additional Reports Identified by
The defense requested the production of three potential "source documents" for the
Rosen article identified at the request of Mr. Russel by
at the time of the alleged
disclosure. No Dkt 91, Ex 3, at 2. This request was based on the FBI-302 for an interview
with some on September 16, 2010, during which stated that "on the day of the
leak" Mr. Russel snowed 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 said that he said that he
ical and conducted a search for the ball he had already provided to Russel, as Russel felt he
already is viewed. If the then
claimed that he "identified three reports" that he felt "had similar information" to the article, but
could not remember during the interview whether
the basis of statements, the defense requested 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 See Dkt. 91, Ex. 6,
at 2. Citing the FBI-302, the government stated that "any source material in the identified
The detense has no way of knowing what has been redacted from the Agent's Notes or the paragraph following the discussion of the second 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.
Trigital Charified

Contents Subject to GPA Protective Order.

Treatus Classified

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" effecting efforts to
identify the source material for the classified information contained in the June 11, 2009,
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
let
Contrary to the government's response the email string provided on July 17, 2012, does
but h valve h valetense is 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
Email: The HH-302 for interview, by contrast, states quite clearly that
identified the three reports "the same day as the leak." Ex. 9. The FBI-302 also says nothing
about may efforts to identify source documents
To the commany according to the 302, was tasked with identifying source documents
for "the order" (singular). Id. And, perhaps most importantly, the discovery provided to the
defense to one indicates that we were could not have been one of the three reports identified as a
potential source assument by According to the 302, and conducted a search
potential source document by According to the 302, and according to the source tor the reports he had already provided to Russel, as Russel felt he already reviewed the source
· · · · · · · · · · · · · · · · · · ·
for the reports he had already provided to Russel, as Russel felt he already reviewed the source
for the apports 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 was not one of
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 was not one of the reports that and already provided to Mr. Russel, as Mr. Russel accessed.
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 was not one of the reports that and already provided to Mr. Russel, as Mr. Russel accessed himself electronically via a computer program called see Ex. 6, and there is no record
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 was not one of the reports that and already provided to Mr. Russel, as Mr. Russel accessed himself electronically via a computer program called see Ex. 6, and there is no record of electronically accessing prior to the publication of the Rosen article. See

Frent in Classified Contents Subject to CHPA Princetive Cirdor

The defense thus moves the Court to order the production of the three intelligence reports identified by as containing similar information to that contained in the Rosen article, as well as any additional email correspondence or other documents related to efforts to identify the source document that have not already been produced. These documents are "relevant and helpfur" to the defense, as they tend to show that was not the only possible source document for the Rosen article. In the event that the government is unable to retrieve the true chard copy reports provided to Mr. Russel by 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 compet the production of an access log documenting the intelligence reports viewed by on June 11, 2009, as well as copies of the reports related to North Korea that were accessed by

The 2:41 p.m. and the Prosecution's Manipulation of the

On November 30, 2012, the government acknowledged for the first time that a 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 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 and the FBI went so far as to try to convince that the defended based on the contents of

Contents Subject to CIPA Princetive Order
Interviewing agents advised to the United States Intelligence Community has reviewed all available intelligence reports and open source reporting and determined the only place the intelligence contained in the Fox News article.
See Ex. 12 at 3-4 (FBI-302 for assertions). As it turned out, however, both of these assertions
were Jalac. On November 3u, 2012, after repeated defense requests, the government finally
produced a containing the same information as the Rosen article. See Ex. 13 (12:16
p m. (1994)
As one might imagine, the sudden production of a town 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 second including a "longer" version of the second that
, brought with him to an interview with the FBI concerning the alleged
disclosure in this case 12 See Dis. 93. Ex. A. According to the state of this longer version of the
was culculated to several mendions 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 a contains a more thorough
discussion of "information derived from and other sources," another clear indication
role in the discovery of the is actually quite instructive regarding the inadequacy of the government's discovery procedures to date. Despite multiple defense requests for any intelligence report, or other document discussing the same information as and the Rosen article, the government apparently failed to discover that a expressly based on the 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 the because the happened to bring a copy of it with him to his July 12, 2012, interview with the FBL. 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.
Trent no Classified Contents Subject to CIPA Protective Order

that was not the only document in existence on June 11, 2009, discussing North Korca's . Id (emphasis added).

On that basis, the defense requested production of the 2:41 p.m. as well as the entail disculating 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 prior to 3:16 p.m. on lune 11, 2009," and any related correspondence. Dkt 95, Ex. A. at 3. The day after traceiving 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. 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 necessed the intelligence and served as a source for Mr. Rosen's article. The proverament 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 brovember 29, 2012, the government consistently maintained that the relevant "out-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. 13, 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

; Contents Subject to CIPA Protective Order "Freat as Classified

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.

and related materials on November Yet, when the government produced (so, it abruptly shifted course and invoked a new theory. For the first time, the government claimed the ban-off time" should be 2:21 p.m., based not on the publication time of the article. but on a life of one-line chail sent at 2:21 p.m. from Fox News reporter Major Garrett to Denn 'CoDemonds a the National Security Council, See Dkt. 91, Ex. 4, at 2. In this alleged chail. Carretteisfield McDonough that he should expect a phone call from his calleague, James Resen, who has some "very good stuff on North Korea," Ex. 15 (6/11/09 Garrett-McDonough Finail) Mr. Garrett did not state what this information was, nor did he indicate whether it related to U.M. sanctions, a nuclear test, Kim Jong II's health, or any of the other North Korea topic, that Mr. Rosen was pursuing at the time.

The experiment's abrupt decision to change the "cut-off time" from 3.49 p.m. (before its on the lidiscovery of the little to 2:21 p.m. (after the became a discovery issue) is a transportant 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 court should order the production of 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 "cutoff 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 the Rosen article, or any one of a number of

Treat as Classified

Gouteuts Subject to CIPA Protestive Octler

Thent ar Classified Government Grant Grant

period. 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 FBL. At trial, the government may well argue that the 2:21 p.m. Garrett-McDonough email demonstrates that Mr. Roser and already obtained the specific information that Mr. Kim is charged with disclosing by that true. But this fact will be contested, and the government cannot unitareadly empose the very the technique with buyer to prove in order to limit discovery.

Scond, the timing of the government's decision to revise its "cut-off time" is highly support. The government first produced the 2:21 p.m. Garrett-McDonough email almost two years ago, on March 14, 2011. See Dkt. 58, Bx. 14. During the various rounds of discovery and meet and-confer sessions between March 14, 2011, and November 30, 2012, the government never once indicated that the "cut-off time" should be moved up from '4.16 p.m. to 2.21 p.m. masec on that anal. 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 a produced at FBI-302 confirming the existence of a "longer" and the cut-off time and the produced at the government has refused to produce. The 2:41 p.m. version of the

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 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 circulated at 2:41 p.m. may contain statements regarding "confidence level" in the intelligence reporting contained in These topics are addressed in the defense's separate motion to compe!

Treat as Classified: ; Contents Subject to CIFA Protective Order was adainly assenversible under the government's prior "cut-off time" of 3.46 p m., but conveniently false just outside the newly-revised "cut-off time" of 2:21 p.m.

Third, even if the Court were to accept the government's revised "out-off time," the mere fact that the "longer" version of the 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 defence. But so For related email correspondence produced by the government, there is reason to believe that the 244 name are contained statements regarding "confidence level" in the intelligence reporting See Ex. 16 (6/11/09 Email). Such statements go directly to whether the intermation contained in was "national defense information," a topic addressed more fully in the defense's separate motion to compel discovery regarding N111 and willfulness. See That Mation is Compel at 9-11. Moreover, the time that a document was carealated is not a throsy for relevance, as the government seems to assume. If someone other that Al. King cent an smooth James Resen tomorrow respecting a favor "in exchange for the information I provided to got on him 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 was not circulated until 2:41 p.m. does not make that document nondiscoverable

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

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 [sie] 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 circulated at 2:41 p.m. on June 11, 2009

Contents Subject to CIPA Protective Order Hreat us Classified 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 circulated at 2:41 p.m. is "relevant and helpful" to the preparation of Mr. Kim's defense. Indeed, the government unplicitly admitted as much by producing another version of the created before its to who should not off time" of 201 pm. The defense thus moves the Court to order the production of the 2.41 p.m. [18, 18], as well as the related materials described above. " June 12, 2009 Email from The detense previously requested another document provided to the government by during his July 12, 2012, interview with the PBI concerning the Dkt. 93, Ex. A. at 4. According to the FBI-302 for that interview, provided agents with a June 12, 2009, email "in which the topic * because " Ex. 14 at 2. The government denied the defense a reque. Intump the a Codis for the moduction 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 locument. 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. the advantage of 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" that it did produce on November to limit the production of documents related to the 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 between 2:21 n.m. (the government's revised "cut-off time") and 3:16 p.m. (the government's previouslyestablished "cut-off time")

Trent as Classified

Contents Subject to CIPA Protective Order

in and at ascit, for withholding the document. The proper analysis hinges on the entail's

content, not just its immig

The June 12, 2009, semail is "relevant and helpful" to the preparation of Mr.

Euro's defense occause, according to the FBI-502, it discusses the relationship between the information contained in the Rosen article and the information contained in the curail apparently states that the Rosen article contained the same intelligence information as the ways is supports the defense's theory that the Rosen article may have been based on documents, including the option than the Rosen article may have been based on order production of the July 12, 2012, email provided to the FBI by

3. Publication

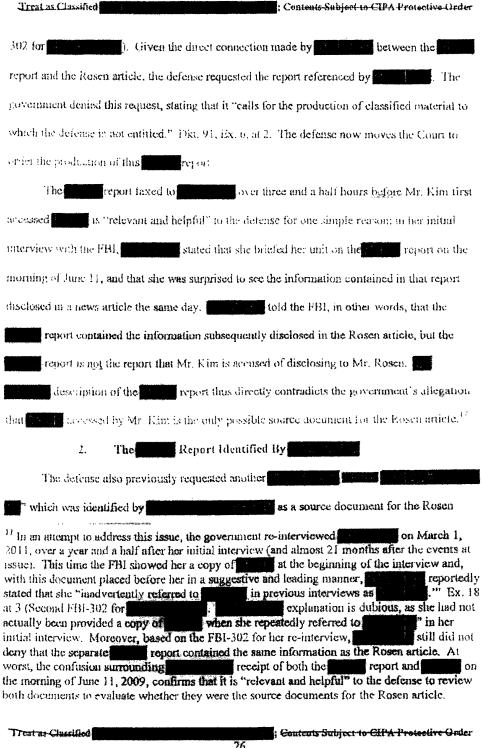
See Dkt. 13, Fr. A, at 4. According to the FBI-30th the report discussed. North Horea's described in the Rosen article. Lx. 14 at ... The government denied this request, stating that it "calls for the production of a classified report dated." after the publication of Mr. Rosen's article." Dkt. 94, at 5-4. The defense now moves the Court to order production of this.

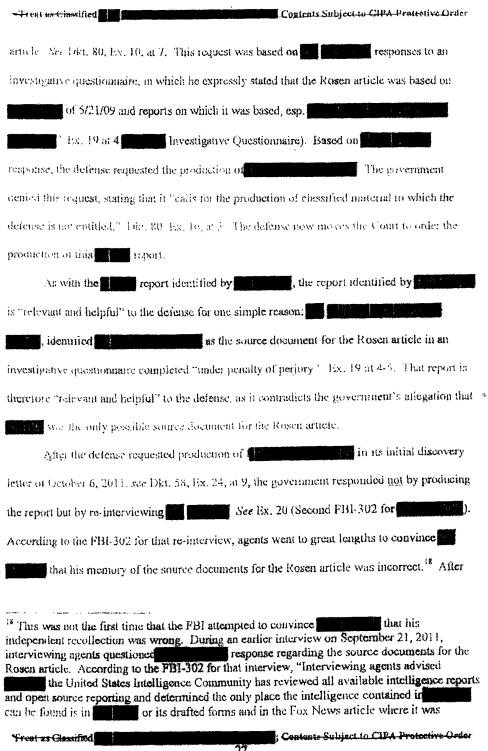
In addition to the and and the June 12, 2009, email, the defense also requested a

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 attack says nothing about whether the report contains discoverable information. If the report completely debunked the alleged intelligence contained in the same proceeds from the same proceeds from the same fact that the report is dated after the publication of the Rosen attack says nothing about whether the report contained in the same proceeds from the same fact that the report is dated after the publication of the Rosen attack says nothing about whether the report contained in the same proceeds from the same fact that the report is dated after the publication of the Rosen attack says nothing about whether the report contained in the same proceeds from the same fact that the report is dated after the publication of the Rosen attack says nothing about whether the report contains discoverable information. If

Treatus Clausified

Contents Subject to CIPA Protective Order _Trunt as Classifich reflects 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 responsible for finally alerting the government to the existence of a containing the same information as the Rosen article. himself chose to bring the publication to his interview with the PBI. According to the "advised Agents that he had reviewed his e-mail from the 6/11/2009 time traine and had arought some printed hard copy e-mail to the interview in which he was the sender." By, 14 at I. That statement certainly implies that, whatever its final date of publication, the report was the subject of correspondence between 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 , "publication is any credit targets independs related documents upon which the report was based Ð The Reports Report Received By 1900 and June 11, 2009 The defense requested an intelligence report identified as was faxed to a.m. on June 11, 2009. See Dkt. 91, Ex. 3, at 2. This request was based on the FBI-302 for interview with the FBI and supporting documents, which indicate that on June 11. "briefed her unit [on] at "and that she was "surprised by the news document, was disclosed." Ex. 17 at 1, 2 (FBIreport in which the classified information from





Firest as Classified 1 2n tearly	Contents Subject to CIPA Protective Order
asl mg all allout a "discrepanc	y" in the dates of the source materials identified in his
questionnance, the interviewing agents s	uggestively provided him with a copy of
accessed by Mr. Kim (a document that	had not identified on his own) and asked "it
he would assess it to be the source mate	rial" of the Rosen article. Id. Not surprisingly,
answered in the affirmative be	
Daring the same re-interview, he	owever, the agents also asked when the why he listed
as a source docum	nent for the Rosen article.
explaining that ne "must have logged in	in an attempt to find the intelligence
reporting" on which the Rosen article wa	us based, "found
and *concluded it was related to the pub	lications." Ex. 20 at 1. If
found that the information conta	ined in was "related to" the
information contained in the Rosen artic	le, 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
the government recently acknowledged	In (3-4. This assertion ultimately proved measured, as that the same information had in fact been included in a that was circulated prior to publication of the Rosen of determination. Who instead left the interview over whether his memory was right).
discussed North Korean distinction between the two intelligence	onclusion because discussed North Korean necess the other intelligence reports that he had reviewed. If that is in fact the sole reports, then the earlier report discussing the defense, as it tends to show that North Korea
	The defense will
argue that disclosing North Cores	s not constitute the disclosure of "national defense
information," as North Korea's and was not "closely held."	was already well known to the general public
	Contage Subject to CIBA Destaction Order

28

**Contents Subject to CWA Protective Order

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

1.. Government Employee Emails

Parally, the defense also requested production of any emails from time 10 or June 11, 2005 or which those povernment employees and contractors who accessed prior to both more of the Rosen article discussed the topics addressed in the article. See Dkt, 80, Ex 16, at 61-1 to the defense explained in its discovery letter, this request was prompted by the determent of the content of the email accounts of acceptance that the government did not appear to have searched the email accounts of acceptance temployees to determine whether any of them shared the contents with previously-andisclosed individuals, discussed the contents of and any similar intelligence reports, or communicated with Mr. Rosen on June 11, 2009. Id. In response, the concurrency stated that may a view, the request "calls for the production of riassa and and method the final material to which the defense is not entitled." but that it was nonetherest "in the processive and the signed and unclassified small sent or received on lane 2, and 11, 2009 in the response content of possession, custody, and control, for each of the individuals." Dkt 30, 15 v. 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

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

contails discussing Mr. Rosen. Id. On November 30, 2012, the government notified the detense 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 boy in 1 that moduced with this letter or in prior discovery productions." Dkt.91 1A, 4, at 5. Hecuated the government and the defense have consistently disagreed on what qualities as "discoverable" information in this case, the defense now moves the Court to order production of the requested canals.

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 the and the Rosen article. For example, the government has not produced emails in response to this request in twoich is comment on the content of the content of or discuss the first this information contained therein. The government also has not produced emails discussing the adeped moniticance of the or emails in which one employee or contractor matrix ted 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 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 the provided by the other intelligence documents that Mr. Russel apparently relied on to assess.

Trent as Classified

Contents Subject to CIPA Protective Order.

-Trent act institled	Contents Subject to CIPA Protective Order
----------------------	---

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

Second, any emails discussing the contents of 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, intervals, and agn-a, shorts to determine which employees and contractors accessed into a deer not appear to nave reviewed email communications to determine whether any or those who accessed 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 prior to publication of the Rosen article. The defense cannot investigate all individuals who accessed the information at issue without I nowing who those individuals are

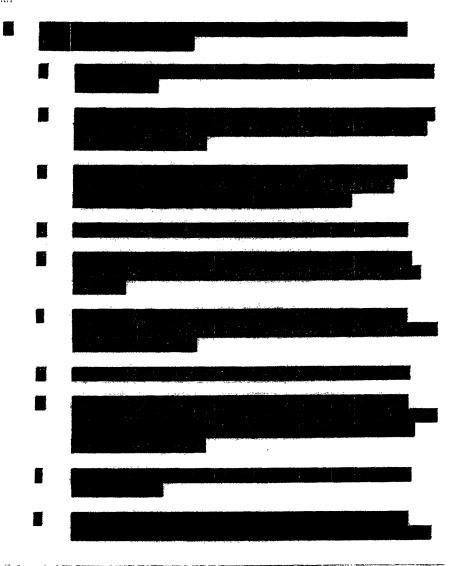
Withouth the government appears to have reviewed the relevant government employed emails for all common in ations involving Mr. Rosen, the rest of the sub-topics originally identified by the defense do not appear to have been incorporated into this review. The defense thus moves the court to compel the 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

Truit as Classified GIPA Protective Order

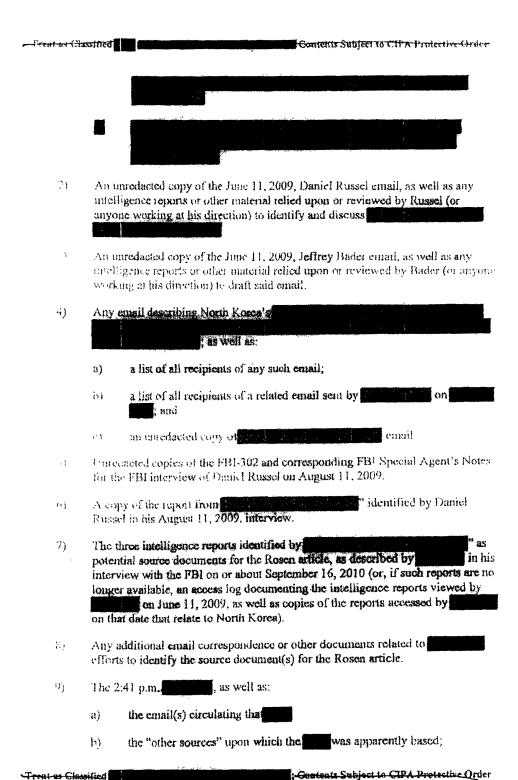
²¹ Presently pending before the Court is an exparte motion by the government pursuant to CIPA § 4, the resolution of which could result in the production of additional discovery to the defense. On February 8, 2013, the government also advised the defense that it is still in the process of respectation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

-Treat as Classified Contents Subject to CIPA Protective Order

WHEREFORE, for the teasons set forth above and any others appearing to the Coun, the detendant seeks an Order compelling the government to produce the following materials forthwith



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.



Front-as Classified Contents Subject to Cll'A-Protective Under the identity of anyone who drafted, edited, viewed, or received this version c) prior to 3.16 p.m. on June 11, 2009, and any related correspondence; and d) any documents related to dissemination of the earlier 2.21 p.m. (the government's revised "cut-off time") and 3.16 p.m. (the government's previously-established "cut-off (ime"). 1:11 the June 12, 2009, email provided to the FBI by relating to the line 1.1 "publication

- The intelligence report identified as
- The intelligence report identified as
- Any emails sent or received during the period June 10 to June 11, 2009, in which any government employee and/or contractor who accessed to the prior to publication of the Posen article discussed any of the topics addressed in the Rosen article.

" identified for the FBI by

any email correspondence or related documents upon which that report was based

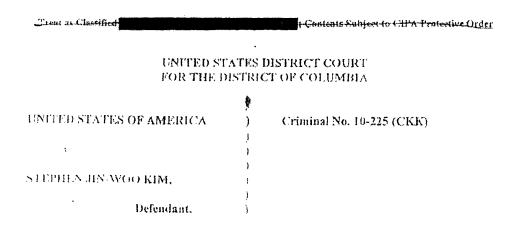
Respectfully submitted,

DATEO February 11, 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

as well as

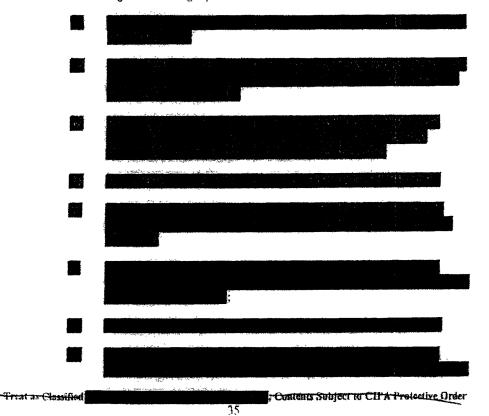
Counsel for Defendant Stephen Kim

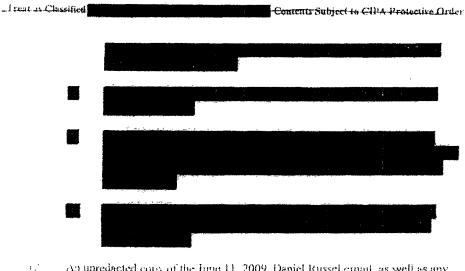


PROPOSED ORDER

For the reasons set forth in Defendant Stephen Rim's First Motion to Compei Discovery (Reporting Additional Source Documents), the government is hereby ORDERED to produce:

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

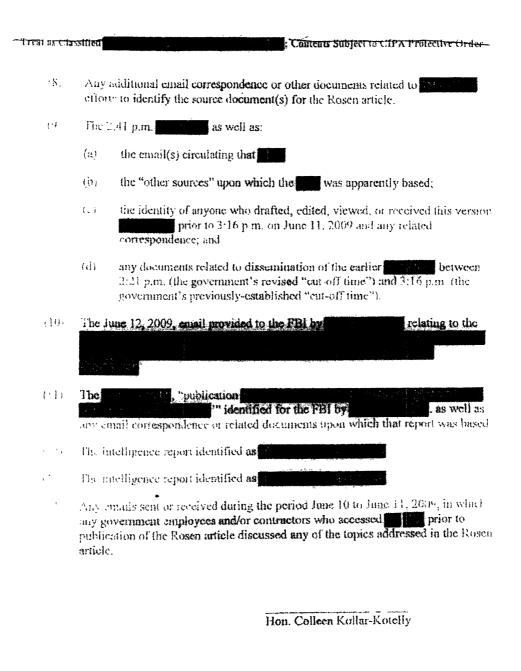




- An unreducted copy of the June 11, 2009, Daniel Russel email, as well as any intelligence reports or other material relied upon or reviewed by Russel (or anyone working at his direction) to identify and discuss
- (3) An unredacted copy of the June 11, 2009, Jeffrey Bader email, as well as any intelligence reports or other material relied upon or reviewed by Bader (or anyone working at his direction) to draft said email.
- Any email describing North Korea's
 - (a) a list of all recipients of any such email:
 - a list of all recipients of a related email sent by and on one of all recipients of a related email sent by
 - (c) an unredacted copy of email.
- (4) Unredacted copies of the FBI-302 and corresponding FBI Special Agent's Notes for the FBI interview of Daniel Russel on August 11, 2009.
- (0) A copy of the report from Russel in his August 11, 2009, interview.
- The three intelligence reports identified by potential source documents for the Rosen article, as described by in his interview with the PBI on or about September 16, 2010 (or, if such reports are no longer available, an access log documenting the intelligence reports viewed by on June 11, 2009, as well as copies of the reports accessed by on that date that relate to North Korea).

Treat or Classified

Contents Subject to CIPA Protective Order



Treat as Classified