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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed with the Classified
Information Security Officer
CISO *[Signature]*
Date 10/22/2013

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

DEFENDANT STEPHEN KIM'S SIXTH MOTION TO COMPEL DISCOVERY AND
REQUEST FOR CLARIFICATION OF THE COURT'S OCTOBER 9, 2013 ORDER

Defendant Stephen Kim, by and through undersigned counsel, hereby moves this Honorable Court for an order directing the government to disclose the following discovery items. This motion is made pursuant to Rule 16 of the Federal Rules of Criminal Procedure as well as Mr. Kim's right to exculpatory information as set forth in Brady and its progeny. See Brady v. Maryland, 373 U.S. 83 (1963). Defendant also requests clarification regarding two issues addressed by the parties at the closed hearing on September 27, 2013.

I. MOTION TO COMPEL

A. [REDACTED]

On October 9, 2013, the Court issued a Memorandum Opinion granting in part and denying in part defendant's fifth motion to compel discovery. See Dkt. 165. In its opinion, the Court reserved ruling on two items discussed in defendant's reply brief: (1) [REDACTED] the intelligence report at issue; and (2) [REDACTED] Id. at 12-13. The Court instructed the parties "to meet and confer regarding these materials and seek further relief through the Defendant's sixth motion to compel." Id. at 13.

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Pursuant to the Court's Order, on October 18, 2013, the parties met and conferred regarding [REDACTED]. The government denied the defense's requests for these materials. Defendant now moves to compel their production.

I. [REDACTED]

As the defense noted in prior briefing, certain emails produced by the government refer to [REDACTED] that was created [REDACTED] on June 11, 2009. See Ex. 1 (CLASS_3212). This [REDACTED] is relevant and helpful to the preparation of Mr. Kim's defense for three reasons. See *United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989).

First, the [REDACTED] is relevant and helpful to the preparation of Mr. Kim's defense because it provides further evidence of who accessed the intelligence information (and when) prior to the "cut-off" time on June 11, 2009. To prepare [REDACTED] one obviously must have accessed [REDACTED] or otherwise become aware of its contents. The [REDACTED] as well as a list of individuals who drafted, received, or otherwise accessed that document and any drafts that were created prior to 3:16 p.m. on June 11, 2009, are thus relevant and helpful to the defense in identifying those individuals who accessed the intelligence information at issue prior to the cut-off time.

Second, the email describing [REDACTED]

[REDACTED] See Ex. 1. As the Court is aware from prior briefing in this case, part of defendant's theory at trial will be that Mr. Rosen was in contact with certain White House officials (including Messrs. Brennan, Lippert, and McDonough) on June 11, 2009, and that the alleged disclosure may have originated with, or been authorized by, those White House officials. See Defendant's Second Motion to Compel at 10-12; Memorandum

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Opinion on Second Motion to Compel at 11-12. The contents of the [REDACTED] are thus relevant and helpful to the preparation of Mr. Kim's defense because they tend to show what information was likely shared with the White House on June 11, 2009. In addition, [REDACTED]

[REDACTED] The [REDACTED] is therefore also relevant and helpful to the defense in determining the content of any White House briefing and whether individuals involved in the drafting and dissemination of the [REDACTED] had reason to believe that the information contained in the intelligence report [REDACTED]

Third, based on an email regarding [REDACTED]

[REDACTED]

See Ex. 3 (CLASS_3102) [REDACTED]

[REDACTED] Such an assessment may support the defense's theory [REDACTED]

[REDACTED] and that someone in Mr. Kim's position would not reasonably have believed that disclosure of the information would damage the United States or help a foreign nation. The contents of [REDACTED] are thus relevant and helpful on that basis as well.

2. Proposed Revisions to [REDACTED]

For many of the same reasons, revisions to [REDACTED] are relevant and helpful to the preparation of Mr. Kim's defense as well. First, as with [REDACTED] a government employee or contractor could not begin revising or editing [REDACTED] without accessing [REDACTED]

¹ As the defense explained in its reply brief in support of its fifth motion to compel, see Reply at 27-28, [REDACTED]

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[REDACTED] or becoming aware of its contents. Any revisions to [REDACTED] are thus relevant and helpful to the defense, as they too demonstrate which individuals accessed the information at issue prior to the cut-off time. Such revisions are particularly important in this case, as the government has acknowledged its difficulty in determining when certain individuals involved in the [REDACTED] process accessed the information at issue. See Dkt. 91, Ex. 4, at 3 (Nov. 30, 2012 Letter). The time that a particular individual created, modified, edited, or saved a revised version of [REDACTED] may therefore serve as the best evidence of when that person accessed or reviewed the information at issue, as well as how that timing relates to certain phone calls to and from Mr. Rosen on June 11, 2009.

Second, revisions to [REDACTED] are also relevant and helpful to the defense because they tend to show how an intelligence analyst in Mr. Kim's position was likely to assess the information contained in the intelligence report. [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] for example, would corroborate the defense's view that Mr. Kim could not reasonably have believed that disclosure of the information would be damaging to the United States or helpful to a foreign nation.

B. [REDACTED]

Defendant's fifth motion to compel discovery stated that the parties were still discussing, *inter alia*, defendant's requests for (1) "any documents addressing [REDACTED] [REDACTED] or the intelligence community's 'confidence level' [REDACTED] [REDACTED] based on information known to the defendant at the time of the alleged disclosure," and (2) "any classified intelligence report [REDACTED] [REDACTED] [REDACTED] [REDACTED] as the charged intelligence report that was accessed by Mr. Kim between June 1, 2008, and June

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11, 2009.” Fifth Motion to Compel at 16-17. Defendant’s requests were based on the Court’s earlier Memorandum Opinion on defendant’s third motion to compel discovery, which held that

[REDACTED]

[REDACTED] were only discoverable if they were based on information known to the defendant at the time of the alleged disclosure. See Memorandum Opinion on Third Motion to Compel at 15-17.

During the closed hearing on September 27, 2013, the government indicated that it had started to collect documents responsive to defendant’s requests, “with one exception.” Transcript of Sept. 27, 2013 Closed Hearing at 30. The government stated that while it had “collected all such reports accessed by Mr. Kim during that date range [REDACTED]” it had not done so with respect to reports [REDACTED] because “it would be very difficult to do, and we think that that’s so far removed to not be probative of anything.” *Id.*

Prior to the closed hearing, the government had not raised the issue of [REDACTED] in the parties’ discussions of the requests during the meet-and-confer process. At the closed hearing itself, the defense clarified that it had not agreed to this approach, as it asked the government “to be comprehensive” in its search and to review all reports [REDACTED]

[REDACTED] *Id.* at 89

(emphasis added). Given the government’s assertion, the defense now renews its motion to compel the production of any classified intelligence report [REDACTED]

[REDACTED] as the charged intelligence report that was accessed by Mr. Kim between June 1, 2008, and June 11, 2009, as well as any documents addressing [REDACTED]

[REDACTED]

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The relevance and helpfulness of information regarding [REDACTED] is apparent from the documents that served as the basis for defendant's original request. [REDACTED]



Information regarding [REDACTED] is relevant and helpful to the defense, as any such information known to the defendant at the time of the alleged disclosure tends to support the defense's theory that Mr. Kim could not reasonably have believed that disclosure of the

² In fact, the intelligence report itself states that [REDACTED]
[REDACTED] Ex. 5 at 3.

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information would damage the United States or aid a foreign nation, because the information contained in the intelligence report [REDACTED]. To fully respond to defendant's requests, the government must therefore include intelligence reports and other information regarding [REDACTED] of the alleged intelligence at issue in this case. The Court should so order.

II. REQUEST FOR CLARIFICATION

On October 9, 2013, the Court issued an Order setting forth a discovery process for the production of certain documents outlined by the parties and the Court during the closed hearing on September 27th. To ensure that defendant's understanding of that process is consistent with the Court's Order, the defense respectfully requests that the Court clarify two particular aspects of the October 9th Order.

A. Intelligence Reports Known to the Defendant

During the closed hearing, the parties discussed the process by which the government has collected intelligence reports and other documents accessed by Mr. Kim between May 1, 2009, and June 11, 2009, in order to approximate what was "known" by the defendant at the time of the alleged disclosure. Tr. at 7-29. As the government acknowledged at the hearing, the parties have used the phrase "intelligence report" to include not only reports accessed by Mr. Kim on [REDACTED] but also emails containing intelligence information that Mr. Kim apparently received from the intelligence community on a regular basis. Tr. at 19-20. The defense believes that the Court's Order incorporates such emails by addressing "all intelligence reports relating to North Korea with electronically accessible dates (e.g., the date on which the document was created, modified, or last accessed) between May 1 and June 11, 2009." Order at 2. The defense thus asks the Court to clarify that any such emails must be included in the

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government's collection of relevant "intelligence reports" accessed by Mr. Kim between May 1 and June 11, 2009.

B. [REDACTED]

During the closed hearing, the parties also discussed the government's proposed process for determining what information was "known" by the defendant at the time of the alleged disclosure regarding [REDACTED].
[REDACTED] Tr. at 29-50. In particular, the defense asked the government to include in this process any intelligence reports [REDACTED] that were accessed by Mr. Kim between June 1, 2008, and June 11, 2009. *Id.* The rationale for this request was fairly straight-forward: in addition to the information "known" to the defendant as described above, [REDACTED] any such reports actually accessed by the defendant are a natural place to look for information known by the defendant [REDACTED].

The Court's October 9th Order requires the government to gather all intelligence reports accessed by the defendant [REDACTED]³ and "then compare the information in the collected reports to [REDACTED] -if any exist--to determine if there is any overlap between the information in the collected reports and the information on which [REDACTED] are based." Order at 2. The defense respectfully requests that the Court clarify two aspects of this process.

First, for purposes of comparing the two sets of information, the defense requests that the Court clarify the definition of what information [REDACTED] was "known" by the defendant at the time of the alleged disclosure. The defendant's request for

³ As noted above, defendant has moved to compel the inclusion of any intelligence reports [REDACTED] in this process as well.

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other intelligence reports [REDACTED] was intended to be in addition to—rather than separate from—its request for all intelligence reports regarding North Korea actually accessed by Mr. Kim between May 1, 2009, and June 11, 2009. In other words, to determine what was “known” by the defendant [REDACTED] the defense asked the government to compile the information described in Subpart A above, plus any additional intelligence reports accessed by Mr. Kim between June 1, 2008, and June 11, 2009, [REDACTED]. Both sets of materials are necessary to approximate what was “known” by the defendant [REDACTED] at the time of the alleged disclosure. Otherwise, for example, an electronic document or an email [REDACTED] that was accessed by Mr. Kim during the relevant time period would not be captured by the government’s process (unless the same comments also happened to be included in another intelligence report [REDACTED], even though it was clearly something “known” by the defendant at the time of the alleged disclosure. The defense therefore respectfully asks the Court to clarify that, when the government runs its comparison, it must include the “intelligence reports” related to North Korea as described in that section of the Court’s order discussing damage assessments. See Subpart A above.

Second, the defense notes that, when the government performs the process described in the Court’s Order, it may very well discover information that is independently producible. The Court’s Order should not be read to excuse the government from producing these materials.

The process agreed to by the parties and described in the Court’s Order is for a limited purpose, namely to determine whether damage [REDACTED] assessments that were not accessed by Mr. Kim must be produced because they were based on information known by the defendant at the time of the alleged disclosure. [REDACTED]

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[REDACTED] for example, the process described in the Court's Order would be utilized to determine whether [REDACTED] must be produced because it was based on information known by the defendant at the time of the alleged disclosure (assuming, of course, that Mr. Kim did not access [REDACTED] himself).

In gathering the various intelligence reports and electronic documents accessed by Mr. Kim prior to the alleged disclosure, however, the government may well discover information that is discoverable in its own right, independent of any comparison process. For example, the government might find that Mr. Kim accessed an intelligence report [REDACTED] in the weeks leading up to the alleged disclosure, [REDACTED]. That intelligence report should be plainly discoverable under the Court's Order, as it is a document accessed directly by Mr. Kim that goes directly to whether [REDACTED]. No comparison would be necessary. Similarly, if Mr. Kim accessed ten other reports [REDACTED] in the weeks leading up to the disclosure, several of which turned out to be [REDACTED], those reports would also be discoverable, as they collectively would tend to support the defense's theory that Mr. Kim could not reasonably have believed that the information contained in [REDACTED] reflected actual intelligence, [REDACTED]. In either case, such reports provide direct evidence of what was known by the defendant regarding [REDACTED] and confidence level at the time of the alleged disclosure.

The defense assumes that the government would produce any such information under Brady as well as this Court's Opinion on defendant's third motion to compel, which held that information known by the defendant at the time of the alleged disclosure regarding [REDACTED] is discoverable. See Mem. Op. at 15-17. If there is any uncertainty

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on this point, however, defendant now moves to compel the production of any intelligence reports or other documents accessed by Mr. Kim regarding [REDACTED] or the intelligence community's confidence level [REDACTED] prior to June 11, 2009. To be clear, this request for any information accessed directly by Mr. Kim regarding [REDACTED] is separate from the process described in the Court's October 9th Order, and remains outstanding.

WHEREFORE, for the reasons set forth above and any others appearing to the Court, defendant's sixth motion to compel discovery and for clarification should be granted. A proposed Order is attached.

Respectfully submitted,

DATED: October 22, 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

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

PROPOSED ORDER

For the reasons set forth in Defendant Stephen Kim’s Sixth Motion to Compel Discovery, it is hereby **ORDERED** that:

- (1) The government shall produce any [REDACTED] on the intelligence report at issue, as well as document(s) that identify the individuals who drafted, received, or otherwise accessed that document, or any drafts or revisions to that document, prior to 3:16 p.m. on June 11, 2009.
- (2) The government shall produce any revisions to [REDACTED] created prior to 3:16 p.m. on June 11, 2009.
- (3) With respect to the review process for determining the discoverability of “damage assessments” described in the Court’s October 9, 2013 Order, the government shall include emails received by Mr. Kim containing intelligence information related to North Korea (in addition to [REDACTED] and other electronic documents) when it collects information “known” by the defendant at the time of the alleged disclosure. See Transcript of Sept. 27, 2013 Closed Hearing at 19-20.

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(4) With respect to the review process for determining the discoverability of [REDACTED] described in the Court's October 9, 2013 Order, the government shall:

(a) Include intelligence reports [REDACTED] [REDACTED] [REDACTED] [REDACTED] as those relied on in the charged intelligence report when it collects those intelligence reports accessed by Mr. Kim between June 1, 2008, and June 11, 2009; and

(b) Include all intelligence reports and other documents related to North Korea that were accessed by Mr. Kim between May 1 and June 11, 2009, when it collects information "known" by the defendant at the time of the alleged disclosure.

(5) The government shall produce any document accessed by Mr. Kim prior to June 11, 2009, regarding (a) [REDACTED] [REDACTED] [REDACTED]

[REDACTED] [REDACTED] or (b) the intelligence community's confidence level [REDACTED] [REDACTED]

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