



Specifically, the United States produced approximately 123 pages of classified material, including classified FBI 302s, underlying agents' notes, related interview materials, emails, electronic audit material, and badge records. In total, the United States has produced approximately 3,199 pages of classified discovery in this matter. Since the last Status Hearing, the United States has produced additional unclassified material. Specifically, the United States has produced 3 pages of unclassified badge records. In total, the United States has produced approximately 16,286 pages of unclassified material produced to date in this matter. With respect to much of this material (classified and unclassified), the United States has produced it to the defense notwithstanding the fact that the government believes that such production exceeds its discovery obligations at this time.

The government's November 30th production included classified material related to what the United States has described as a "discrete matter" relating to the drafting of a separate intelligence product referenced in prior Joint Status Reports dating back to August 31, 2012, and mentioned during prior Status Hearings. The government's November 30th production also contained additional classified material that completed the government's response to the defense's earlier June 22nd discovery letter.

Further, the defense sent the United States a new classified discovery letter, dated November 19, 2012, to which the United States responded today (December 5, 2012). The government's December 5th production included classified material requested in the defense's November 19th letter.

The United States expects to file with the Court tomorrow a Notice of Filing, attaching all discovery correspondence between the Parties since the last such Notice of Filing (i.e., ECF

Docket No. 80), reflecting in detail the progress made to date in resolving or narrowing the defense's requests.

As to the current status, the United States takes the position that it has responded to the outstanding discovery requests of the defense. While the United States understands that its discovery obligations are continuing and is prepared to meet with the defense, as necessary, to address any questions that the defense may have about discovery produced to date, the United States takes the position that uncontested discovery is complete at this time. In the view of the United States, there is no reason at this time to postpone the scheduling of any defense motions to compel. Nevertheless, as described below, the defense has advised the United States today that it intends to send a new discovery letter by Monday, December 10, 2012. The United States is not in a position at this time to state what impact, if any, the defense's forthcoming letter would have on the scheduling of motions to compel.

The defense's position is as follows. The defense has had only three business days to review the classified discovery produced on November 30th related to the drafting of a separate intelligence product referenced in prior Joint Status Reports. It is already clear to the defense, however, that this new discovery is significant and raises a host of questions and grounds for additional discovery requests. Because these requests relate to the drafting of a separate intelligence product, the discovery relating to which was not produced to the defense until last week, these new issues could not have been reasonably anticipated. The defense can explain the nature and substance of the new discovery at the Status Hearing in closed session if helpful to the Court. The defense intends to make its discovery requests based on this new item by Monday of next week, prior to the Status Hearing. The Parties have agreed to hold a meet-and-confer session to discuss the defense's forthcoming letter on Tuesday, December 11, 2012. At next

week's Status Hearing, the Parties will be in a better position to address the impact of the defense's forthcoming letter on the proposed briefing schedule below.

### **III. Proposed Briefing Schedule on Motions to Compel**

Apart from any issues that may arise from the defense's forthcoming letter and the Parties' meeting on Tuesday, the Parties have conferred and would respectfully propose the following briefing schedule for any defense motions to compel: (a) the defendant shall file its initial discovery motions by February 11, 2013; (b) the government shall file its responses by April 5, 2013; and (c) the defendant shall file any replies by April 19, 2013. Hearings on those motions would be scheduled at the Court's convenience.

The defense notes, however, that in light of the time necessary to resolve prior discovery requests with the intelligence community, the proposed briefing schedule likely will be affected by the additional discovery requests prompted by the government's production last week. Defense counsel therefore respectfully submit, as we have in past Status Reports and Status Hearings, that it may be most efficient to schedule another Status Hearing in lieu of a motions schedule, to allow the Parties to discuss and resolve the defense's forthcoming requests.

### **IV. Witness Issues**

#### **A. Fact Witnesses**

The Parties have no issues to report concerning fact witnesses.

#### **B. Expert Witnesses**

Neither Party has indicated a decision to use any expert witnesses nor has identified any such witnesses. Defense counsel will seek a procedure where potential expert witnesses may have access to the classified materials in the case.

## **V. Motions**

### **A. Dispositive Motions**

In a written memorandum opinion and order, issued on August 24, 2011, the Court denied three pretrial motions filed by the defense. Pending before the Court is the defense's fourth pretrial motion, a motion to suppress statements.

### **B. Government's CIPA § 4 Motion**

On September 7, 2012, pursuant to the Court's CIPA Protective Order, the United States gave notice that it had filed with the Court, through the Classified Information Security Officer, a pleading entitled the "Government's Ex Parte, In Camera, Under Seal Motion and Memorandum of Law for a Protective Order Pursuant to CIPA § 4 and Fed. R. Crim. P. 16(d)(1)" ("CIPA § 4 Motion"). The defense filed a Response to the government's CIPA § 4 Motion, to which the United States filed a Reply. In turn, the defense filed a Sur-reply. This motion remains pending before the Court.

### **C. Motions to Compel**

See above.

## **VI. CIPA §§ 5 and 6**

Once the Court rules upon the Government's CIPA § 4 Motion and on any defense motions to compel, the Parties can address with the Court the various CIPA procedures and schedule for addressing the use of classified material at trial.

## **VII. Trial**

Given the complexity and sensitivity of the issues likely to be raised in CIPA proceedings in this case, as well as the delays that are frequently concomitant with that process, the Parties

estimate that this matter will not be ready for trial before summer 2013.

Dated: December 5, 2012

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 5, 2012, I caused a true and correct copy of the foregoing be served via the Court's ECF filing system to all counsel of record in this matter.

/s/ \_\_\_\_\_  
Jonathan M. Malis  
Assistant United States Attorney