



declassified or substituted, counsel cannot use the information to interview a witness or to obtain later leads without running afoul of the Court's Protective Order or the strictures of Title 18."

Attached to this pleading is a letter to defense counsel in which the government outlines procedures for conducting such interviews involving classified information. We believe that these procedures are consistent with the Protective Order and provide defense counsel with the ability to conduct the pretrial investigation referenced in its three CIPA notices.

### **CONCLUSION**

For these reasons, the United States requests that the Court find that the defendant has failed to comply with the requirements of CIPA Section 5(a). Alternatively, the United States requests that the Court hold a hearing pursuant to CIPA Section 6(a) to determine the use, relevance and admissibility of the classified information contained within the documents submitted by the defendant in the CIPA Section 5 notice filed April 28, 2011.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that I have caused an electronic copy of the foregoing *Response of the United States to Defendant's Third CIPA Section 5 Notice [Unclassified]* to be served via ECF upon Edward B. MacMahon, Jr., and Barry J. Pollack, counsel for the defendant.

By: \_\_\_\_\_ /s/  
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May 9, 2011

Edward B. MacMahon, Jr.  
107 East Washington Street  
P.O. Box 903  
Middleburg, Virginia 20118

Re: *United States v. Jeffrey Sterling*, No. 1:10cr485 (LMB)

Dear Ed:

You had inquired about procedures to be employed in conducting interviews of potential witnesses involving classified discovery. This letter responds to your questions.

1. Contact with potential witnesses. We have provided you with the names and contact information for certain intelligence officials. You may contact these persons directly about an interview. As for those persons we have not fully identified (*i.e.*, covert employees), we have agreed to contact these individuals for you (*e.g.*, deliver a sealed letter to them on your behalf).

2. Location of interviews. If you intend to discuss classified information (as that term is defined in the February 10, 2011 Protective Order Regarding Classified Information) during an interview, the interview must be conducted in a secure area as defined by the Protective Order (*i.e.*, a SCIF). If the courthouse SCIF is impractical for a particular interview, we will try to make another secure area available for you.

3. Clearances. If you intend to discuss classified information during an interview, the potential witnesses must possess the requisite security clearances. You may not rely on the representations of the potential witness as to the status of that person's clearances. We will verify whether the potential witness has the requisite clearances. If for some reason the potential witness does not have such clearances (*e.g.*, a former employee), we will take reasonable steps to have the person cleared for the specific purpose of allowing the interview to proceed. If we are unable to obtain the necessary clearances for a potential witness, you then could file a CIPA Section 5 notice regarding that person and identify the classified information you wish to disclose during an interview. We can then proceed accordingly. If you would prefer to handle clearance issues through the Classified Information Security Officer (CISO), you may do so. The CISO can determine the status of an individual's clearances through contacts with the intelligence agencies who are

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otherwise walled off from this case.

4. Subject matter of the interviews. During interviews with potential witnesses who possess the requisite clearances, you may discuss with the potential witness the allegations made in this case (*i.e.*, the facts alleged in the indictment) and anything disclosed to you on discovery. You may not discuss the following:

a. The true identity of covert employees. In this regard, you may not ask the potential witness questions which would reveal, directly or indirectly, the true identity of that witness or of any other covert employee or former employee.

b. The background of covert employees. You may not ask questions about the education, training, experience, or employment history of any covert employee or former employee, except to the extent such information has been disclosed to you in the discovery materials.

c. Other operations. You may not ask questions about intelligence operations other than that which has been disclosed to you in the discovery materials.

d. Redacted information. You may not ask questions about information that has been redacted from the discovery materials or any questions that would require the witness to disclose redacted information.

5. Memorandum of Understanding. We believe that potential witnesses currently employed by an intelligence agency and possessing the requisite clearances may have access to classified information that has been disclosed to you on discovery, and, therefore, no further authorization is required under the Protective Order to conduct interviews with such individuals. Former employees, however, must sign the Memorandum of Understanding attached to the Protective Order prior to any such interviews, and the signed memoranda must then be filed with the Court.

6. Notes. Any notes or other materials created during the interviews are classified and must be handled and stored in accordance with the Protective Order and Memorandum of Understanding. Before you may disclose the contents of the notes (*e.g.*, at trial), the notes must undergo a classification review, which you can coordinate through the CISO; if classified, disclosure of the contents of the notes would require a CIPA filing.

7. Notice to the Potential Witness. You must provide the potential witness with a copy of this letter describing the restrictions and limitations of the interview.

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With these restrictions, which we have reviewed with intelligence officials, we believe that you may conduct interviews with potential witnesses consistent with the Protective Order previously entered by the Court. If you believe that you cannot satisfactorily conduct a particular interview given these restrictions, you may file a CIPA Section 5 notice identifying the classified information you intend to use during such interview, and we can then attempt to work out the parameters of the interview through the CIPA process.

We intend to file this letter with the Court prior to the May 12, 2011 CIPA hearing.

Sincerely,

NEIL H. MACBRIDE  
UNITED STATES ATTORNEY

James L. Trump  
Assistant United States Attorney