IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	*	
v.	*	**Criminal No. 1:10-cr-0181-RDB**
THOMAS ANDREWS DRAKE	*	

DEFENDANT'S MOTION TO DISMISS COUNT TWO OF THE INDICTMENT BASED ON UNCLASSIFIED NATURE OF "REGULAR MEETINGS" DOCUMENT

The defendant, Thomas Drake, through his attorneys, hereby moves this Honorable Court to dismiss Count Two of the Indictment in this case. As grounds for this request, he states the following:

1. In Count Two of the Indictment, the government alleges that Thomas Drake violated 18 U.S.C. § 793(e) by having unauthorized possession of, and willfully retaining, a document relating to the national defense – "namely, a two page classified document . . . referred herein as 'the Regular Meetings' document[.]" (Emphasis added). The government asserts that the "Regular Meetings" document was classified at the time it was allegedly found in Mr. Drake's possession. *See* Indictment ¶ 17. Indeed, the government identifies the crime charged in Count Two as the "Retention of Classified Information."

2. In support of its willful retention charges, including Count Two, the government alleges that "[c]lassified information had to contain markings identifying the level at which it was classified." *See* Indictment ¶ 3.[1]

3. Evidence recently produced by the government reveals that the allegedly classified

[1] The Indictment contains two paragraphs numbered "3." This citation refers to the second paragraph "3."

"Regular Meetings" document contained clear "markings" that it was an "unclassified" document. According to a March 22, 2010 memorandum prepared by the lead NSA investigator in this case – which was produced to the defense just three weeks ago – the allegedly classified "Regular Meetings" document was posted on the National Security Agency intranet, called "NSANet," and it was marked "UNCLASSIFIED//FOR OFFICIAL USE ONLY" in the header and footer. *See* Exhibit A (March 22, 2010 Memorandum for the Record). In the March 2010 memorandum, the NSA agent describes how he verified the nature and history of the "Regular Meetings" document. He reports that he contacted two NSA employees with knowledge of the document, and they confirmed (i) that the document was a "list of weekly meetings supporting" an NSA department and (ii) that the document "was posted to NSANet as 'UNCLASSIFIED//FOR OFFICIAL USE ONLY.'" The "Regular Meetings" document, as posted on NSANet, is identical to the document allegedly found on Mr. Drake's home computer. In the face of this exculpatory evidence, the government cannot as a factual matter convict Mr. Drake of the criminal charge set forth in Count Two, "Retention of Classified Information."[2]

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[2] It is disturbing that the government did not produce the March 22, 2010 memorandum to the defense until February 4, 2011, ten months after the Indictment was issued. The information in the memorandum is undisputedly *Brady* material, and the government should have disclosed it many months ago. None of the documents found in Mr. Drake's home was marked classified. For some of these documents, the government claims that Mr. Drake had received them originally with classification markings. The significance of the March 2010 memorandum is the government's concession that the "Regular Meetings" document was published as "unclassified" and had never been deemed "classified" until after it was recovered from Mr. Drake's home.

Under the Due Process Clause of the Fifth Amendment, the prosecution is required to disclose exculpatory evidence to a defendant in a criminal case. *See Brady v. Maryland*, 373 U.S. 83 (1963). Here, there can be no dispute that the information in the memorandum is exculpatory. In the Indictment, the government charges that the "Regular Meetings" document is "classified." *See* Indictment ¶ 17. The fact that the document was marked "unclassified" and was posted on the NSA intranet as "unclassified" directly contradicts material allegations in the

4. In addition to being unable to prove the facts alleged in Count Two, the government also cannot prove the statutory elements of an offense under 18 U.S.C. § 793(e) in light of the fact that the "Regular Meetings" document was marked and posted on the internal website as "unclassified." Section 793(e) provides in relevant part:

> Whoever having unauthorized possession of . . . any document . . . relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, . . . willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it [has committed a federal offense.][3]

Indictment. *See id.*; *see also id.* ¶ ¶ 2, 3, 3 [sic] ("Classified information had to contain markings identifying the level at which it was classified."); ¶ 8 (alleging Mr. Drake retained and disclosed "classified" documents). In addition, the government clearly seems to be of the opinion that, if a document is classified, this fact supports a successful prosecution under 18 U.S.C. § 793(e) (an opinion with which the defense disagrees). It necessarily follows, therefore, that a memorandum indicating that a document was marked "unclassified" and posted on NSA's intranet as "unclassified" is potentially exculpatory to a defendant who is alleged to have violated § 793(e). For this reason, the prosecution was under a constitutional obligation to disclose the memorandum to defense counsel, yet chose not to do so. *See Brady,* 373 U.S. at 87 ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

What makes the government's actions even more disturbing is the fact that defense counsel had to specifically ask the government for any evidence that the "Regular Meetings" document was posted on NSANet. This request came months after our initial request for all *Brady* material and the prosecution's representation that it had produced all *Brady* material. It was only after our specific inquiry about a central document in the case that the government produced the March 22, 2010 memorandum. The government's failure to turn over this exculpatory evidence at the beginning of the case is indefensible. And its decision to charge Mr. Drake with retaining a "classified" document clearly marked "unclassified" is, at a minimum, wrong.

[3] Simultaneous with this motion, Mr. Drake filed a motion to dismiss Counts One through Five, charging willful retention of classified information, because 18 U.S.C. § 793(e) is unconstitutionally vague as applied to Mr. Drake under the Fifth Amendment and is overbroad under the First Amendment. For the reasons stated in that motion, Count Two should be dismissed. If, however, the Court denies Mr. Drake's constitutional challenge to the statute, the Court should nevertheless dismiss Count Two for the reasons stated in this motion.

5. One of the statutory elements of an offense under § 793(e) is that the document at issue "relat[e] to the national defense." To prove that a document relates to the national defense, the government must show two things. First, the government must establish beyond a reasonable doubt that disclosure of information in the document would be potentially damaging to the national defense or useful to an enemy of the United States. *See United States v. Morison*, 844 F.2d 1057, 1071 (4th Cir. 1988); *United States v. Dedeyan*, 584 F.2d 36, 39 (4th Cir. 1978). To meet this high burden, the government is required to demonstrate that the document contains information of the sort that, if disclosed, would have a "reasonable and direct" likelihood of damaging national security. *Gorin v. United States*, 312 U.S. 19, 31 (1941). "The connection [between the document and national security] must not be a strained one nor an arbitrary one." *Id.*[4]

6. Second, to prove that a document relates to the national defense under § 793(e), the government must also establish that the document at issue is "closely held," *i.e.*, that it has not been made public. *See Morison*, 844 F.2d at 1071-72; *Dedeyan*, 584 F.2d at 39-40. Courts have defined "closely held" as "a government secret." *United States v. Rosen*, 445 F. Supp. 2d 602, 622 (E.D. Va. 2006); *cf. United States v. Truong Dinh Hung*, 629 F.2d 908, 918 n.9 (4th Cir. 1980) (jury instructed to consider whether documents were classified); *United States v. Abu-Jihaad*, 600 F. Supp. 2d 362, 387 (D. Conn. 2009) (in determining whether information was "closely held," jury may consider whether information was classified "and whether it remained classified on the dates pertinent to the Indictment").

[4] In *Gorin*, the Supreme Court interpreted a predecessor statute to 18 U.S.C. § 793(e). *Dedeyan*, 584 F.2d at 39.

7. Thus, at a minimum, to prove that a document "relat[es] to the national defense" under 18 U.S.C. § 793(e), the government must establish beyond a reasonable doubt that the document was classified, that it was not otherwise available to the public, and that it contained information that, if disclosed, was potentially damaging to the security of the United States. *See Morison*, 844 F.2d at 1086 (Phillips, J., concurring); *Rosen*, 445 F. Supp. 2d at 624-26. Because the "Regular Meetings" document was clearly marked "unclassified" at all relevant times, the government cannot meet these criteria, and the document therefore does not "relat[e] to the national defense" for purposes of § 793(e).

8. Finally, because the "Regular Meetings" document was unclassified, the government cannot prove that Mr. Drake acted with the requisite *mens rea* necessary to support a conviction under 18 U.S.C. § 793(e). To convict Mr. Drake of violating § 793(e) by being in unauthorized possession of, and willfully retaining, the "Regular Meetings" document, as alleged in Count Two, the government must prove beyond a reasonable doubt that he specifically intended to violate § 793(e) – in other words, that Mr. Drake knew information in the document, if disclosed, could potentially harm the United States, that he retained and possessed the document with a bad purpose to disregard the law, that he knew the document or information was closely held, and that he had reason to believe the information in the document could be used to the injury of the United States or to the advantage of any foreign nation. *See Morison*, 844 F.2d at 1071 ("An act is done *wilfully* if it is done voluntarily and *intentionally* and with the *specific intent to do something that the law forbids. That is to say, with a bad purpose either to disobey or to disregard the law*.") (emphasis in original); *Truong Dinh Hung*, 629 F.2d at 919 (to act willfully under § 793(e), defendant must proceed in bad faith with "a design to mislead or deceive another"; defendant must not be prompted

by an honest mistake as to his duties, but instead by "some personal or underhanded motive"); *see also Rosen*, 445 F. Supp. 2d at 625:

> [To establish that the defendant acted with the requisite scienter under § 793(e),] the government . . . must prove beyond a reasonable doubt that [he] knew the information was . . . closely held by the United States and that disclosure of this information might potentially harm the United States. . . . Further the government must prove beyond a reasonable doubt that the defendant[] [acted] . . . with a bad purpose either to disobey or to disregard the law. It follows, therefore, that if the defendant[] . . . w[as] truly unaware that the information [he is] alleged to have received . . . was classified, [he] . . . cannot be held to have violated the statute.

(Quotation and citation omitted). *See id.* at 626 (discussing need for additional scienter requirement that defendant have "reason to believe [the information] . . . could be used to the injury of the United States or to the advantage of any foreign nation").

9. Because the "Regular Meetings" document was posted on the NSA intranet as an "unclassified" document, Mr. Drake could not possibly have possessed or retained that document with the bad intent necessary to support a valid conviction under 18 U.S.C. § 793(e). Accordingly, Count Two must be dismissed.

WHEREFORE, for these reasons and any others that may be developed at a hearing on this motion, Thomas Drake requests that this Honorable Court issue an order dismissing Count Two of the Indictment in this case.

Respectfully submitted,

/s/

JAMES WYDA, #25298
Federal Public Defender
DEBORAH L. BOARDMAN, #28655
Assistant Federal Public Defender
Office of the Federal Public Defender
100 South Charles Street
Tower II, Ninth Floor
Baltimore, Maryland 21201
Phone: 410-962-3962
Fax: 410-962-0872
Email: Jim_Wyda@fd.org
Deborah_Boardman@fd.org

UNITED STATES GOVERNMENT

MEMORANDUM

MEMORANDUM FOR THE RECORD

Event: (U) Verification of Regular Meetings Document
Date: 22 March 2010

(U//FOUO) The Reporting Agent contacted Ms. [redacted] H, [redacted], in order to ascertain the origin of the RegularMeetings.PDF document that was located on Mr. Drake's home computer. Ms. H stated she was familiar with the document and identified it as a list of weekly meetings supporting the [redacted] published by the [redacted]. Ms. H advised Ms. [redacted] G who is the [redacted] would also able to confirm the document's origin.

(U//FOUO) The Reporting Agent contacted Ms. G. Ms. G also identified the document as being published by the [redacted]. Ms. G stated the document was posted to NSANet as UNCLASSIFIED//FOR OFFICIAL USE ONLY. Ms. G advised the document is no longer posted on NSANet.

[redacted]
[redacted], Counterintelligence Investigations

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ORDER

Upon consideration of the defendant's Motion to Dismiss Count Two of the Indictment Based on the Unclassified Nature of the "Regular Meetings" Document, and consideration of other arguments of counsel, and for good cause shown,

It is hereby ORDERED that Count Two of the Indictment is dismissed with prejudice.

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THE HONORABLE RICHARD D. BENNETT
United States District Judge