Form A2-2. Notice of Public-Authority Defense (Fed. R. Crim. P. 12.3) and Motion for Discovery of Authorizing Instruments

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Use. A former UAP program participant is charged with an offense (for example, unauthorized retention or disclosure of national defense information, 18 U.S.C. §793; false statements, §1001; conversion of government property, §641) and contends that the conduct was undertaken at the request or with the authorization of a federal official or under a classified directive. Rule 12.3 requires written notice; the notice triggers reciprocal disclosure obligations and, in CIPA cases, notice under CIPA §5 if classified information will be disclosed.

When to use. A criminal defendant who will claim that a government official authorized the conduct charged. **Not for:** Civil cases, or a defense of mistaken belief in legality without an official’s authorization.

Deadlines. Rule 12.3 notice within the time for pretrial motions; the government responds within 14 days. CIPA §5 notice within the time the court sets, or 30 days before trial.

UNITED STATES DISTRICT COURT FOR THE [DISTRICT]

UNITED STATES OF AMERICA v. [DEFENDANT]	Criminal No. [_____] **DEFENDANT'S NOTICE OF PUBLIC-AUTHORITY DEFENSE PURSUANT TO FED. R. CRIM. P. 12.3**

Defendant [name], through counsel, gives notice under Federal Rule of Criminal Procedure 12.3(a) that Defendant intends to assert a defense of actual or believed exercise of public authority on behalf of [the Department of War / the Department of the Air Force / (agency)] at the time of the alleged offense[s].

1. **Agency.** [Name of law enforcement or federal intelligence agency.]

2. **Agency member.** [Name of the official or officials on whose behalf Defendant claims to have acted, or a description sufficient to identify them where names are classified, e.g., "the program manager of the special access program identified in the classified addendum filed with the Classified Information Security Officer."]

3. **Time.** [Period during which Defendant claims to have acted with public authority.]

[If the identity of the agency, official, or program is classified, add:] Information responsive to Rule 12.3(a)(2) that is or may be classified is set out in a classified addendum lodged with the Classified Information Security Officer under the protective order entered in this case and served on cleared government counsel. Defendant is also filing notice under section 5 of the Classified Information Procedures Act.

Dated: [_____] [signature block]

DEFENDANT'S MOTION TO COMPEL DISCOVERY OF DOCUMENTS BEARING ON THE PUBLIC-AUTHORITY DEFENSE

Defendant moves for an order under Federal Rule of Criminal Procedure 16(a)(1)(E) and *Brady v. Maryland*, 373 U.S. 83 (1963), compelling the government to produce, subject to CIPA §4 where classified, all documents in the possession, custody, or control of the prosecution team, or of the agencies whose files the prosecution has reviewed or should review, that bear on whether Defendant's conduct was requested, authorized, or known by federal officials, including:

a. any directive, finding, memorandum of notification, program authorization, or indoctrination agreement under which Defendant performed duties;

b. communications between Defendant and the official(s) identified in the notice; c. records showing the scope of authority of those officials;

d. records of any review of Defendant's conduct by the agency's security office, general counsel, or inspector general.

In *United States v. Giffen*, 379 F. Supp. 2d 337 (S.D.N.Y. 2004), the court held that documents pertaining to a possible public-authority defense were discoverable, including classified documents reviewed under CIPA, though the obligation did not extend to documents unknown to the prosecution. The same rule applies here. Whether an official had actual authority to sanction the conduct is a factual question that Defendant must be permitted to litigate. *See United States v. Fulcher*, 250 F.3d 244 (4th Cir. 2001) (affirming new trial where evidence of an agent's possible authorization emerged after trial and actual authority had not been litigated).

[Add: argument specific to the prosecution team's access to the relevant agency files; request that the government confirm the search of named agency components; request for a CIPA §2 pretrial conference.]

Dated: [_____] [signature block]

DEFENDANT'S NOTICE UNDER SECTION 5 OF THE CLASSIFIED INFORMATION PROCEDURES ACT

Defendant [name], through counsel, notifies the United States under section 5(a) of the Classified Information Procedures Act, 18 U.S.C. App. 3, that Defendant reasonably expects to disclose, or to cause the disclosure of, classified information in connection with the trial and pretrial proceedings in this case. A brief description of the information, which is itself classified, is set out in a classified addendum lodged with the Classified Information Security Officer and served on cleared government counsel. Defendant requests a hearing under section 6(a) on the use, relevance, and admissibility of the information.

Dated: [_____] [signature block]

Drafting notes

- Most circuits require actual authority; an honest but mistaken belief may still negate mens rea for specific-intent offenses. Research the circuit's rule before asserting the defense.
- A directive that could not lawfully authorize the conduct (see Issue A2 §3) weakens the actual authority theory but may support mens rea arguments.
- **CIPA §5 timing.** The notice is due within the time the court sets, or 30 days before trial; failure to give it can lead the court to preclude the evidence (CIPA §5(b)). Describe the information generally and specifically enough in the classified addendum to allow the §6 hearing.
- Coordinate with any immunity negotiations (Issue B3) and with the client's statutory disclosure protections (50 U.S.C. §3373b; PURSUE waiver; Issue C1 and C2).