DATE: September 20, 2005

In re:

SSN: ----------

Applicant for Security Clearance

CR Case No. 02-12199

REMAND DECISION OF ADMINISTRATIVE JUDGE

JAMES A. YOUNG

APPEARANCES

FOR GOVERNMENT

Francisco Mendez, Esq., Department Counsel

FOR APPLICANT

Mark F. Riley, Esq.

SYNOPSIS

Based on purported admissions Applicant made to a polygrapher, the Defense Office of Hearings and Appeals declined to grant Applicant a clearance on grounds of sexual behavior and personal conduct. The statement of reasons alleged Applicant downloaded pornographic images of children to his home computer and deliberately falsified material facts about this conduct in a statement to a Defense Security Service agent. Applicant mitigated sexual behavior and personal conduct security concerns. Clearance is granted.

STATEMENT OF THE CASE

Applicant is an employee of a defense contractor holding contracts with the National Security Agency (NSA). Applicant held a top secret clearance and applied for access to sensitive compartmented information (SCI).[(1)] He was required to take a polygraph concerning possible counter-intelligence activities and his lifestyle. Thereafter, NSA denied Applicant access to SCI, based on his involvement with child pornography. Exs. 2d, 2e, 2f. NSA's action triggered a review of Applicant's eligibility for a security clearance. On 17 July 2003, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR),[(2)] detailing the basis for its decision that Applicant's security clearance should not be continued-security concerns raised under Guideline D (Sexual Behavior) and Guideline E (Personal Conduct) of the Directive. Applicant answered the SOR in an undated writing and elected to have a hearing before an administrative judge. The case was assigned to me on 27 October 2003. On 18 December 2003, I convened a hearing to consider whether it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. DOHA received the transcript (Tr.) of the proceeding on 2 January 2003. On 29 January 2004, I issued a decision granting Applicant a clearance. The Government appealed. The Appeal Board remanded the case to me on 7 October 2004. I issued a remand decision on 3 January 2005. The Appeal Board remanded on 8 August 2005.

FINDINGS OF FACT

Applicant, a 37-year-old network engineer, is married and has two children. Tr. 51-54. He has had a top secret clearance

since 1995. Tr. 53. He is viewed by his father-in-law, his superiors, and co-workers as a superior performer who is honest and trustworthy.

As an employee of a defense contractor for the NSA, Applicant applied for access to sensitive compartmented information (SCI). As part of an investigation for SCI access, Applicant was required to take a polygraph examination. During the suitability (also known as lifestyle) portion of the exam, the polygrapher noted an anomaly in the polygraph response to Applicant's denial of criminal conduct. Tr. 132. When Applicant was unsure what the problem could be, the polygrapher listed a number of different criminal offenses, one of which was child pornography. At the hearing, Applicant admitted telling the polygrapher that he "may have downloaded some child pornography" from the Internet. Tr. 133. Applicant told the polygrapher that, between 1995 and 2000, he had downloaded pictures of naked women from the Internet and some of these pictures were of naked children. The polygrapher asked whether it involved more or less than 1,000 pictures. Applicant replied, "Approximately 1,000." Tr. 134.

On 20 February 2002, Applicant completed a signed, sworn statement to a Defense Security Service (DSS) agent in which he clarified his activities in downloading images on his personal computer. Ex.4. Applicant claimed he downloaded well over 1,000 pictures of which approximately 20 happened to be of naked children. He asserted he had never actively searched for child pornography, had not engaged in any activity or behavior involving child pornography, was not interested in the images of naked children, and immediately deleted the images of nude children from his computer. *Id.* at 2. His wife, his family, and his employer are now aware of the allegations against him and the conduct that led to the SOR.

Applicant consulted a licensed psychologist before the hearing. The consultation consisted of six hours of clinical interview plus various psychological testing. The psychologist concluded Applicant did not have a personality disorder, but his "profile indicates that he is highly vulnerable to manipulation by authority due to a strong, even inordinate desire to please others and meet their expectations." Ex. F at 4.

THE HEARING AND DECISION

At the hearing, Applicant objected to the admission of four government exhibits:

Ex. 2c for identification A document, labeled "Report," dated 16 November 2000, purportedly written by an NSA polygrapher who interviewed Applicant. The report is unsigned and the name of the polygrapher does not appear on the document.

Ex. 2d for identification Clearance decision statement from NSA's Office of Security, denying Applicant access to SCI, dated 11 July 2001.

Ex. 2g for identification NSA's First Appeal Review of the denial of Applicant's access to SCI, dated 3 October 2001.

Ex. 2i for identification NSA's Access Appeals Panel's decision, dated 24 January 2002, sustaining the denial of his access to SCI.

Ex. 2c for identification states Applicant admitted purposely searching for child pornography 500 times on his home computer and downloading no more than 1,000 pornographic images of girls between 4 and 17 years of age in non-suggestive poses. At the hearing, Applicant asserted Ex. 2c for identification was not an accurate summary of the interview. He claimed he downloaded images of naked adult women and that he immediately deleted the approximately 20 images of naked children that were included. He objected to Ex. 2c for identification on two grounds. First, that the Government refused to produce or even identify the polygrapher so Applicant could exercise his right to cross-examination. Tr. 11 (citing Ex. Or. 10865 § 4); *see* Directive ¶ E3.1.22. Applicant also argued Ex. 2c for identification was a report of investigation that could not be received without an authenticating witness. *Id.*; *see* Directive ¶ E3.1.20. Department Counsel argued the polygrapher's statement was not a report of investigation (Tr. 16) and it was admissible as an exception to the hearsay rule under Fed. R. Evid. 803(6), 803(8), and 807 regardless of the availability of the witness.

I determined Ex. 2c for identification was a written statement adverse to Applicant relating to a controverted issue under

Ex. Ord. 10865 § 4 and Directive ¶ E3.1.22, and was therefore not admissible without affording Applicant an opportunity to cross-examine the declarant unless the head of the agency supplying the statement or the General Counsel of the Department of Defense provided special certification concerning the availability of the declarant. I offered Department Counsel a continuance so he could seek such certification. After consultation with the Chief Department Counsel, he declined the offer. I sustained Applicant's objection to Ex. 2c.

Applicant's main objection to Exs. 2d, 2g, and 2i for identification was that they were decisions of NSA security official concerning Applicant's access to SCI that were based entirely on Ex. 2c for identification. Ex. 10. I admitted Exs. 2d, 2g, and 2i, for the limited purpose of establishing that NSA had denied Applicant access to SCI and the basis of that denial. I did not admit the documents as substantive evidence that Applicant committed the allegations described in the SOR.

In a decision dated 29 January 2004, I granted Applicant a clearance because the Government failed to establish facts that would disqualify Applicant from a security clearance. Department Counsel appealed. The Appeal Board remanded on 7 October 2004. On 3 January 2005, I issued another decision. Department Counsel appealed and the Appeal Board again remanded on 8 August 2005.

THE REMANDS

Ex. 2c for Identification

In the original remand, the Appeal Board sustained my conclusion that the Government had failed to establish the necessary predicate for admission of Ex. 2c for identification as a written statement adverse to the applicant relating to a controverted issue under Directive ¶ E3.1.22. The Government had failed to produce the witness or to meet the special certification requirements that would permit the document's admission without the witness. But the Board concluded Ex. 2c for identification was a "report of investigation" and ordered me to consider its admissibility under Directive ¶ E3.1.20. ISCR Case No. 02-12199 at 6, 10 (App. Bd. Oct. 7, 2004).[(3)] A report of investigation is admissible"with an authenticating witness provided it is otherwise admissible under the Federal Rules of Evidence." Directive ¶ E3.1.20.

The Board authorized me to reopen the record, on a showing of good cause, to accept the testimony of an authenticating witness. The Government asked to reopen the record to offer an affidavit from the records custodian of the document, but failed to suggest any basis upon which I could find good cause. I concluded the Government had not shown good cause, denied the Government motion to reopen, and ruled Ex. 2c for identification was not admissible. The Appeal Board sustained this decision. ISCR Case No. 02-12199 at 3-4 (App. Bd. Aug. 8, 2005).

Exs. 2d, 2g, 2i for Identification

Exs. 2d, 2g, and 2i for identification are not written statements adverse to the applicant on a controverted issue. Instead, they are the decisions of various security officials at NSA on Applicant's request for access to SCI. But Ex. 2d for identification, the initial NSA SCI clearance decision statement, does contain substantial excerpts from Ex. 2c for identification, the polygrapher's inadmissible summary of his interview with Applicant. At the hearing, I admitted Exs. 2d, 2g, and 2i for identification for the limited purpose of establishing that NSA had denied Applicant access to SCI and the basis for its decision. In its first remand, the Appeal Board ordered me to consider the admissibility of these three documents under Directive ¶¶ E3.1.20 and E3.1.22. The Board agreed that these three documents are not reports of investigation, so the Government would not have to present an authenticating witness to establish their admissibility under ¶ E3.1.20. ISCR Case No. 02-12199 (App. Bd. Oct. 7, 2004).

In my first remand decision, I concluded the three documents are not adverse statements on controverted issues, so Directive ¶ E3.1.22 does not apply. I reaffirmed my ruling that these documents are admissible under Directive ¶ E3.1.20 for the limited purpose of establishing that NSA had denied Applicant access to SCI and the basis for its decision. I held that the documents were based on hearsay-the polygrapher's adverse written statement. By refusing to disclose the polygrapher's identity, the Government precluded Applicant from impeaching him. *See* Fed. R. Evid. 806 (a hearsay declarant may be attacked by any evidence which would be admissible for those purposes if declarant had testified as a witness). Thus, there is no way to determine the reliability of the person making the adverse statement,

whether the report was composed by the person who conducted the interview with Applicant, or even whether the statement was made contemporaneously with the interview.

In its second remand, the Appeal Board held that I erred by admitting Exs. 2d, 2g, and 2i for a limited purpose without "good reason," and that I inappropriately placed a burden on the Government to show reliability of the documents. The Board insists the documents were substantively admissible under Fed. R. Evid. 803(8). That rule provides that, in civil actions, factual findings resulting from an investigation made pursuant to authority granted by law are not excluded by the hearsay rule, "*unless the sources of information or other circumstances indicate a lack of trustworthiness.*" Fed. R. Evid. 803(8)(C) (emphasis added).

All three of the documents in question rely on the polygrapher's summary of his interview with Applicant, Ex. 2c for identification, which I concluded was not admissible under Exec. Or. 10865 § 4 and Directive ¶ E3.1.22. The record established that the source of information on which the three documents were based and other circumstances indicate a lack of trustworthiness. *See* Fed. R. Evid. 803(8)(C). The source is an unnamed individual. The source's statement was not given under oath. Indeed, it was not even signed. Its maker was not subject to cross-examination or even impeachment under Fed. R. Evid. 806. There is no way to test the writer's ability to accurately perceive and record what Applicant said. It is not clear whether the statement was made contemporaneously with the interview or several hours later or even if the person who made the report was the individual who conducted the interview. Thus, I would conclude the three exhibits were not substantively admissible because they are based on evidence that indicates a lack of trustworthiness. Regardless, the Appeal Board ruled that the documents are admissible substantively. Therefore I must consider them and weigh them with all other evidence of record.

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id.* at 527. The President authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960). Eligibility for a security clearance is predicated upon the applicant meeting the security guidelines contained in the Directive. An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3.

Enclosure 2 of the Directive sets forth personnel security guidelines, as well as the disqualifying conditions (DC) and mitigating conditions (MC) under each guideline. In evaluating the security worthiness of an applicant, the administrative judge must also assess the adjudicative process factors listed in ¶ 6.3 of the Directive. The decision to deny an individual a security clearance is not necessarily a determination as to the loyalty of the applicant. *See* Exec. Or. 10865 § 7. It is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

CONCLUSIONS

Guideline D-Sexual Behavior

In the SOR, DOHA alleged Applicant downloaded up to 1,000 pornographic images of children to his home computer. ¶ 1.a. Applicant admitted downloading more than 1,000 pornographic images of women, but denied retaining or intentionally downloading any pornographic images of children. An applicant's sexual behavior is a security concern if it involves a criminal offense, indicates a personality or emotional disorder, may subject the individual to coercion, exploitation or duress, or reflects a lack of judgment or discretion. Directive ¶ E2.A4.1.1.

The Government's evidence that Applicant downloaded pornographic images of children to his personal computer consists of three documents: a clearance decision statement denying Applicant access to SCI (Ex. 2d) and the decisions of the two appellate authorities affirming that denial (Exs. 2g, 2i). The initial NSA clearance decision statement is based on the polygrapher's inadmissible statement of interview with Applicant (Ex. 2c for identification). The clearance

decision statement's recitation of the conduct involved is as follows:

During his 16 November 2000 NSA Security Interview, [Applicant] advised that he downloaded no more than 1,000 child pornographic photographs onto his personal computer between 1995 and February or March 2000. He reported that these photographs contained nude females that ranged in age from 4 to 17 years old. [Applicant] stated that he purposely searched for and downloaded the child pornography on approximately 500 occasions.

The photographs were of juvenile females *in non-suggestive poses*. According to [Applicant], *none of the photos contained any type of sexual activity*. After downloading the photos to his computer, he saved the "older looking girls" to his hard drive, and deleted the rest. [Applicant] defined the "older looking girls" as about 15 years old. He could not recall if he masturbated while viewing the photos.

In February or March 2000, [Applicant] deleted all of the child pornography from his computer because his wife was pregnant and he thought it would be wrong to continue to view child pornography. His spouse is not aware of his involvement in child pornography, and he never made copies or sent copies to others. [Applicant advised that his computer must be completely degaussed before the photos are completely removed from his hard drive; however, he is unaware of how to access the photos after the deletion. [Applicant's] spouse is not aware of his involvement with child pornography.

Ex. 2d (emphasis added).

In his appeal of the initial NSA decision and in a statement made to the DSS agent (Ex. 4), Applicant denied ever actively searching for images of children. He insists he downloaded images of naked women with newsreader software and some of the images contained children. The children were not engaged in sexually explicit activities, but were merely children and their families at nudist resorts and beaches. Ex. 2f; Ex. 4.

On direct examination at the hearing, Applicant asserted he told the polygrapher that he inadvertently downloaded "child pornography" through an automatic electronic newsreader while he was actually looking for images of naked women. He claimed that of the 1,000 to 2,000 pictures that were downloaded, only about 20 were of naked children and he immediately deleted them. He asserted he was not looking for pictures of children and none of the pictures, whether of adult women or children, were of sexually explicit acts.

An applicant's sexual behavior may raise disqualifying security concerns when it:

(1) Is of a criminal nature (¶ E2.A4.1.2.1);

(2) Is compulsive, addictive, or symptomatic of a personality disorder (¶ E2.A4.1.2.2);

(3) Causes an applicant to be vulnerable to coercion, exploitation, or duress (¶ E2.A4.1.2.3); or

(4) Is of a public nature and/or reflects lack of discretion or judgment (¶.E2.A4.1.2.4).

Of a Criminal Nature:

The knowing possession or downloading of child pornography is a criminal offense. *See* 18 U.S.C. § 2252 et seq. To amount to child pornography, the images must be of actual children engaged in sexually explicit poses or conduct. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002). The only evidence of record is that the images were of naked children who were not engaged in sexually explicit conduct. While Applicant used the term child pornography when describing these images, it is clear from the context that he was not referring to children engaged in sexually explicit conduct. Under the circumstances, I conclude Applicant did not download or possess child pornography as defined in the criminal statutes. Therefore, DC 1 does not apply.

Is Compulsive, Addictive, or Symptomatic of a Personality Disorder

There is no evidence Applicant suffers from a compulsion or addiction. In fact, the psychologist who consulted with

Applicant for six hours of clinical interviews plus various psychological testing opined Applicant did not have a personality disorder. Ex. F. DC 2 does not apply.

Causes an Applicant to be Vulnerable to Coercion, Exploitation, or Duress

Applicant was obviously embarrassed by his conduct and kept it from his wife. DC 3 applies.

Is of a Public Nature and/or Reflects a Lack of Discretion or Judgment

Applicant's behavior was not public in nature; it occurred in the privacy of his own home on his own computer. While denying he purposely downloaded child pornography, Applicant admitted his conduct in downloading pictures of naked individuals showed a lack of judgment. The conduct made him vulnerable to coercion and exploitation because he did not want his wife or family to know what he had done. DC 4 applies.

The Guideline lists several conditions that could mitigate sexual behavior security concerns. Only three of the four listed mitigating conditions are arguably applicable to Applicant:

(2) The behavior was not recent and there is no evidence of subsequent conduct of a similar nature (¶ E2.A4.1.3.2);

(3) There is no other evidence of questionable judgment, irresponsibility, or emotional instability (¶ E2.A4.1.3.3); and

(4) The behavior no longer serves as a basis for coercion, exploitation, or duress (¶ E2.A4.1.3.4).

I conclude that MC 2, 3, and 4 apply to Applicant's case. The last time he downloaded pictures of naked women and children was in 1999 or 2000, some five years ago. There is no other evidence of questionable judgment, irresponsibility, or emotional instability. Although he may be vulnerable to manipulation by authority, the record established that he is an individual with reasoned judgment who is responsible and emotionally stable. No doubt that is why his top secret security clearance was not suspended during the investigation, adjudication, and hearing of this case. As Applicant has told his wife, his family, his employer, and his friends he downloaded such images to his computer, it can no longer be used to coerce or exploit him.

I have carefully weighed all of the evidence concerning Applicant's conduct, including Exs. 2d, 2g, and 2i, the disqualifying and mitigating conditions, and the adjudicative process factors (Directive ¶ E2.2.1. I conclude Applicant mitigated any sexual behavior security concerns raised by the alleged conduct.

Guideline E-Personal Conduct

In the SOR, DOHA alleged Applicant (a) deliberately falsified material facts in a sworn statement he submitted to a DSS agent when he claimed he had not intentionally searched for child pornography to download on his home computer, and (b) downloaded up to 1,000 pornographic images of children to his home computer. Applicant denied both allegations. Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate the applicant may not properly safeguard classified information. Directive ¶ E2.A5.l.l.

According to Ex. 2d, Applicant stated he purposely searched for and downloaded child pornography on approximately 500 occasions. In his statement to the DSS agent, Ex. 4, Applicant swore he never actively searched for child pornography, was not interested in pictures of naked children, and never engaged in other activity involving child pornography. The Government's evidence raised the following potentially disqualifying conditions under Guideline E.

(1) Reliable, unfavorable information provided by associates or employers (¶ E2.A5.1.2.1);

(3) Deliberately providing false or misleading information concerning relevant and material matters to an investigator in connection with a security worthiness determination (¶ E2.A5.1.2.3); and,

(4) Personal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation,

or duress (¶ E2.A5.1.2.4).

The admission of public records into evidence as an exception to the hearsay rules and without authentication is based on a presumption that public records are reliable. *See McCormick On Evidence* §§ 315-316 (Edward W. Cleary ed., 3d ed. (West 1984). But Fed. R. Evid. 803(8) specifically provides that such public records are not admissible under that provision if "the sources of information or other circumstances indicate lack of trustworthiness." I would find the source of information and the circumstances in this case indicate lack of trustworthiness, and then conclude DC 1 does not apply. By determining Ex. 2d was admissible under Fed. R. Evid. 803(8), however, the Appeal Board must have concluded the sources of information and other circumstances did not indicate a lack of trustworthiness. Thus, I am constrained to find DC 1 applies. But it is important to determine to what DC 1 applies. The evidence is clear. Applicant did not intentionally download or possess images of naked children, and none were engaged in sexually explicit conduct or poses.

To conclude Applicant deliberately provided the DSS agent false or misleading information as alleged in SOR ¶ 2.b, I would have to find that he intentionally searched for child pornography to download to his home computer. I carefully weighed the information in Ex. 2d and compared it to Applicant's statement to the DSS agent and his testimony at the hearing. I listened carefully to Applicant's testimony and observed his demeanor closely. I find Applicant's statement and his testimony to be credible and persuasive. I conclude Applicant did not deliberately provide false or misleading information to the DSS agent in his 20 February 2002 signed, sworn statement. DC 3 does not apply.

Applicant's concealment of his conduct from his wife increased his vulnerability to coercion, exploitation, and duress. DC 4 applies.

Two mitigating conditions arguably apply:

(1) The information was unsubstantiated;

(5) The individual has taken positive steps to eliminate or significantly reduce vulnerability to coercion, exploitation, or duress.

I have considered all of the mitigating conditions listed under Guideline E as well as the adjudicative process factors of Directive ¶ E2.2.1. Applicant's conduct was legal. He did not knowingly download images of naked children and none of those images, whether of adults or children, were engaged in sexually explicit acts or poses. Applicant's conduct occurred more than five years ago and has not been repeated since. By telling his wife, family, and company of his conduct, Applicant took positive steps to eliminate vulnerability to coercion, exploitation, or duress. MC 5. Under all the circumstances of this case, I find for Applicant on ¶ 2.

FORMAL FINDINGS

The following are my conclusions as to each allegation in the SOR:

Paragraph 1. Guideline D: FOR APPLICANT

Subparagraph 1.a: For Applicant

Paragraph 2. Guideline E: FOR APPLICANT

Subparagraph 2.a: For Applicant

Subparagraph 2.b: For Applicant

DECISION

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is granted.

James A. Young

Administrative Judge

1. Pursuant to Director of Central Intelligence Directive 6/4, *Personnel Security Standards and Procedures Governing Eligibility for Access to Sensitive Compartmented Information (SCI)* (Oct. 13, 1999).

2. Pursuant to Exec. Or. 10865, *Safeguarding Classified Information within Industry* (Feb. 20, 1960), as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Jan. 2, 1992), as amended and modified,.

3. Although contained in a report of investigation, the polygrapher's statement is clearly a written "statement adverse to the applicant on a controverted issued." If the applicant is not afforded an opportunity to cross-examine the person making the statement, it may only be considered by the administrative judge if the head of the agency supplying the statement or the General Counsel of the Department of Defense certifies good cause not to make the witness available for cross-examination. Directive ¶ E3.1.22. Neither the head of the agency supplying the statement nor the General Counsel of the Department of Defense made such certification.

There are two types of evidentiary rules. Most are rules of inclusion. The evidence is admissible if certain conditions are met. If a party is unable to meet the conditions of that rule of admission, he may offer the evidence under other rules of evidence. The other type of evidentiary rules are rules of exclusion. The evidence is not admissible unless the evidence meets certain conditions. If the conditions are not met, the party is not free to offer it under another rule of evidence. To do so would defeat the purpose of the rule of exclusion. Directive ¶ E3.1.22 is a rule of exclusion. By failing to produce either the witness or the special certification of the head of the agency supplying the statement or the General Counsel of the Department of Defense, the administrative judge is precluded from considering the adverse statement. The statement cannot then be admitted under the more liberal rules for reports of investigation found in Directive ¶ E3.1.20. To do so would eviscerate the rule. Every adverse statement on a controverted issue, even if collected from an un-named source, would be admissible if placed in a report of investigation. Surely that is not what the drafters intended.

The rules on the admissibility of statements adverse to the applicant relating to a controverted issue, found in Directive ¶ E3.1.22, are based on those found in the President's Exec. Or. 10865 § 4, 3 C.F.R. 1959-1963 (1960). The executive order was issued after the Supreme Court held that as a matter of due process "the evidence used to prove the Government's case must be disclosed to the individual so that *he has an opportunity to show that it is untrue*." *Greene v. cElroy*, 360 U.S. 474, 496 (1959) (emphasis added). Although Applicant was provided the documents, the Government precluded him from showing the statement was untrue by failing to disclose the declarant's identity such that he could be impeached.