

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

<p>UNITED STATES OF AMERICA</p> <p style="text-align: center;">v.</p> <p>KHALID SHAIKH MOHAMMAD; WALID MUHAMMAD SALIH MUBARAK BIN ‘ATTASH; RAMZI BINALSHIBH; ALI ABDUL AZIZ ALI; MUSTAFA AHMED AL HAWSAWI</p>	<p>AE 233A</p> <p>Government Response to Defense Motion of Mr. Ali to Review the Letterhead Memorandum of His Alleged “Clean Team” Statements</p> <p>18 October 2013</p>
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1. Timeliness

This motion is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.b(1).

2. Relief Sought

Pending final classification review, the Prosecution intends to provide FOUO/LES versions of all 8 Letter Head Memoranda (“LHMs”) documenting law enforcement interviews of the five Accused in the case to all five Defense team, including the FOUO/LES attachments, all of which will be releasable to the five Accused. This pending disclosure will make this motion moot.

3. Burden of Proof

As the moving party, the Defense must demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1)-(2).

4. Facts

On 17, 18, and 19 January 2007, Ali Abdul Aziz Ali met with Special Investigators of the Federal Bureau of Investigation (FBI) and DoD’s Criminal Investigation Task Force (CITF) and voluntarily discussed his associations with al Qaeda and his role in financing and facilitating the September 11, 2001 attacks that killed 2,976 people. The three-day interview was documented

in a 62-page FBI “Letter Head Memorandum” (LHM) dated 30 January 2007 and had 224 additional pages of attachments. Based on the subject matter of the interview, certain portions of the LHM were originally classified at the SECRET//NOFORN level. The LHMs were neither signed nor sworn to by Mr. Ali.

On 1 June 2011, in seeking a capital referral of this case against the five above-named Accused, the Prosecution forwarded charges and a “referral binder” of evidentiary material that supported the charges to the Convening Authority. The “referral binder” materials included the 29 January Letter Head Memorandum documenting Mr. Ali’s voluntary admissions to the FBI and CITF, as well other documents that established probable cause that Ali Abdul Aziz Ali was a principal¹ in the September 11, 2001 attacks. The referral binder LHM did not include the attachments to the LHMs (although many of the attachments were otherwise used to support each overt act in the conspiracy as independent documents).

On 4 April 2012, the Convening Authority referred the charges against Ali Abdul Aziz Ali and the four other Accused to a military commission empowered to adjudge a sentence of death. The Accused are each charged with Conspiracy, Attacking Civilians, Attacking Civilian Objects, Intentionally Causing Serious Bodily Injury, Murder in Violation of the Law of War, Destruction of Property in Violation of the Law of War, Hijacking Aircraft, and Terrorism.

On 9 February 2013, pursuant to Rule 701(B)(1), the Prosecution disclosed the unclassified “referral binder” materials to Mr. Connell. The materials were disclosed as they constituted papers accompanying the charges under RMC 701(B)(1). This disclosure constituted 1,088 pages of materials, including the redacted 30 January LHM at issue in this motion. With the exception of the LHMs that had previously been classified, all of the other materials were releasable to the Accused.

On or about 19 February 2013, Mr. Connell’s defense team signed the Memorandum of Understanding to receive classified information.

¹ For the legal definition of Principal the prosecution is relying upon *see* 10 U.S.C. §950q(1); *see also United States v. Jefferson*, 22 M.J. 315, 323-24 (C.M.A. 1986) , previously cited in AE 120.

On or about 8 May 2013, the Prosecution provided the classified version of the 30 January 2007 LHM to Mr. Connell's team only (his attorneys had signed the Memorandum of Understanding for the handling of classified information). It is marked SECRET//NOFORN, and, as such, is not releasable to Mr. Ali.

5. Law and Argument

The Prosecution does not disagree with defense counsel that it has an obligation to disclose all relevant statements that are material to the preparation of the defense. *See* R.M.C. 701(c)(3). The Prosecution does not disagree that Mr. Ali should have access to those statements and intends to provide those statements following final classification review/declassification² of the statements (consistent with any national security implications that may arise in doing so and pursuant to M.C.R.E. 505). Of course the Accused will be able to view any of the evidence that is ultimately used against him. However, to the extent that the Defense is asserting that the Military Judge has the authority to order currently classified information be shared with Mr. Ali in its current form, the Defense is mistaken, and such motion should be summarily denied. While the Military Judge clearly presides over this Commission and has full authority to ensure that the conduct of proceedings is in the interest of justice, no military judge may order the release of classified information to a person not authorized to receive such information. *See* M.C.R.E. 505(a)(1).

In the interests of fairness and transparency in this prosecution by military commission, and to streamline and ease the litigation of this case for all parties, the U.S. Government is currently undertaking a classification review/declassification of thousands of previously-classified items of information in this case, including, but not limited to, the LHMs, attachments to the LHMs, and the physical and documentary items that were seized [REDACTED] [REDACTED] (that may or may not have been referenced during the FBI/CITF interviews

² The Prosecution has requested the declassification of the affirmative evidence it intends to admit, and certain other discovery, which requires a classification review be conducted. This is what is meant by the term "classification review/declassification" used throughout this filing.

of the Accused). The final classification review, which includes all eight relevant LHMs in this case, is nearing completion. Once complete, the Prosecution intends to disclose the LHMs that have been completely declassified (with all of the attachments) as FOUO//LES documents, to all five Defense teams. All five Defense teams will receive the LHMs documenting the FBI/CITF interviews of all five Accused. These FOUO//LES versions of the LHMs will be releasable to all five Accused.

For those LHMs that, after classification review, still have some portions that remain classified, the Prosecution will produce those LHMs (with all of the attachments) to Mr. Connell's team, and, upon the signing of the MOU, to the other four defense teams, as classified documents. The classified versions will not be releasable to the Accused. However, for these LHMs that remain classified following classification review, the Prosecution intends to provide a redacted copy of the LHMs (with all of the attachments), redacting only those portions that remain classified, and these redacted versions of the LHMs will be marked FOUO//LES and will be releasable to all five Accused. For those items that remain classified and redacted the Prosecution will seek to provide an adequate substitute of the classified information that will be releasable to the detainee.

There are other relevant statements made by the Accused that have been deemed by the Prosecution to be material to the preparation of the Defense pursuant to R.M.C. 701, to include relevant statements made by Mr. Ali, and the other four Accused while in custody prior to their arrival in Guantanamo in September 2006. While the Prosecution intends on disclosing these additional statements, it does not intend to rely upon them as evidence in the case. However, as the Commission is aware, the Prosecution has filed two *ex parte, in camera* motions and memoranda for protective orders pursuant to the Military Commissions Act (M.C.A.), 10 U.S.C. §949p-4, and Military Commission Rule of Evidence (M.C.R.E.) 505 in order to provide classified discovery to the Defense. Rather than allow the Military Judge to review these motions and approve the proposed summaries, the Defense has objected to any consideration by the Military Judge of these filings and proposed summaries. *See* AE 073A, AE 073E, AE 156A,

AE 156E. In doing so, the Defense has repeatedly hindered efforts by the Prosecution to fulfill its discovery obligations, including in regard to statements of the Accused.

Defense counsel for Mr. Ali received the redacted LHM documenting his client's voluntary statements to the FBI and CITF because that was the exact memorandum provided to the Convening Authority (albeit in its un-redacted and classified form) when the sworn charges were sent to him requesting referral. At the time of this disclosure none of the Defense teams had signed the MOU to receive classified information, and in order to provide the "referral binder" materials to all five defense teams, the classified portions of the binder had to be redacted to get them down to an unclassified level. All of the "referral binder" materials were provided together, as they had been previously provided to the Convening Authority, which did not include the attachments to the LHMs.

Furthermore, because of the fact that the Accused themselves had spoken on certain topics with the FBI/CITF agents in the past, with no knowledge of whether such topics were classified or unclassified, had the redacted LHMs that had been previously classified been provided to the Accused, the Accused would have been able to identify the specific types of information that the U.S. Government still considered classified. Therefore, the redacted and previously classified versions of the LHMs were not releasable to the Accused at that time, while the LHMs began undergoing a classification review/decryption with the ultimate goal of providing an FOUO//LES version of each LHM to each Accused.

The Defense further asserts that the government has not (1) produced responsive audio/video recordings of the January 2007 interrogation³; (2) denied the existence of such recordings, or (3) explained the destruction and/or non-production of such recordings. The Prosecution affirms now that there were no audio/video recordings of any of the FBI/CITF interviews of the five Accused that are documented in the LHMs, consistent with FBI policy at the time of the interviews.

³ The Prosecution uses the term "interrogation" because it is the Defense's terminology in its motion.

Defense also complains that the government has not produced the investigating agents' notes from the interrogation. Disclosure of such agent notes is not mandatory under the rules, and, to the extent that such notes constitute a statement of a witness pursuant to R.M.C. 914, not required until after the testimony of the agent. *See* R.M.C 914. That being said, the Agent notes are part of the same classification review/decryption that the LHMs are currently undergoing, and the Prosecution intends to disclose the agent notes for all eight LHMs after their classification review is complete.

Finally, while the Defense acknowledges that the Prosecution has disclosed over 240,000 pages of discovery to date, it also implicitly recognizes that many of the exhibits (i.e. the documents that were attached to the LHM) it seeks throughout its various discovery requests may be "scattered" within those documents, and complains that the government has failed to produce either an index to these documents or the documents themselves. *See* AE 233, n. 5. While the Prosecution is clearly not required to create such an index, it has already done so on a significant amount of discovery to date,⁴ and will continue to do so in the future when the LHMs are disclosed, in order to allow an expeditious review of these materials by the Defense.

However, these Defense comments underscore the continued negative impact on the discovery that was caused by the Defense's continued litigation regarding Protective Order #1 and Protective Order #2. While seven months passed between the time of arraignment and the issuance of protective orders that allowed the Prosecution to produce discovery in this case, that interim period did not prevent the Defense from issuing a flurry of Defense requests for discovery, prior to reviewing a single piece of actual discovery, that the Prosecution intended to produce. In essence, the entire discovery practice the Defense⁵ has engaged in during this case is backward. Instead of first reviewing the items that have been produced, and requesting items

⁴ On 25 January 2013, an index was provided to the Defense with the first set of 86,160 pages of discovery along with a 179 page index. Although not required, the Prosecution intends to provide additional indices for the remaining unclassified discovery it provides.

⁵ The Term "Defense" here is used in regard to all five defense teams, and not just Mr. Ali's Defense Team.

that were not produced, the Defense chose to request various categories of discovery, many of which are now included in the 240,000 + pages of discovery, or will be following the M.C.R.E. 505 process or the classification review/declassification of items.

The Prosecution has not responded in writing to every Defense request⁶ for discovery from all five teams, and some of the requests would have required verifying the existence of classified information in the Prosecution response (which in and of itself would have constituted classified information) noting that four of the five defense counsel still have not signed the MOU to be able to receive classified information. However, that does not mean that the Prosecution has not already provided, either to the Defense or to the Military Judge pursuant to the M.C.R.E. 505 process, much of the discovery that has been requested.

While the Prosecution recognizes that Mr. Connell's team has signed the MOU, four other defense teams have not, and the cases, the discovery, and the evidence are all inter-twined. Having a final classification review/declassification of the LHMs and the evidence seized in various countries prior to disclosure is in the best interests of justice, will simplify the litigation, and is also in the interests of protecting national security, so there are not documents with various different classification markings being provided to different defense counsel. This classification review/declassification is working towards completion, and once the Prosecution has disclosed all of the discovery it is obligated to disclose, or otherwise intends to disclose, it will notify the defense counsel and the Commission, and the Defense can make any motion to compel any additional discovery it seeks at that time.

6. Conclusion

Pending final classification review, the Prosecution intends to provide FOUO//LES versions of all 8 LHMs, including the attachments, that are relevant to this case and to Mr. Ali (and the other four Accused), which will make this motion moot upon disclosure. For the remaining classified aspects of the LHMs, the Prosecution will seek to provide an adequate

⁶ There have been over 125 separate Defense correspondence requesting discovery.

substitute that will be releasable to the Accused. To the extent that the Defense is asserting that the Military Judge has the authority to order that currently classified information be shared with Mr. Ali in its current form, the Defense is mistaken, and such motion should be summarily denied. While the Military Judge clearly presides over this Commission and has full authority to ensure that the conduct of proceedings is in the interest of justice, no military judge may order the release of classified information to a person not authorized to receive such information, and Mr Ali is clearly not authorized to receive such information. *See* MCRE 505(a)(1).

7. Oral Argument

The Prosecution does not request oral argument.

8. Witnesses and Evidence

The Prosecution will not rely on any witnesses or additional evidence in support of this motion.

9. Additional Information

The Prosecution has no additional information.

10. Attachments

A. Certificate of Service, dated 18 October 2013

Respectfully submitted,

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Clay Trivett
Managing Deputy Trial Counsel

Mark Martins
Chief Prosecutor
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ATTACHMENT A

