

UNITED STATES OF AMERICA

v.

KHALID SHAIKH MOHAMMAD, WALID
MUHAMMAD SALIH MUBARAK BIN
‘ATTASH, RAMZI BINALSHIBH, ALI
ABDUL AZIZ ALI, MUSTAFA AHMED
ADAM AL HAWSAWI

AE255(AAA)

Defense Motion to Compel Discovery
Regarding Recordings of Mr. al Baluchi

13 December 2013

1. **Timeliness**: This motion is timely filed.
2. **Relief Sought**: The defense requests that the Military Judge compel production of all recording of statements made by Mr. al Baluchi in the government’s possession, as well as all documents regarding recording policies.
3. **Burden and Standard of Proof**: The burden of persuasion on this motion to compel discovery rests with the defense.¹
4. **Facts**:
 - a. In February 2013, JTF-GTMO acknowledged that it had installed and maintained surreptitious listening devices disguised as smoke detectors in spaces it provides for attorney-client meetings.² JTF-GTMO subsequently removed the smoke detector microphones.
 - b. On 8 March 2013, the defense propounded a discovery request for the complete unredacted copies of any recordings of Mr. al Baluchi, as well as related policy.³ Specifically, this document requested the government to do the following:

¹ Rule for Military Commission (“RMC”) 905(c)(2).

² See, e.g., Unofficial Transcript of 12 February 2013, at 1984-85 (testimony of CAPT Welsh).

³ Attachment B, DR-032-AAA.

1. Please produce complete unredacted copies of any recordings of Mr. al Baluchi, including but not limited to:

- a. Video recordings of Mr. al Baluchi (in any format);
- b. Photographic records of Mr. al Baluchi (in any format);
- c. Audio recordings of Mr. al Baluchi (in any format);
- d. Any other recording of Mr. al Baluchi (regardless of the format).

This request includes the periods for which any recording was made regardless whether made before, during, or after Mr. al Baluchi was placed in U.S. custody.

2. Please produce complete unredacted records of all communications regarding audiovisual recording of Mr. al Baluchi.

3. Please produce complete unredacted copies of any all government policies, procedures, guidance, orders and/or instructions regarding the recording (of any kind and in any format) of detainees now or ever held at Guantanamo Bay.

d. On 7 November 2013, the military commission issued AE245 Trial Conduct Order, which permits defense counsel to treat failure to respond for 28 days as a refusal. More than nine months have elapsed since the discovery request, and the prosecution has not made any response to the discovery request.

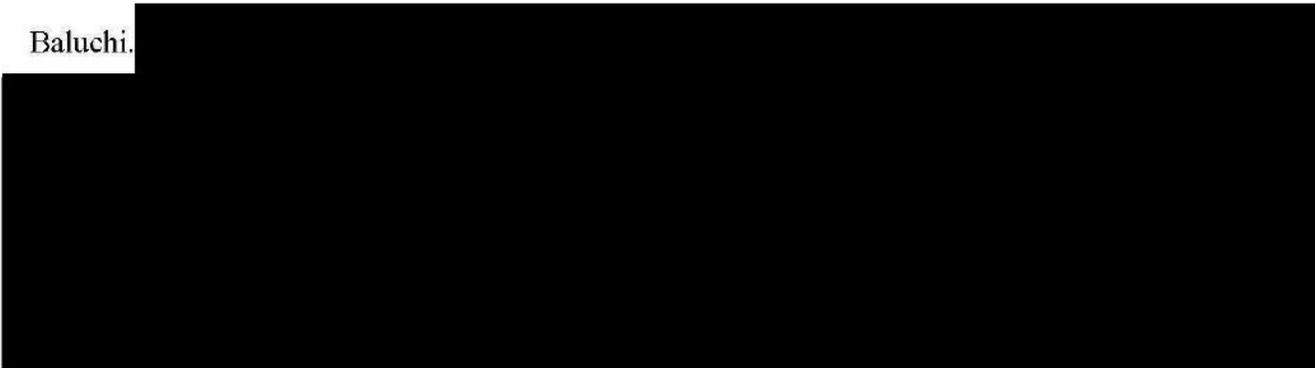
e. On 18 September 2013, the 410th CSB Regional Contracting Office, Guantanamo Bay, Cuba, published a “Sources Sought Notice” “to determine availability of sources to provide Maintenance and Service Support to REDWOLF Systems at the Joint Task Force Guantanamo Bay, Cuba.”⁴ According to its manufacturer, REDWOLF “is an integrated solution that is designed to meet the operational needs of agencies that are empowered to capture and analyze intelligence information from intercepted telephone, wireless phone, microphone, packet data, and VOIP communications.”⁵ The features of the system include “automated voice processing for speaker identification.”⁶

⁴ Attachment C.

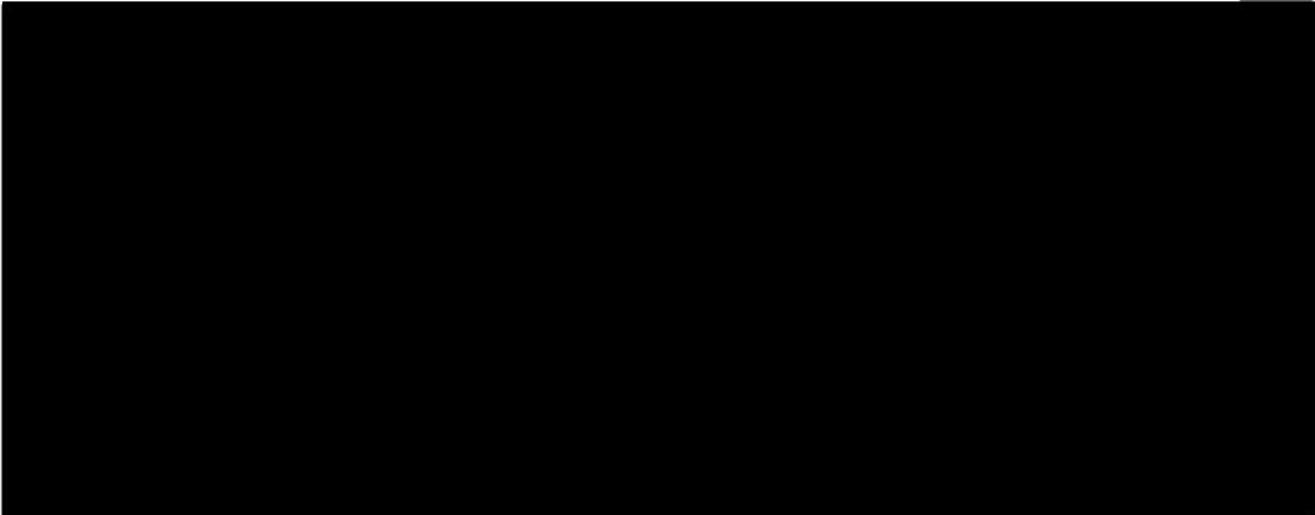
⁵ Attachment D.

⁶ Attachment E.

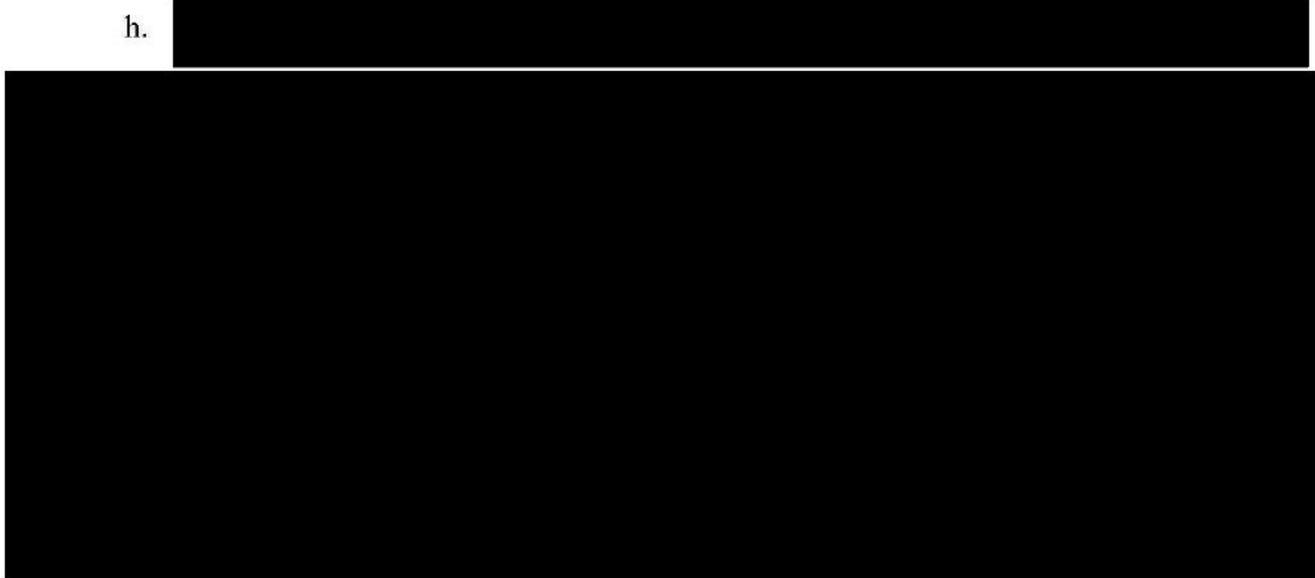
f. On 2 December 2013, JTF-GTMO took fingerprints and photographs of Mr. al Baluchi.



g. On 3 December 2013, counsel for Mr. al Baluchi conferenced an emergency motion



h.



⁷ Att. F.

5. Law and Argument:

There are many reasons to suspect the government possesses audio and/or video recordings of Mr. al Baluchi. The attorney-client visiting facilities at Echo 2 include at least video cameras, and included audio monitoring equipment until at least early 2013. Recent unclassified contracting materials confirm that JTF-GTMO is using integrated voice-video-internet surveillance. [REDACTED]

Recordings of Mr. al Baluchi are highly material to preparation of the defense and discoverable under Rule for Military Commission (“RMC”) 701 the Fifth and Eighth Amendments.⁹ Under the Rules for Military Commissions, Mr. al Baluchi is entitled to discover

[t]he contents of all relevant statements—oral, written or recorded—made or adopted by the accused, that are within the possession, custody or control of the Government, the existence of which is known or by the exercise of due diligence may become known to trial counsel, and are material to the preparation of the defense or are intended for use by trial counsel as evidence in the prosecution case-in-chief at trial.¹⁰

In addition, the government is required to turn over all statements that tend to exculpate him with

⁸ *Id.*

⁹ Apart from his other constitutional arguments, given the importance of Mr. al Baluchi’s statements to his defense as a whole, they are admissible as a matter of right under the Due Process Clause regardless of whether RMC 701 and/or the Military Commission Rules of Evidence would otherwise bar them. *Mississippi v. Chambers*, 410 U.S. 284, 302 (1973) (prior statements by a witness admissible to impeach witness regardless of state evidence rules that would otherwise bar them).

¹⁰ RMC 701(c)(3); *see also* MCRE 304(c)(1).

regard to guilt or degree of culpability, and that tend to mitigate his sentence.¹¹

All recordings of Mr. al Baluchi statements are discoverable under these standards. The statements in any recordings are material. First, to the extent that the statements discuss Mr. al Baluchi's alleged role in the crime, they are plainly relevant, material to preparation of the defense, and likely to lead to the discovery of other material evidence.¹² Second, the recordings may reveal government wrongdoing, such as monitoring attorney-client or joint defense-privileged conversations. Depending on the time period of any recordings which may exist, the recordings may provide important evidence regarding interrogation methods, conditions of confinement, and Mr. al Baluchi's documented head injury and associated symptoms.

Moreover, all of the recordings are relevant, material, or likely to lead the discovery of admissible mitigation evidence that will be critical in the event that a sentencing hearing is necessary.¹³ Recordings of Mr. al Baluchi, regardless of whether they are relevant to any other issue in the case, are highly likely to provide evidence both of his experience of his interrogations and of his life leading up to his alleged involvement in the crime. He is entitled under the Eighth Amendment to present both these types of evidence. In a capital case, “the sentencer . . . [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”¹⁴ The Supreme Court has held that a defendant's post-offense experience and conduct while incarcerated are admissible mitigating

¹¹ RMC 701(e); *Brady v. Maryland*, 373 U.S. 83 (1963).

¹² RMC 701(c)(3).

¹³ See AE112 at 10-11 (evidence that statements obtained by torture is mitigating); AE112C Reply to Government's Response to Motion to Compel Discovery Related to White House and DOJ Consideration of the CIA Rendition, Detention and Interrogation Program at 14-15.

¹⁴ *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis original)).

evidence of the defendant's character.¹⁵ Mr. al Baluchi's post-offense abuse qualifies as mitigating under this standard.¹⁶ Evidence of his earlier life is admissible as well under *Eddings* and *Lockhart*. The statements are thus discoverable regardless of whether they are material to guilt, degree of culpability, or any other issue in the case.

The policies and communications regarding recording are also material, although for a different reason. The policies and communications will demonstrate the scope of recording and explain the circumstances of the suspected recording.

If no recording has taken place, the policies and communications will explain to the panel why they are not seeing or hearing surveillance information regarding the conditions of confinement. If recording has taken place, but the recordings have been destroyed, that information is material to possible pretrial motions regarding spoliation of evidence.

For the foregoing reasons, all recordings of Mr. al Baluchi, and related communications and policy, are material evidence or likely to lead to material evidence. The Commission should therefore order the government to produce all of Mr. al Baluchi's statements in its possession, custody or control and the recordings thereto.

6. **Request for Oral Argument:** The defense requests oral argument.

7. **Request for Witnesses:** None at this time. Counsel is actively investigating potential witnesses and reserve the right to request witnesses at a later time.

¹⁵ *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986) (post-incarceration, pretrial good behavior must be considered as mitigating evidence).

¹⁶ *See, e.g., Neal v. Puckett*, 286 F.3d 230, 244 (5th Cir. 2002) (defense attorney's failure to present, *inter alia*, mitigating evidence of "abuse and mistreatment in prison" made attorney's representation constitutionally deficient).

8. **Conference with Opposing Counsel:** The prosecution states in conference that it “is unable to articulate its position on this motion until we read the entirety of the motion.”

9. **Attachments:**

- A. Certificate of Service
- B. Defense Request for Discovery (DR-032-AAA), 8 March 2013
- C. Sources Sought Notice, 18 September 2013
- D. Raytheon Company: REDWOLF
- E. Technology Today Article: REDWOLF
- F. Motion to Halt Collection of Voice Exemplars, 3 December 2013

Very respectfully,

//s//

JAMES G. CONNELL, III
Learned Counsel

Counsel for Mr. al Baluchi

//s//

STERLING R. THOMAS
Lt Col, USAF
Defense Counsel

Attachment A

CERTIFICATE OF SERVICE

I certify that on the 13th day of December, 2013, I electronically filed the foregoing document with the Clerk of the Court and served the foregoing on all counsel of record by email.

//s//

JAMES G. CONNELL, III

Learned Counsel

Attachment B



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DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
OFFICE OF MILITARY COMMISSIONS
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620

8 March 2013

MEMORANDUM FOR Trial Counsel

FROM: James G. Connell, III, Learned Counsel for Mr. al Baluchi

SUBJECT: DEFENSE REQUEST FOR DISCOVERY. (DR-032-AAA)

Pursuant to 10 U.S.C. § 949j, RMC 701, and the Due Process Clause of the Fifth Amendment to the United States Constitution, Mr. al Baluchi through counsel submits this discovery request.

Definition(s). For purposes of this request,

(a) The term *government* is not limited to the prosecutor's office but also includes United States government officials and/or any governmental entity or agency aligned with the prosecution. This further includes but is not limited to the White House, the CIA, FBI, and/or DOD. Further, this includes but is not limited to any private entity or person who performed services or contacted with the United States government.

(b) The term *communication* means any written, recorded, electronic, oral, verbal and/or telephonic exchange of information. The term includes but is not limited to briefings, documents, attachments, and/or exhibits accompanying any communications.

Request.

1. Please produce complete unredacted copies of any recordings of Mr. al Baluchi, including but not limited to:
 - a. Video recordings of Mr. al Baluchi (in any format);
 - b. Photographic records of Mr. al Baluchi (in any format);
 - c. Audio recordings of Mr. al Baluchi (in any format);
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3. Please produce complete unredacted copies of any all government policies, procedures, guidance, orders and/or instructions regarding the recording (of any kind and in any format) of detainees now or ever held at Guantanamo Bay.

Thank you for your attention to this matter. If you have any questions regarding this request or would like to discuss further, please feel free to contact me.

Respectfully Submitted,

//s//

James G. Connell, III

Attachment C

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D--Maintenance and Service Support to REDWOLF Systems at the Joint Task Force Guantanamo Bay, Cuba

Solicitation Number: W91WRZ-13-R-0006

Agency: Department of the Army

Office: Army Contracting Command, ECC

Location: GTMO Branch (PARC Americas 410th CSB)

Notice Type:

Sources Sought

Posted Date:

September 18, 2013

Response Date:

October 8, 2013

Archiving Policy:

Automatic, on specified date

Archive Date:

November 17, 2013

Original Set Aside:

N/A

Set Aside:

N/A

Classification Code:

D -- Information technology services, including telecommunications services

NAICS Code:

541 -- Professional, Scientific, and Technical Services/541511 -- Custom Computer Programming Services

Synopsis:

Added: Sep 18, 2013 8:47 am

This is a Sources Sought Notice for written information only. The Government does not intend to award a contract on the basis of this notice or reimburse the costs incurred by potential offerors in providing the information requested herein. In preparation for an upcoming procurement, the 410th CSB Regional Contracting Office (RCO) at Guantanamo Bay, Cuba (GTMO) is conducting market research to determine availability of sources to provide Maintenance and Service Support to REDWOLF Systems at the Joint Task Force Guantanamo Bay, Cuba. The contractor will provide the software and hardware IT support required to maintain the proprietary system developed by Raytheon Company to include develop and install software patches and updates, configuration management support, software and hardware integration, repair and life cycle replacement, periodic onsite maintenance and training, and offsite help desk staffed with system engineers. No solicitation document exists and no telephone inquires will be accepted.

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The North American Industry Classification System (NAICS) code for this procurement is 541511. THIS IS NOT A REQUEST FOR TECHNICAL OR COST PROPOSALS. This is a request for interested potential offerors to submit a brief capability statement demonstrating their ability to provide services stated above. Submitted capability statements should include the following: (1) Name of vendor; (2) Contact information (address, telephone, facsimile, e-mail); and (3) Experience and/or Technical data with sufficient description to determine capabilities in meeting the requirement.

Businesses should submit an electronic copy of the requested information [REDACTED]

[REDACTED] No feedback will be provided regarding individual capabilities statements. No reimbursement will be made for any costs associated with providing information in response to this announcement and/or any follow-up information requests. No telephone calls and/or requests for a solicitation will be accepted or acknowledged.

DISCLAIMER: This request for sources sought (RSS) is issued solely for information and planning purposes only and does not constitute a solicitation. Contractors are solely responsible for all expenses associated with responding to their RSS. All information received in response to this RSS that's marked proprietary or confidential will be treated accordingly. Information received in response to this RSS will not be returned. The purpose of this RSS is to gather potential sources that have the capabilities to provide Maintenance and Service Support to REDWOLF Systems at the Joint Task Force Guantanamo Bay, Cuba.

Contracting Office Address:

GTMO Branch (PARC Amercias 410th CSB), KO DIRECTORATE OF CONTRACTING, JTF GTMO J4, APO AE 09360, AE 09360-0000

Place of Performance:

GTMO Branch (PARC Amercias 410th CSB) KO DIRECTORATE OF CONTRACTING, JTF GTMO J4 APO AE 09360 AE
09360-0000
CU

Point of Contact(s):

[GTMO Branch \(PARC Amercias 410th CSB\)](#)

Opportunity History**■ Original Synopsis**

Sep 18, 2013

8:47 am

Attachment D

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Raytheon

Redwolf™

A powerful, integrated solution that collects, stores, and analyzes digital audio telecommunications, Internet traffic and Voice Over Internet Protocol communications.

Resources

[Request Information](#)



Today, your agency is challenged to collect, interpret and respond to increasingly overwhelming amounts of data to keep the public safe. Time is critical and resources are limited, so when it comes to electronic intercept, Redwolf™ is the only choice. Imagine one system that can quickly intercept, gather and process key communications. Imagine being able to identify and respond to threats instantly with the right information at the right time.

Designed to collect audio and data telecommunications, Redwolf is a modular and scalable system that can meet the changing needs of today's most demanding security operations. Law enforcement agencies that are empowered to legally intercept phone communication, packet data and Voice Over Internet Protocol (VoIP) can now gather that information and record and store audio inputs from a variety of sources more efficiently, more quickly and more reliably.

Redwolf is an integrated solution that is designed to meet the operational needs of agencies that are empowered to capture and analyze intelligence information from intercepted telephone, wireless phone, microphone, packet data, and VoIP communications.

IIS Communications
Raytheon Company
iiscommunications@raytheon.com

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Raytheon is proud to be an equal
opportunity employer, M/F/D/V.
[Accessibility](#)

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Attachment E

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Technology Today

HIGHLIGHTING RAYTHEON'S TECHNOLOGY

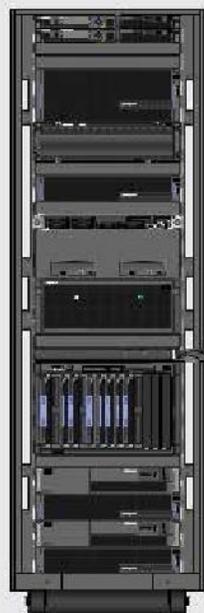
2010 Issue 1

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Message from Mark
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Leaders Corner
Eye on Technology
RedWolf™
Cyberspace 101: Internet Basics
People
Special Interest
Events
Resources
Patent Recognition
Interact
Archive

Information Systems and Computing RedWolf™ Mission-Driven Technology Advancement

The name *RedWolf* may not be well known to the public, but it is known and highly respected by agencies tasked to protect the U.S. homeland and perform other lawful surveillance functions.

The engineers and managers of the Telecommunications Surveillance Products (TSP) program, part of Raytheon's Intelligence and Information Systems business, have directly supported the missions of their criminal investigation community customers for over a decade. These developers of the RedWolf product line of audio and electronic data surveillance systems often work on site with customers to ensure the peak performance of operational systems, as well as to derive requirements for the continued enhancement of RedWolf products. This on-site presence can lead to challenging assignments for the RedWolf development team, whose members were on the ground in New York City just days following the Sept. 11, 2001 terrorist attacks.



A RedWolf large system can scale up to accommodate hundreds of law enforcement users.

RedWolf's primary customers are national-level government agencies that perform court-warranted surveillance — such as the FBI, the Drug Enforcement Administration and similar organizations in other countries. Hands-on support of these customers drives the technical evolution of the RedWolf product line.

Originally developed to support simple telephony and audio surveillance, RedWolf has been expanded in recent years to include direct integration with wireless telephone service providers and a comprehensive Internet traffic collection capability. This expansion requires RedWolf engineers to react quickly to the everchanging and expanding technology used by telecommunications service providers and the multitude of available online services. This fast-reaction system revision capability is facilitated by the open-architecture development approach that has been a hallmark of the RedWolf system architecture since its inception.

Evolving customer needs continue to push RedWolf toward new capabilities and technical advances. As RedWolf systems have grown in size and technical capability, and customer missions have become increasingly focused on criminal intelligence, users have requested analytic tool enhancements. In response to this need, within the past year the RedWolf team has integrated a number of new capabilities, including a secure text search feature that enforces essential data access restrictions; automated mapping of cellular telephone system location reports; and automated voice processing for speaker identification, plus language and gender recognition. Work has begun on integrated link analysis tools and databases to support investigation of social networks. These tools will soon be available.

TSP engineers are particularly enthusiastic about a 2008 exploratory study of the automated voice identification and recognition capability. Initial results have been very promising. TSP chief engineer Art Stefanelli explained the primary concept supporting the addition of this capability: "Intercept operators must try to [determine] the exact identity of the person(s) who are speaking to the surveillance target during a call that is pertinent to the investigation. The voice processing system should help them make this determination more quickly and accurately by showing voice matches against a set of previously identified associates for which good speech samples exist."

RedWolf engineers are keenly aware that a hyper-efficient development timeline is important to customers in the high-stress criminal investigation community. Therefore, RedWolf's development and marketing approach has been revised to reflect the unique needs of these customers, who do not tend to invest in long-term custom-built development projects. Instead, they demand capabilities offered as off-the-shelf products — products that can be quickly customized and installed within an operational environment with minimal disruption of the day-to-day mission. This

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product line development and sales approach, which departs from the traditional custom-development business approach of many Raytheon programs, may well be as innovative as the technology advancements that characterize RedWolf's evolution.

Despite the success of the 2008 research, RedWolf engineers are not content to rest; further technology advancements are already on the drawing board. As the customer mission evolves, RedWolf will also evolve as part of TSP's firm commitment to support that mission. The need to integrate sophisticated analysis capabilities across multiple systems is driving RedWolf developers to adapt more of the available analytic technology from the intelligence community to the lawful surveillance community. It is expected that other drivers of future capabilities will stem from the complex statutory guidelines that RedWolf customers follow. These guidelines, which can include important and far-reaching regulations like the USA PATRIOT Act, are the result of an increasing cognizance of privacy issues related to the capture, processing and retention of personal data.

Based on their stellar record of mission support to their customers, we believe that TSP's engineers are well equipped to meet the new challenges that the future will undoubtedly bring.

Jeanne Minahan Robinson
Contributor: Art Steianelli

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Raytheon
Customer Success Is Our Mission

Attachment F

From:

■

[REDACTED]

■

[REDACTED]

Subject:

RE: Request for position

Date:

Wednesday, December 04, 2013 3:28:27 PM

Mr. Connell,

[REDACTED]

As such, should you still feel the need to file a motion, the Prosecution would oppose.

Regards,

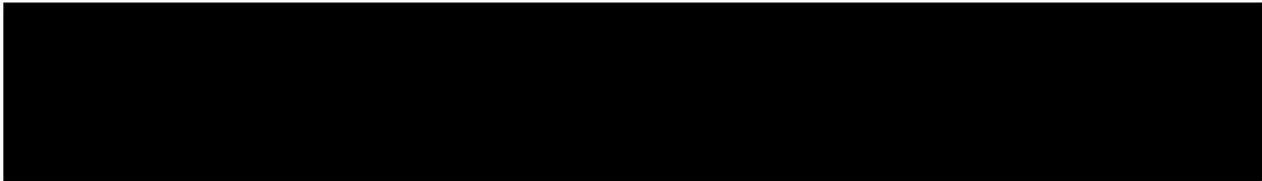
Clay Trivett

From:

[REDACTED]



Dear Brigadier General Martins et al.,



May I state the prosecution's position on this motion?

Best regards,

James Connell