MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **KHALID SHAIKH MOHAMMAD;** **WALID MUHAMMAD SALIH** **MUBARAK BIN 'ATTASH;** **RAMZI BINALSHIBH;** **ALI ABDUL AZIZ ALI;** **MUSTAFA AHMED AL HAWSAWI**	**AE 306A (GOV)** **Government Response to Defense Motion to Compel Discovery of Metadata from Electronically Stored Raid Discovery** 14 July 2014

1. Timeliness

This Response is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.

2. Relief Sought

The Defense motion to compel metadata should be denied. With regards to one raid site, the Prosecution is still currently seeking additional information pertaining to certain metadata assocated with photographs taken at that location. Upon review of that information, the Prosecution will make an appropriate determination regarding what, if any, metadata associated with photographs taken at that site are discoverable.

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

At trial the Prosecution intends on admitting various pieces of real and documentary evidence, relevant to the charges, found at at least nine sites around the world. This includes evidence found at the scene where Ramzi Binalshbih was captured; evidence found at the scene where Khalid Shaykh Mohammad and Mustafa al Hawsawi were captured together; evidence

found at the scene where Walid Bin 'Attash and Ali Abdul Aziz Ali were captured together; evidence found at an apartment associated with Mustafa al Hawsawi, and various pieces of evidence found at Al Qaeda safehouses in Afghanistan and Pakistan.

During the discovery process, the Prosecution has provided pictures of the items that were seized at these various sites. These pictures were taken in the D.C. Metropolitan Area, over the course of the last few years, and at the behest of the Prosecution by its agents. This process was done for the convenience of parties to assist in preparing the case. For the physical evidence items that it has in its possession, the Prosecution intends to admit the actual piece of real evidence, not the picture that was provided to the Defense.

For a small number of certain pictures of the sites, or pictures of the various Accused shortly after they were captured, the Prosecution will be calling a competent witness who can lay a proper foundation to sponsor pictures into evidence. The Prosecution has reviewed the metadata associated with these pictures, where available, and determined with respect to each set of pictures, none of the metadata is material to the preparation of the defense. However, the Prosecution is seeking additional information regarding photographs taken at one site and will provide the metadata for those photos in the event that investigation reveals metadata that is material to the preparation of the defense.

On 5 March 2014, and again on 17 June 2014, the Prosecution notified Defense counsel for Mr. Ali that they would have an opportunity to view the actual physical evidence, and that

the Prosecution had directed its agents to photograph these materials for the Defense's convenience in the discovery process. *See* AE 306 (AAA) Attachments B and C.

On 30 June 2014, the Defense filed the instant motion.

5. Law and Argument

I. The Defense Cannot Meet its Burden to Compel the Metadata for Thousands of Pictures Already Provided in Discovery.

R.M.C. 701(c)(1) requires the Prosecution to permit defense counsel to examine

> [a]ny books, papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, which 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 which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial.

See R.M.C. 701 (c)(1). The Military Commissions Act of 2009 (M.C.A.) affords the Defense a reasonable opportunity to obtain evidence through a process comparable to other United States criminal courts. *See* 10 U.S.C. § 949j. Pursuant to the M.C.A., the Rules for Military Commissions (R.M.C.) require that the government produce evidence that is material to the preparation of the defense. *See* R.M.C. 701; *see also* 10 U.S.C. § 949(j)(a). However, no authority grants defendants an unqualified right to receive, or compels the government to produce, discovery merely because the defendant has requested it. Rather, the government's discovery obligations are defined by the relevant rules and statutes. *See generally United States v. Agurs*, 427 U.S. 97, 106 (1976) (noting that "there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor").

A criminal defendant has a right to discover certain materials, but the scope of this right and the government's attendant discovery obligations are not without limit. For example, upon request, the government must permit the defendant to inspect and copy documents in the government's possession, but only if the documents meet the requirements of R.M.C. 701. Military courts have adopted a standard where "relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the

action more probable or less probable than it would be without the evidence." *United States v. Graner*, 69 M.J. 104, 107-08 (2010). In instances where the defense did not present an adequate theory of relevance to justify the compelled production of evidence, C.A.A.F. has applied the relevance standard in upholding denials of compelled production. *See Graner*, 69 M.J. at 107-08. A defense theory that is too speculative, and too insubstantial, does not meet the threshold of relevance and necessity for the admission of evidence. *See United States v. Sanders*, 2008 WL 2852962 (A.F.Ct.Crim.App. 2008), citing *United States v. Briggs,* 46 M.J. 699, 702 (A.F.Ct.Crim.App.1996). A general description of the material sought or a conclusory argument as to their materiality is insufficient. *See Briggs*, 46 M.J. at 702, citing *United States v. Branoff*, 34 M.J. 612, 620 (A.F.C.C.A. 1992) (remanded on other grounds), citing *United States v. Cadet*, 727 F.2d 1453, 1468 (9th Cir. 1984).

Litigation surrounding the discovery of metadata often arises in civil litigation contexts in federal courts, and is instructive here. Emerging standards of electronic discovery in federal courts articulate a general presumption against the production of metadata. *See Mich. First Credit Union v. Cumis Ins. Soc'y, Inc.*, 2007 U.S. Dist. LEXIS 84842, 5-6 (E.D. Mich. Nov. 16, 2007) *citing Williams v. Sprint*, 230 F.R.D. 640, 651 (D. Kan. 2005). Federal courts have found that most metadata is of limited evidentiary value, and reviewing it can waste litigation resources. *Id. citing Wyeth v. Impax Laboratories, Inc.*, 2006 U.S. Dist. LEXIS 79761, 2006 WL 3091331, *2 (D.Del. 2006) (unpublished). In most cases and for most documents, metadata does not provide relevant information. *Id. citing Kentucky Speedway, LLC v. NASCAR, Inc.*, 2006 U.S. Dist LEXIS 92028, *24 (E.D. Ky. 2006).

1. The Metadata for Pictures Taken at Behest of the Prosecution for Discovery and Provided by Another Country is Not Discoverable.

With regard to AE 306 (AAA), the Defense seeks metadata that is wholly irrelevant to these proceedings. As set forth above, over the last few years, the Prosecution directed its agents to photograph all of the evidence that was seized at various sites around the world, many of

which occurred over 10 years ago, so that the parties would better be able to prepare for trial and so it could satisfy part of its obligation under R.M.C. 701. The Defense cannot possibly demonstrate that the metadata is material to the preparation of the defense where, in this case, the Prosecution does not intend to use the photographs as substantive evidence, and when the Defense will be able to inspect the actual items of physical and documentary evidence that was seized. The same can be said for the pictures taken in Spain, as the United States Government does not intend to use pictures or documents from Spain as substantive evidence in its case-in-chief.

As Defense Counsel aptly points out, "there is an enormous difference between the probative value of a photograph taken contemporaneously with a search and a photograph taken years later and thousands of miles away." *See* AE 306 (AAA) at 8. The Prosecution agrees. The Prosecution took the vast majority of raid item photographs in 2012 - 2013 in the D.C. Metropolitan area, some ten years after and thousands of miles away from the scenes where the evidence was seized. Despite being told what the Prosecution's purpose was for providing pictures of items seized in these raids, the Defense still seemingly misconstrues the purpose behind provision of photographs of the physical items found at these scenes by seeking to compel this information. The very purpose behind the photographs was meant to augment, not substitute for, the Defense examination of the physical items that will be used as the actual evidence.

The Defense claims that by removing the metadata, the government "hides evidence of non-standard evidence practices that are extremely useful to the defense." *See* AE 306 (AAA) at 5. The Defense also lists what the metadata "potentially" includes, listing the date and time each photo was taken/created; camera settings (aperture, shutter speed); manufacturer make and model;the date an image file went on a system; the last date that the data inside a file was modified, or the last date that that file was accessed by an application; the last person to access a file, or the person who actually created it; and the GPS coordinates of where the photo was taken. *See* AE 306 (AAA) at 8.

Notwithstanding its presupposition of non-standard evidence practices in making its materiality arguments, the Defense has not established how knowing any of the information set forth above would assist them for the items the Prosecution directed be photographed, or the documents from Spain that the Prosecution does not intend on using in its case. The Defense provides an explanation of what metadata is, but makes no serious attempt to establish how such metadata for these items is actually material to the preparation of the defense for these items. The Defense makes only speculative and conclusory arguments of it materiality which is insufficient. *See Briggs*, 46 M.J. at 702.

2. The Metadata of Pictures Taken at the Raid Sites (or of the Accused) Shortly After Their Captures is Not Discoverable When the Witnesses Will Be Testifying From Their Own Recollections and Not Relying on any Metadata

In order to lay a foundation and establish the authenticity for the small number of photos of the actual sites, or pictures of the various accused shortly after they were captured that have been disclosed among these items, the Prosecution will call a competent witness who is familiar with the scene (or person) depicted in the photograph, who will testify that it is a fair and accurate description of the scene (or person) at the relevant time. The Defense will have the opportunity to cross examine these witnesses, but having the metadata for these pictures is not necessary for them in order to do so.

The Prosecution has reviewed the metadata for all raid photos in its possession. Where metadata exists, the Prosecution's review determined that none of the information was material to the preparation of the Defense. In one raid, the Prosecution has determined that additional investigation is necessary before the Prosecution can make a determination whether the metadata could be material to the preparation of the Defense.

If the metadata was not inadvertently manipulated it will be of no evidentiary value at all. In short, and unlike the cases cited by the Defense, the metadata of these pictures will not be a genuine issue in this case. Authenticating witnesses will testify from their own obeservations

and will not be relying on any metadata to authenticate the pictures. The metadata the Prosecution has reviewed is consistent with the information contained in reports provided to the Defense regarding the searches in question and is consistent with the expected testimony of the Prosecution's witnesses regarding the raids in question. As previously stated, the Prosecution's review of metadata related to phots from one raid is not complete. Once that review has been completed, the Prosecution will provide photos with metadata if any of the metadata is arguably material to the preparation of the defense.

II. The Prosecution Produced the Discovery in a Usable Format, Taking Differing Classification Levels and Proper Handling Procedures Into Account, and Did Not Shuffle the Order of Discovery in Order to Make it Difficult to Follow.

The Defense states "as it did with the FBI discovery, the government shuffled the order on the Bates numbering of these documents, making them difficult to follow, especially in comparing classified versus unclassified documents." *See* AE 306 (AAA), Para 5a-5b. The Defense further complains "the government magnified the processing challenge by producing separate indices for classified and unclassified information for each trigram, creating apparently random numbering gaps." *Id.* The Prosecution had good reason for producing separate indices, and the Defense has an easy remedy to their complaint.

Knowing that to combine both classified and unclassified material on the same disc would be to invite a potential classification spill, where appropriate, the Prosecution has produced a separate disc for each classification level of information. For example, the items seized in the Rawalpindi Raid (RAW) were made up of both Secret and For Official Use Only classifications. The Prosecution therefore produced one disc with all SECRET//NOFORN documents and an index to go with those documents, and it produced another disc with the FOR OFFICIAL USE ONLY items and an index to go with those documents. Given that the documents will likely be maintained on separate systems, this was the prudent course of action, and actually makes it easier for the Defense (to the extent they seek to load the unclassified discovery on unclassified systems). Contary to the Defense suggestions, the Prosecution's intent

was to assist the Defense in the segregation of classified and non-classified items and safeguard classified information, not to make its job more difficult.

Furthermore, whatever difficulties the Defense counsel may have had in processing two separate indices would be resolved by simply combining the two indices into a single spreadsheet on their classified network. Further clarity would be gained by then sorting on the "Full Name" field, which would demonstrate that rather than attempting to muddy the waters as the Defense asserts, the Prosecution sorted the items based on the item number assigned to the items shortly after they were seized. Although the Defense asserts that the production of metadata would somehow "solve this puzzle," no matter how the records were stored the metadata in this instance would not assist in this manner. *See* AE 306 (AAA) at 4, ft nt 4. However, as set forth above, the Prosecution's proposal to merge the spreadsheets would solve this part of the "puzzle" for the Defense and obviate any purported need for metadata for this purpose.

In regard to the allegations set forth in AE 206 (AAA), Para 5c-5f, the Prosecution produced the photographs in portable document format (.pdf) in order to ensure that the documents could be Bates stamped and to ensure that they could be viewed by the Defense. The .pdf format is one of the most widely used document formats in the world today. The government contractor that provides computer services to the OMC computer networks provides a program called Adobe Acrobat Professional which will open the .pdf format. For those not working on an OMC network, a version of Adobe Acrobat called Acrobat Reader is available for free from Adobe's website that would allow for these items to be viewed.

6. Conclusion

As set forth above, the Defense cannot articulate a basis for requiring the Prosecution to disclose the metadata of the pictures it has already produced in discovery. The Prosecution has provided the discovery in a usable format, and has done so in a way that is consistent with best

practices in handling information of differing classification levels. The Defense motion should be denied.

With respect to metadata associated with one of the raid sites, the Prosecution is seeking additional information and will make an appropriate determination regarding its discoverability as expeditiously as possible. Once that determination is made, the Prosecution will properly notify defense counsel.

7. Oral Argument

The Prosecution waives oral argument and the Defense motion should be decided on the papers alone.

8. Witnesses and Evidence

None.

9. Additional Information

None.

10. Attachments

A. Certificate of Service, dated 14 July 2014

Respectfully submitted,

//s//
Clay Trivett
Managing Deputy Trial Counsel

Mark Martins
Chief Prosecutor
Military Commissions

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 14th day of July 2014, I filed AE 306A(GOV), the **Government Response to** Defense Motion to Compel Discovery of Metadata from Electronically Stored Raid Discovery with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

//s//
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Office of the Chief Prosecutor
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