

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY**

UNITED STATES OF AMERICA

v.

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

AE328(WBA)

Defense Motion to Compel Discovery Related
to Conditions of Confinement and Disciplinary
Status

Date Filed: 19 November 2014

1. Timeliness: This motion is timely filed.

2. Relief Sought:

Mr. bin 'Atash requests that the Commission compel discovery of the material requested in Attachment B.

3. Overview:

Despite defense requests to have substantially similar rights to evidence and witnesses as a defendant in an Article III court, this Commission has denied defense requests to subpoena material required to defend Mr. bin 'Atash. Instead, Mr. bin 'Atash is forced to request all information through a Prosecution team that routinely denies requests for even the most relevant materials. Here, Mr. bin 'Atash made a discovery request for information pertaining to his conditions of confinement and disciplinary status for the period 1 July 2014 to present. The material requested by Mr. bin 'Atash will inform Mr. bin 'Atash's case in mitigation, as well as active litigation pertaining to Mr. bin 'Atash's conditions of confinement and unlawful pretrial punishment, and it is unquestionably encompassed by both R.M.C. 701 and *Brady*. However,

the Government has denied defense requests for this important information. The Government does not contest the discoverability of the requested materials; it simply claims that documents responsive to the defense's request are classified and will "be produced only after defense counsel have signed the Memorandum of Understanding Regarding the Receipt of Classified Information."

The Government repeatedly uses its request for a superfluous MOU in this case to deny disclosure and discovery of information which it is constitutionally, statutorily, and ethically mandated to provide to the defense at the earliest available opportunity. No statute, rule, or regulation mandates the use of a MOU as a prerequisite to the receipt of *Brady* material or material covered by R.M.C. 701(c)(1). The Commission ordered the Government to show cause as to the necessity of the MOU, and the Government failed to offer any authority that would require the use of a MOU under such circumstances.

The Government's use of its MOU as a shield to prevent discovery and disclosure of material and exculpatory information is unlawful. The Government's obligation to disclose exists irrespective of the MOU. Moreover, there is reason to believe that the Government is using the MOU as a tool to avoid due diligence even with respect to unclassified information requested in discovery; in the Military Commission case *United States v. abd al Hadi al-Iraqi*, the Accused recently received an unclassified SOP pertaining to Mr. bin 'Atash's confinement facility which is explicitly encompassed within the scope of Mr. bin 'Atash's request.

The Commission should order the Government to produce the discovery requested in Attachment B at the earliest possible opportunity and without any artificial preconditions that are not specifically mandated by law.

4. Burdens of Proof:

The defense bears the burden of persuasion; the standard of proof is a preponderance of the evidence. R.M.C. 905(c)(1).

5. Facts:

A. On 16 December 2013, the Commission issued AE013DDD, Second Amended Protective Order #1. The Protective Order mandates that the defense sign a Memorandum of Understanding (MOU) that was drafted by the Prosecution and that simply reiterates the defense's existing obligations under the Commission's Protective Order, under various federal laws pertaining to the protection of classified information (e.g. the Espionage Act, 18 U.S.C. § 792 *et seq.*), and under various legally-binding nondisclosure agreements already signed by all members of the defense who will receive classified information (e.g. AE013PPP, Attachment J).

B. With the exception of Mr. al Baluchi, every co-accused has consistently objected to the MOU. On 23 January 2014, Mr. Mohammad filed AE013III, which noted, *inter alia*, that the MOU would "effectively release the Prosecution from its obligations under the Act to produce to the Defendant discovery and related materials, or an adequate substitute therefore under [10 U.S.C.] § 949p-4." AE013III at 8-9.

C. On 22 January 2014, Mr. bin 'Atash filed AE266(WBA). In the filing, Mr. bin 'Atash notes that the "prosecution in the instant case has failed to make timely disclosure of required information, instead using its MOU as a shield to prevent the disclosure of exculpatory and mitigating evidence to the defense." AE266(WBA) at 7. Mr. bin 'Atash further notes that "[t]he Military Commissions Act of 2009, the Military Commissions Rules of Evidence, and the Rules for Military Commissions contain no mention of a prosecution-drafted MOU as a prerequisite for the receipt of classified information," and that, in failing to provide information in response to

defense discovery requests, “the prosecution is ignoring its independent ethical obligation to make timely disclosure and discovery.” *Id.* at 8-9.

D. The Commission has acknowledged that counsel have an independent duty to safeguard classified information that exists irrespective of the MOU. *See, e.g.* Tr. at 7154 (“[n]ow, it’s been discussed many times, all defense counsel here are cleared. All defense counsel here, they have not signed the MOU, I got that, but they know the responsibility of handling classified information. They know, regardless of the protective order, they’re not allowed to give classified information to their client.”). At times, the Commission has ordered discovery of classified information in spite of defense counsel’s refusal to sign the MOU. *See, e.g.* AE108II (directing confinement facility visits for cleared defense counsel over Prosecution’s objection that counsel had failed to sign MOU).

E. Trial Counsel has acknowledged on the record that the MOU provides no additional substantive protection for classified information. *See, e.g.* Tr. at 4268 (Trial Counsel stated that “the [prosecution MOU] simply delineates what the parties’ obligations are under the existing order.”); *see also* Tr. at 6758 (Trial Counsel stated that “the defense understand their obligations with their security clearance; the prosecution recognized they have all signed nondisclosure agreements.”).

F. On 17 September 2014, the Commission issued AE013000, wherein the Commission ordered the Government to show cause as to the necessity of the MOU and provide the Commission with “any authority for the MOU requirement taking into consideration documentation already signed by Defense counsel when receiving their clearances and the requirement they follow all orders issued by the Commission...” AE013000 at 3. In its Order, the Commission noted that defense counsel had repeatedly reaffirmed on the record that counsel

were bound by the Commission's Protective Order with respect to the handling of classified information. *Id.* at 2.

G. In response to the Commission's Order, the Prosecution failed to provide the Commission with "any authority for the MOU requirement," as specifically requested by the Commission. Instead, the Prosecution merely regurgitated a list of cases in which various courts had adopted a prosecution-drafted MOU on a *pro forma* basis. *See* AE013PPP.

H. On 3 October 2014, Messrs. Mohammad, bin 'Atash, and bin al Shibh filed AE013QQQ, wherein they indicated that AE013PPP failed to provide "authority even suggesting that signature of an MOU must be required as a precondition to defense counsels' receipt of classified information." AE013QQQ at 4. Also on 3 October 2014, Mr. al Baluchi filed AE013QQQ(AAA), wherein he noted that the MOU is "redundant with the Second Amended Protective Order #1" and both legally and practically irrelevant. AE013QQQ(AAA) at 1.

I. In July 2014, the new Commander of the camp in which Mr. bin 'Atash and his co-accused are housed reintroduced female guards into detainee-contact roles. On 8 October 2014, the Commander notified Mr. bin 'Atash and his fellow detainees that female guards would be permitted to have physical contact with detainees during movement, including movement to and from legal meetings and sessions of the Commission. On the same date, Mr. Hadi al Iraqi, another detainee housed with Mr. bin 'Atash, was forcibly removed from his attorney-client visitation room at Camp Echo II when he refused to be escorted by female guards. *See* AE254Y at 8. In 2007, when the Camp previously and briefly employed female guards in contact roles, Mr. bin 'Atash objected to contact on the basis of his faith, [REDACTED]

[REDACTED]

J. On 15 October 2014, Mr. bin ‘Atash served the Prosecution with his discovery request pertaining to conditions of confinement and disciplinary status for the period between 1 July 2014 and present. Attachment B. The request includes routine confinement facility records such as Detainee Information Management System (DIMS) entries which document both routine and significant events pertaining to Mr. bin ‘Atash and which have been provided to counsel in discovery in the past (in the past, such records have been marked U//FOUO). *See, e.g.* AE254Y, Attachment B. The request also includes information specifically related to the treatment of Mr. bin ‘Atash, including records related to conditions, restrictions, loss of privileges, or modifications to living accommodations that have been imposed upon him. The request further includes audio or video recordings documenting alleged infractions as well as disciplinary procedures – records which JTF-GTMO is known to maintain. The request includes several additional categories of information.

K. On 12 November 2014, the Prosecution responded to Mr. bin ‘Atash’s discovery request. Attachment C. The Prosecution provided a generic statement that it would “continue to produce the periodic updates of medical records of Mr. bin ‘Attash,” despite the fact that medical records, while possibly covered by the defense request, were not one of the many items specifically identified in the defense request. The Prosecution further indicated that “[t]here are other documents that are responsive to your request that are classified and will be produced only after defense counsel have signed the [MOU].” The Prosecution did not deny or dispute the discoverability of any material covered by the defense request. However, the Prosecution did not provide the defense with any material responsive to the request.

6. Law and Argument:**A. Materials are Discoverable**

The Prosecution has both constitutional and statutory disclosure and discovery obligations. Under the Military Commissions Act of 2009, the Prosecution must permit the defense to examine information within the possession, custody, or control of the Government that is “material to the preparation of the defense.” R.M.C. 701(c)(1). Materiality is a low threshold well below evidentiary relevance; evidence is material “as long as there is a strong indication that it will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal.” *United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993) (internal quotation marks and citation omitted); *see also United States v. Libby*, 429 F. Supp. 2d. 1, 7 (D.D.C. 2006); *United States v. Roberts*, 59 M.J. 323, 325 (C.A.A.F. 2004) (the scope of materiality is broad and is “not focused solely upon evidence known to be admissible at trial” but includes evidence used in formulating defense strategy); *United States v. George*, 786 F. Supp. 56, 58 (D.D.C. 1992) (demonstrating materiality is “not a heavy burden”). Material evidence includes negative or inculpatory evidence because it is “just as important to the preparation of a defense to know its potential pitfalls as it is to know its strengths.” *United States v. Marshall*, 132 F.3d 63, 67 (D.C. Cir. 1998).

Per *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Prosecution is also required to disclose “evidence favorable to an accused” that is “material either to guilt or to punishment.” *See also* 10 U.S.C. § 949j(b)(1)-(4) (expanding upon *Brady* and requiring disclosure of exculpatory evidence that tends to negate guilt, reduce the degree of guilt, impeach a prosecution witness, or mitigate a sentence). The duty to provide such evidence includes the duty to search for evidence, where the evidence may be maintained by another Government agency. *Kyles v.*

Whitley, 514 U.S. 419, 438 (1995). In a capital case, *Brady* material includes evidence in mitigation “in that it may justify a sentence of life imprisonment as opposed to death.” *United States v. Feliciano*, 998 F. Supp. 166, 170 (D. Conn. 1998); *see also United States v. Beckford*, 962 F. Supp. 804, 811 (E.D. Va. 1997) (holding that evidence relevant to a statutory mitigating factor is “favorable” evidence pertaining to punishment under the *Brady* standard).

With respect to discovery and disclosure of classified information, M.C.R.E. 505 (patterned after the Classified Information Procedures Act (CIPA), 18 U.S.C. App.), establishes those procedures that must be followed if the Government wishes to withhold classified material from discovery. CIPA and M.C.R.E. 505 do not make classified materials non-discoverable simply because the materials are classified; the provisions “create[] no new rights of or limits on discovery of a specific area of classified information.” *United States v. Yunis*, 867 F.2d 617, 621 (D.C. Cir. 1989); *see also United States v. Smith*, 780 F.2d 1102, 1106 (4th Cir. 1985) (noting that CIPA is merely a “procedural tool requiring a pretrial court ruling on the admissibility of classified information.”).

Under CIPA and M.C.R.E. 505, materials are discoverable where they are “relevant and helpful to the defense of an accused” or “essential to a fair determination of a cause.” *United States v. Roviario*, 353 U.S. 53, 60-61 (1957); *Yunis*, 867 F.2d at 623 (applying the *Roviario* test for disclosure of an informant’s identity to CIPA). “Relevant and helpful” evidence is equivalent to “material” evidence under R.M.C. 701(c)(1). *United States v. Aref*, 533 F.3d 72, 79 (2d Cir. 2008) (“we have interpreted ‘relevant and helpful’ under *Roviario* to mean ‘material to the defense.’”); *In re Terrorist Bombings of U.S. Embassies in East Africa*, 552 F.3d 93, 124 (2d Cir. 2008); *United States v. El Mazain*, 664 F.3d 467, 520 (5th Cir. 2011).

It is irrelevant whether the information requested in the instant discovery request is classified or unclassified; the information is material and clearly discoverable by any standard. In a capital case, appropriate mitigating factors include “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.” *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *see also McKoy v. North Carolina*, 494 U.S. 433, 440 (1990) (“[r]elevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.”) (quoting *State v. McKoy*, 323 N.C. 1, 55-56 (1988) (Exum, C.J. dissenting)). Specifically, evidence of Mr. bin ‘Atash’s character and record includes evidence of Mr. bin ‘Atash’s treatment and behavior while in confinement. *See, e.g. Skipper v. South Carolina*, 476 U.S. 1 (1986) (evidence of defendant’s conduct in pretrial confinement admissible in mitigation); *Neal v. Puckett*, 286 F.3d 230, 244 (5th Cir. 2002) (counsel ineffective where counsel failed to introduce in mitigation evidence of defendant’s “abuse and mistreatment in prison.”). Discoverable evidence of Mr. bin ‘Atash’s character and record also includes standard operating procedures and other “general guidance materials or policy statements,” even where such evidence does not refer to Mr. bin ‘Atash by name. *See, e.g. United States v. Naegele*, 468 F. Supp. 2d 150, 154 (D.D.C. 2007) (generalized policy materials may trigger *Brady* obligation).

There can be no question in this case that the instant discovery request encompasses the type of treatment and behavior evidence, including policy evidence, that is clearly and obviously discoverable. Evidence of Mr. bin ‘Atash’s behavior in confinement and adaptation to the harsh circumstances in which he finds himself may persuade panel members to impose a sentence less than death. Similarly, any evidence of abuse or mistreatment in confinement may lead panel members to conclude that a sentence of death is not justified. Moreover, evidence of Mr. bin

‘Atash’s conditions of confinement and disciplinary status is also material in pretrial litigation in the instant case, as such evidence may inform the defense’s argument on various motions that Mr. bin ‘Atash is being unlawfully punished in various respects prior to trial. *See, e.g.* AE254Y(WBA) (use of female guards); AE321(WBA) (lack of communication with family); *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (“under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.”); *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983) (due process right to be free from unlawful pretrial punishment is “at least as great” as the Eighth Amendment’s protection against cruel and unusual punishment).

B. MOU Illegitimate Basis to Deny Discovery

The Government does not dispute the obvious discoverability of the materials requested by Mr. bin ‘Atash on 15 October 2014. Instead, the Government simply indicates that documents responsive to the request are classified and will “be produced only after defense counsel have signed the [MOU].” Attachment C. However, the Government’s basis for denying discovery in this instance is illegitimate. As Mr. bin ‘Atash noted in AE266(WBA), the Prosecution’s disclosure and discovery obligations are “independent of [the] MOU,” and no authority (including the Military Commissions Act of 2009, the Military Commissions Rules of Evidence, or the Rules for Military Commissions) conditions receipt of classified discovery on a MOU. AE266(WBA) at 8. The Commission itself recognized this fact when it asked the Prosecution to show cause as to the MOU “requirement,” and in response the Prosecution could offer no authority mandating the use of a MOU for classified discovery. *See* AE013000. At best, the MOU is superfluous in light of the myriad obligations already imposed upon defense counsel by the Commission and by the Government. *See In re Guantanamo Bay Detainee*

Continued Access to Counsel, 892 F. Supp. 2d 8, 16 (D.D.C. 2012) (“[t]he Protective Order has been in place for nearly four years and there is no record that its provisions have threatened classified information or caused any harm to the military’s operation of the Guantanamo Bay Naval Base. The Government itself argues that the MOU and the Protective Order provide essentially the same protections. In the first instance, this raises the question of why the Government felt it necessary to promulgate the MOU at all.”).

Where no authority mandates the use of a MOU, Trial Counsel cannot continue to use the instrument as a means to avoid the obligation to provide complete and timely disclosure and discovery. *See ABA Standards for Criminal Justice: Prosecution and Defense Function* (3d ed., 1993), Standard 3-3.11 (“[a] prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged...A prosecutor should not fail to make a reasonably diligent effort to comply with a legally proper discovery request.”); *see also ABA Model Rules of Professional Conduct*, Rule 3.8. Timely discovery pertaining to Mr. bin ‘Atash’s present conditions of confinement and disciplinary status is crucial because this material not only informs Mr. bin ‘Atash’s case in mitigation but also informs ongoing litigation pertaining to JTF-GTMO’s treatment of Mr. bin ‘Atash – litigation such as AE254Y and AE321. Should the Prosecution believe that information subject to the defense discovery request is classified, it has appropriate tools to handle its classification concerns. For example, the Prosecution may seek judicially-authorized substitutions, deletions, and redactions under M.C.R.E. 505(f)(2)(A) and M.C.R.E. 505(h)(4). However, where information is discoverable, the Prosecution must either immediately make the required discovery or submit to the M.C.R.E. 505 process; it may not simply fail to act, as it has done in this instance.

Additionally, there is reason to believe that the Prosecution is using the MOU as a blanket excuse to avoid due diligence even with respect to unclassified discovery. For example, in the Military Commission *United States v. abd al Hadi al-Iraqi*, in response to a discovery request similar to that made in the instant case, the Government provided Mr. al-Iraqi with a SOP pertaining to the operation of the confinement facility where both Mr. al-Iraqi and Mr. bin ‘Atash are housed. The Government specifically indicated on the record on 17 November 2014 that the SOP was unclassified. *See* Attachment D. The SOP provided to Mr. al-Iraqi is clearly and explicitly encompassed by Mr. bin ‘Atash’s request for “[a]ll records, in any format, reflecting disciplinary policies and procedures for “Camp 7” in effect during the period 1 July 2014 to present,” which Mr. bin ‘Atash noted specifically includes “Standard Operating Procedures (“SOPs”) in effect 1 July 2014 to present.” Had Mr. bin ‘Atash not learned of the existence of the unclassified SOP through Trial Counsel’s on the record statement in *United States v. al-Iraqi*, the Prosecution likely would have been able to hide the existence of the SOP behind its blanket MOU requirement – clearly an inappropriate outcome.

For the foregoing reasons, Mr. bin ‘Atash requests that the Commission compel the Prosecution to produce those materials requested in Attachment B, promptly and without any preconditions that are not mandated by law.

7. Oral Argument: The defense requests oral argument.

8. Witnesses: Mr. bin ‘Atash reserves the right to request production of witnesses on this motion at a later date.

9. Conference with Opposing Counsel: The Government opposes the relief requested herein.

10. Attachments:

- A. Certificate of Service
- B. Discovery Request dtd 15 Oct 2014

- C. Government Response to Discovery Request dtd 12 Nov 14
- D. Excerpt from Transcript, *United States v. al-Iraqi*, 17 Nov 14

//s//

CHERYL T. BORMANN
Learned Counsel

//s//

JAMES E. HATCHER
LCDR, USN
Defense Counsel

//s//

MICHAEL A. SCHWARTZ
Capt, USAF
Defense Counsel

//s//

TODD M. SWENSEN
Maj, USAF
Defense Counsel

Attachment A

CERTIFICATE OF SERVICE

I certify that on 19 November 2014, I electronically filed the attached **Defense Motion to Compel Discovery Related to Conditions of Confinement and Disciplinary Status** with the Trial Judiciary and served it on all counsel of record by e-mail.

//s//

CHERYL T. BORMANN

Learned Counsel

Attachment A

Attachment B



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

OSD-OGC-OCDC

15 October 2014

MEMORANDUM FOR Office of the Chief Prosecutor, Office of Military Commissions

SUBJECT: Request for Discovery – Conditions of Confinement and Disciplinary Records
1 July 2014 to Present

1. Pursuant to R.M.C. 701, 10 U.S.C. § 949j, the Fifth, Sixth, and Eighth Amendments to the United States Constitution, and international law, Mr. bin ‘Atash requests that the Government provide the following information in discovery. Failure to provide the requested information will deny Mr. bin ‘Atash his rights to the due process of law, to the effective assistance of counsel, a fair, speedy, and public trial, and to be free from cruel and unusual punishment.

2. Mr. bin ‘Atash requests that the Prosecution produce the following books, papers, documents, photographs, video recordings or other tangible objects which are within the possession, custody, or control of the Government and which are material to the preparation of the defense:

- A. All records, in any format, pertaining to Mr. bin ‘Atash’s current conditions of confinement, from the period 1 July 2014 to present. This request includes but is not limited to records in any format documenting Mr. bin ‘Atash’s disciplinary status and any conditions or restrictions that have been imposed upon him, including modifications to living accommodations or any loss of privileges. This request includes but is not limited to Detainee Information Management System (DIMS) records pertaining to Mr. bin ‘Atash.
- B. All records, in any format, documenting allegations of misconduct lodged by any person (detainee or staff member) against any detention facility staff member and related to the treatment of Mr. bin ‘Atash between 1 July 2014 and the present.
- C. All records, in any format, reflecting disciplinary policies and procedures for “Camp 7” in effect during the period 1 July 2014 to present. This request includes but is not limited to Standard Operating Procedures (“SOPs”) in effect 1 July 2014 to present.
- D. All audio or video recordings of Mr. bin ‘Atash made at “Camp 7” for the period 1 July 2014 to present. This request includes but is not limited to audio or video recordings documenting alleged infractions, disciplinary procedures, confrontations with staff, use of force, forced cell extractions (“FCEs”), modifications to living accommodations, and any restrictions or loss of privileges.

3. Points of contact for this discovery request are the undersigned at Michael.Schwartz [REDACTED], James.Hatcher [REDACTED], Todd.Swensen [REDACTED], and Cheryl.Bormann [REDACTED].

DR-187-WBA

OSD-OGC-OCDC

SUBJECT: Request for Discovery – Conditions of Confinement and Disciplinary Records 1
July 2014 to Present

//s//

CHERYL T. BORMANN
Learned Counsel

//s//

JAMES E. HATCHER
LCDR, USN
Defense Counsel

//s//

MICHAEL A. SCHWARTZ
Capt, USAF
Defense Counsel

//s//

TODD M. SWENSEN
Maj, USAF
Defense Counsel

Attachment C



OFFICE OF THE
CHIEF PROSECUTOR

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF PROSECUTOR OF MILITARY COMMISSIONS
1610 DEFENSE PENTAGON
WASHINGTON, DC 20301-1610

12 November 2014

MEMORANDUM FOR Defense Counsel for Mr. bin 'Attash

SUBJECT: Prosecution Final Response to 15 October 2014
Request for Discovery (DR-187-WBA)

1. The Prosecution received the Defense request for discovery on 15 October 2014. The Prosecution hereby responds to the Defense request.
2. The Defense requests that the Prosecution produce the following books, papers, documents, photographs, video recordings or other tangible objects which are within the possession, custody, or control of the Government and which are material to the preparation of the defense:
 - A. All records, in any format, pertaining to Mr. bin 'Attash's current conditions of confinement, from the period 1 July 2014 to present. This request includes but is not limited to records in any format documenting Mr. bin 'Attash's disciplinary status and any conditions or restrictions that have been imposed upon him, including modifications to living accommodations or any loss of privileges. This request includes but is not limited to Detainee Information Management System (DIMS) records pertaining to Mr. bin 'Attash.
 - B. All records, in any format, documenting allegations of misconduct lodged by any person (detainee or staff member) against any detention facility staff member and related to the treatment of Mr. bin 'Attash between 1 July 2014 and the present.
 - C. All records, in any format, reflecting disciplinary policies and procedures for "Camp 7" in effect during the period 1 July 2014 to present. This request includes but is not limited to Standard Operating Procedures ("SOPs") in effect 1 July 2014 to present.
 - D. All audio or video recordings of Mr. bin 'Attash made at "Camp 7" for the period 1 July 2014 to present. This request includes but is not limited to audio or

Attachment D

1 couriered that for them to this location so that we could
2 present it to them.

3 At this point -- and Lieutenant Colonel Jasper is
4 correct, there are roughly 150 pages of discovery that were
5 provided to the government. Everything the government was
6 provided, everything the government read, observed has been
7 provided to the defense.

8 There are roughly 30 pages of the 150 that amount to
9 what are classified statements. The vast majority of that
10 discovery is unclassified SOP. The requested video is
11 approximately ten minutes long. So the government's position
12 would be that, based on the fact that even those 30 pages of
13 statements aren't all statements, some are logbook entries
14 that are requested, some are just the standard detention
15 facility practices for maintaining logs.

16 So when the defense is saying that they would not be
17 able to go through the material because we have had them for
18 weeks, well, in effect, yes, they were provided to us pursuant
19 to the review process required for being able to clear and
20 release classified material, but that doesn't mean the
21 government has had four weeks to pour over this material as if
22 that were necessary.

23 MJ [CAPT WAITS]: But it was in your hands four weeks ago

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1 before you began the process of determining releasability to
2 the defense.

3 ATC [LTC LONG]: Well, I would use the monolith language.
4 Because actually, sir, it took two weeks for the government to
5 get the discovery, yes. When I came two weeks ago, I was
6 provided access, but at that point it had already been two
7 weeks into the process. So once the discovery request was
8 received, it was forwarded immediately to JTF for processing.
9 That takes time.

10 And so the time that it took for defense -- for the
11 government, I'm sorry, for the government to get that actually
12 only left us about two weeks to then clear it through the
13 remainder of the classified discovery release process. And so
14 that was Friday. And so ----

15 MJ [CAPT WAITS]: I mean, that was back in your hands on
16 Friday, and that's when you found out the defense couldn't
17 receive it any way besides the courier method that you just
18 described?

19 ATC [LTC LONG]: Correct.

20 MJ [CAPT WAITS]: So the final result of that is they
21 didn't get it until last night?

22 ATC [LTC LONG]: That is correct.

23 MJ [CAPT WAITS]: Okay.

UNOFFICIAL/UNAUTHENTICATED TRANSCRIPT

1 ATC [LTC LONG]: Again, back to what the material is, it
2 is not hundreds and hundreds of pages of complex or intricate
3 material. They are a very small handful of rather short
4 statements of the particular guards involved in this incident
5 with the accompanying logs, and then about more than a hundred
6 pages of unclassified SOP.

7 So the notion that, just because it is 150 pages --
8 and certainly, as has already been raised, the defense was
9 provided the opportunity to speak to the Joint Detention Group
10 commander, and I understand that was about a 45-minute
11 interview, and that's who the government spoke with. So also
12 there is also no notion that what the government received the
13 defense has not also received. Granted, just because of the
14 process -- and the timing, obviously, this week being the
15 timing of the hearings rolled back to the date of the request,
16 the date the government received it, the time it took us to
17 process that information, it's taken this long, and that's the
18 process. So it's not a matter that the government is trying
19 to obfuscate or hide the ball. It just simply took that long.

20 And so again, when we look at what this material
21 is -- and if the court wishes to, we can certainly provide
22 that so you can review that material for yourself, Your Honor,
23 so that you can see what it is that the government is