

**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 ADAM  
AL HAWSAWI**

**AE 328A (GOV)**

**Government Response**  
To Defense Motion  
To Compel Discovery Related to  
Conditions of Confinement and  
Disciplinary Status

2 December 2014

**1. Timeliness**

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

**2. Relief Sought**

The Prosecution respectfully requests that this Commission deny the Defense motion.

**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).

**4. Facts**

On 16 December 2013 this Commission issued AE 013DDD, ordering all defense counsel to sign a Memorandum of Understanding Regarding the Receipt of Classified Information (MOU) in this case. As of the date of this filing, only counsel for Mr. al Baluchi has signed the MOU. Counsels for Mr. Bin 'Attash, Mr. Mohammad, Mr. Binalshibh, and Mr. al Hawsawi have refused to follow the Military Judge's Order and sign the MOU.

On 15 October 2014, the Defense provided the Prosecution with a discovery request pertaining to conditions of confinement and disciplinary status for 1 July 2014 through present (DR-187-WBA). *See* AE 328, Attachment B. In response to this discovery request, on

12 November 2014, the Prosecution responded that it would continue to produce periodic updates of medical records of Mr. Bin 'Attash. It further indicated that there were other responsive documents to the request which were classified and would only be provided to the Defense once it signed the MOU. *See* AE 328, Attachment C.

## **5. Argument**

Since the beginning of this case, the Prosecution has been providing several different categories of JTF-GTMO records to the Defense on a rolling basis, which include nine different types of medical records, as well as Detainee Information Management System (DIMS) records. These records are continually created as the detainees remain in custody and will be created throughout the pendency of these proceedings.

The DIMS records contain various different categories of information, including, but not limited to, disciplinary actions taken on the Accused. The DIMS records come to the Prosecution from JTF GTMO as classified documents, and are then put through a DoD declassification process. It is important to note that four of the five Defense teams could not receive these documents at all if they remained classified, given the fact that they have not signed the MOU for receipt of classified information. The Defense acknowledges having been provided with such records in the past. *See* AE 328 at 6. The Defense has these records for their client through 11 August of 2014 at the Unclassified//FOUO level.

In its response to Mr. Bin 'Attash's request for discovery regarding conditions of confinement and disciplinary records, the Prosecution asserted that it would continue to produce these periodic updates of "medical records." The DIMS records, being the only category of documents provided on a rolling basis that are not specifically medical records (but which sometimes will also include certain medical information such as when and whether the detainee received his medications) were perhaps in-artfully described by the Prosecution as "medical records," however they will continue to be produced in accordance with past practice. The Prosecution has disclosed all DIMS from 2006 through 11 August 2014 to the Defense, and will provide an update through 15 October 2014 as they finish the process of being declassified. In

sum, the request for these records was not denied by the Prosecution and the records will be provided to the Defense following the declassification process.

The Defense accuses the Prosecution of “using the MOU as a blanket excuse to avoid due diligence even with respect to unclassified discovery.” To support this accusation it references an SOP provided to defense counsel in *United States v. al Hadi al-Iraqi* that it believes would be encompassed in the request it made of the Prosecution in DR-187-WBA. See AE 328 at 12. The SOP referred to by the Defense in AE 328 was never actually provided to the defense counsel of Abd al Hadi al Iraqi to maintain, but counsel for Mr. al Iraqi were allowed to view four sections of the SOP in the Expeditionary Legal Center (ELC) and return them to the Prosecution. These documents were marked Unclassified/FOUO. Of import, these SOP sections did not reflect any disciplinary policies or procedures for Camp VII, as was requested by Counsel for Mr. Bin ‘Attash, but rather addressed Search and Inspection procedures, Escort procedures, Recreation and Shower Procedures and Forced Cell Extraction Procedures, which would not reasonably fall under the Defense’s request.

In conducting its due diligence, the Prosecution did identify an SOP that deals specifically with disciplinary policies and procedures for Camp VII, which is, in fact, classified at the SECRET//NOFORN level. Surely the Defense is not suggesting they are entitled to every Standard Operating Procedure that Camp VII has simply because the SOP may not be classified.

“Where litigants have once battled for the court’s decision, they should neither be required, nor without good reason permitted, to battle for it again.” See *Zdanok v. Glidden Co.*, 327 F. 2d 944, 953 (2nd Cir.1964). In AE 328, the Defense goes to great lengths to recycle its losing arguments against being required to sign the MOU to receive classified information,<sup>1</sup> and while it may be true that the Military Judge has not yet ruled on whether the Prosecution showed cause for why the MOU is necessary, AE 013DDD, requiring that the MOU be signed, is still a binding order on all parties to the Commission, to include the Prosecution.

<sup>1</sup> In response to these arguments the Prosecution incorporates by reference its arguments in AE 013PPP.

It is also important to note that the Military Judge in *United States v. Abd al Hadi al Iraqi* (based on substantially the same government pleading as the one filed as a response to the order to show cause in this case) reconsidered his protective order that did not initially have an MOU requirement, and required the Defense to sign an MOU as a condition precedent for the receipt of classified information. See *United States v Abd al Hadi al Iraqi*, AE 013H. In doing so, Judge Waits set forth in his order the following reasoning for why an MOU is an important part of the protective order:

An MOU does, however, provide certain expedient and practical protections the Commission had not previously taken into consideration, including: a) setting out the procedures to implement CIPA in these particular proceedings; b) creating a record with the Chief Security Officer, Office of Special Security and the Court Room Security Officer of all defense personnel who have been given access to the classified information in this case; and c) providing a method of accountability for all members of the Defense team extending beyond the powers of the Commission and beyond a time the commission ceases to exist.

See *United States v Abd al Hadi al Iraqi*, AE 013H. He also found that “the practical functions of the MOU far outweigh the minimal burden of executing the MOU.” *Id.* The Defense in that case signed the MOU shortly after being ordered to do so, and have already begun to receive classified information, despite the fact that the case was arraigned two years and several months after the arraignment in this case.

While not binding on this military commission, Judge Waits has now joined the legion of other federal judges and military judges who, for legal and practical reasons, require a signed MOU as a condition precedent to the receipt of classified information. As such, Defense teams in this case continue to be in a minority of one in holding on to their mistaken belief that the MOU is unnecessary in a case that has far more classified information at issue than any before it.

The Prosecution eagerly awaits compliance with AE 13DDD by the Defense so that it can swiftly provide not only the materials specifically requested within this filing, but all additional discovery signing the MOU would allow the Defense to receive, so that this case can finally begin to proceed.

**6. Conclusion**

As set forth above, the Commission should deny the Defense's requested relief as the pertinent records were never denied by the Prosecution, and because the Defense is using this motion as an attempt to circumvent the ongoing litigation over the signing of the MOU. Counsel for Mr. Bin 'Attash have refused to follow this Commission's Order in AE 013DDD by choosing to forgo signing the MOU and have made a tactical decision to delay or completely forego receipt of classified information through the discovery process. That decision has consequences, none of which the Prosecution should have to bear. The Prosecution has consistently stated that it stands ready to produce classified information once counsel signs the MOU. However, the Prosecution cannot produce classified information until the Defense signs the pertinent MOU subject to this Commission's amended protective order.

**7. Oral Argument**

The Prosecution does not request oral argument; however, if the Military Commission decides to grant oral argument to the Defense, the Prosecution requests an opportunity to respond.

**8. Witnesses and Evidence**

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

**9. Attachments**

- A. Certificate of Service, dated 2 December 2014



# ATTACHMENT A

