

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

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**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 330A (GOV)**

**Government Response**

To Defense Motion To Compel Production  
of Complete, Unredacted Medical Records

8 January 2015

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**1. Timeliness**

This Response is timely under Military Commission Ruling AE 330-2. *See* AE 330-2 (granting the government motion to extend the time to respond to AE 330 (AAA) until 9 January 2015).

**2. Relief Sought**

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

**3. Overview**

The Prosecution respectfully requests that the Commission deny the Defense motion. To date, the Defense has been provided with records pertaining to the Accused's physical and mental health (medical records) dating from September 2006 through August 2014 with appropriate redactions of only the identities of medical-care providers consistent with Protective Order #2. All medical records dating from 13 August 2014 going forward will be provided to the Defense on a rolling basis, as has been the Prosecution's practice.

**4. Burden of Proof**

As the moving party, 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**

On 31 May 2011 and 25 January 2012, pursuant to the Military Commissions Act of 2009 (“M.C.A.”), charges in connection with the 11 September 2001 attacks were sworn against Khalid Shaikh Mohammad, Walid Muhammad Salih Bin ‘Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi. From 20 December 2012, the date which the Military Judge signed Protective Order #2, the Prosecution has been providing the Defense with updates to records pertaining to the Accused’s physical and mental health on an ongoing basis. The Defense acknowledges receipt of these very records. *See* AE330. On 12 December 2014, the Defense filed AE 330 (AAA), a “Motion to Compel Production of Complete, Unredacted Medical Records.”

**6. Law and Argument**

As a health-care provider, the government owns the medical records it generates and maintains, subject to the patient’s interest in the information those records contain. *See United States v. Abbey*, 63 M.J. 631, 634 n.4 (A. Ct. Crim. App. 2006) (concluding that the government owns “a military member’s medical and dental records”) (citing *United States v. Isler*, 36 M.J. 1061, 1064 n.7 (A.F. Ct. Mil. Rev. 1993)); *see also* 1 Health L. Prac. Guide § 4.7 (West 2013) (explaining the general rule that “the health care facility or provider owns the medical records subject to the patients’ interest in the information it contains”). Recognizing that an accused has an interest in the information the medical records contain and recognizing that the Prosecution has an obligation to produce discoverable information, the Prosecution has provided records regarding the Accused’s medical treatment to the Defense on a rolling basis since 22 April 2013 and will continue to do so.

The Defense contends these medical records are incomplete, alleging that “the production contains large gaps of time without records.” AE 330 (AAA) at 1. But not all types of medical records provided to the Defense have a standard operating procedure of documentation on a daily basis. This means that some types of the medical records are updated only when there is a cause

or need for something to be documented, thereby accounting for “gaps” in time the Defense speculates are missing from the medical records. The Prosecution believes it has disclosed all known records for those time frames. Even so, out of an abundance of caution, the Prosecution is currently coordinating with Joint Task Force, Guantanamo to re-examine all medical records of Mr. Ali and will provide the Defense with any medical records found within the time “gaps” listed in the Defense motion, should any exist.

The Prosecution’s production of the Accused’s medical records notwithstanding, the Health Insurance Portability and Accountability Act (“HIPAA”) and its “Privacy Rule” do not by their own terms apply to medical records of detainees held at Guantanamo Bay and thus do not confer on the Accused a right to their medical records—complete or otherwise. Regardless, even if HIPAA were to apply, “nothing in HIPAA is inconsistent with ownership belonging to the provider[,] as its Privacy Rule merely gives individuals a right of access—to inspect and copy—their records.” 1 Health L. Prac. Guide § 4.7 (West 2013) (citing 45 C.F.R. § 154.524).

The Prosecution has given, and will continue to give, the Defense access to their medical records consistent with the M.C.A., Rule for Military Commissions (“R.M.C.”) 701, Military Commissions Rule of Evidence (“M.C.R.E.”) 505, and Protective Order #2. The Defense fails to show that any purported right of access is absolute. Nor can it. To the extent their medical records contain classified information, the Prosecution will produce discoverable information contained in the medical records in accordance with the classified-information procedures set forth in Sections 949p-1 through 949p-7 of the M.C.A. and M.C.R.E. 505. Also, to date, the Prosecution has redacted only the identities of medical-care providers as a force-protection measure. Such redactions are not only appropriate given force-protection concerns, but also consistent with Protective Order #2. *United States v. Mohammad, et al.*, Protective Order #2 To Protect Unclassified Discovery Material Where Disclosure Is Detrimental to the Public Interest ¶ 7 (Dec. 20, 2012). Should the Defense articulate why access to a particular health care

provider is required pursuant to R.M.C. 701, the Prosecution will consider such requests on a case-by-case basis.

Further contrary to the Defense motion, the Commission's ruling in AE 200CC does not constitute a blanket order for production of the identity of every individual whose name has been redacted in the medical records received by the Defense. In AE 200M, counsel for Mr. Mohammad reviewed the medical records and asked for the production of twelve medical personnel to testify concerning their "first-hand knowledge of the physical and mental injuries Mr. Mohammad suffered as a result of being tortured by agents of the United States . . . and his attempts to report his torture." AE 200M at 1. The Commission denied the request for production of the witnesses in AE 200CC, instead granting what it considered a request for discovery for the identities of twelve specified medical personnel. AE 200CC at 3. The Commission's ruling is simply that the Commission, under those specific circumstances, saw the need for Defense to know the identities of those particular twelve individuals.

The Commission should look instead to its order in AE 332A. There, the Commission explained that "Rule of court 3.7 sets out the procedures and timing for filings before the Commissions. The procedures incorporate an appropriate period of time for responding parties to research and assess their position; provide time for necessary and, if possible, reconcile their differences with the opposing party." AE 322A at 2. Redactions of medical personnel are an appropriate and necessary force-protection measure consistent with Protective Order #2. As stated above, upon a request for discovery from the Defense, the Prosecution will consider, on an individual basis, requests for identification of medical personnel.

## **7. Conclusion**

The Commission should deny the Defense motion because the Prosecution has provided the Defense the Accused's medical records on a rolling basis since 22 April 2013 and will continue to do so, consistent with its discovery obligations, Protective Order #2, and classified-information procedures set forth in the M.C.A. and M.C.R.E. 505. The Prosecution will consider

individual discovery requests for the identification of medical personnel, but the blanket request in this motion for the identification of all medical personnel in the Accused's medical records is an insufficient request under R.M.C. 701, nor does it satisfy the proper procedure for witness requests under R.M.C. 703 or the Military Commission Trial Judiciary Rules for Court, as AE 332A requires.

**8. Oral Argument**

The Prosecution does not request oral argument on this motion but requests the opportunity to argue if the Defense is granted oral argument.

**9. Witness and Evidence:** None.

**10. Additional Information:** None.

**11. Attachments**

A. Certificate of Service, dated 8 January 2015.

Respectfully submitted,

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# ATTACHMENT A

