

UNITED STATES OF AMERICA

v.

KHALID SHEIKH MOHAMMAD, WALID  
 MUHAMMAD SALIH MUBARAK BIN  
 'ATASH, RAMZI BIN AL SHIBH, ALI  
 ABDUL-AZIZ ALI, MUSTAFA AHMED  
 ADAM AL HAWSAWI

AE330E (AAA)

**Mr. al Baluchi's Response**

To AE330D(GOV), Government Notice of  
 Efforts and the Status of Discovery Within  
 AE330(AAA), Defense Motion to Compel  
 Production of Complete, Unredacted Medical  
 Records

18 May 2016

1. **Timeliness:** This response is timely filed.
2. **Overview:**

Mr. al Baluchi filed a motion to compel on 12 December 2014.<sup>1</sup> In that motion, Mr. al Baluchi, having exhausted efforts to obtain certain, basic records through the normal course of discovery, requested production of all of his medical records without violation of his medical privacy by the prosecution. The government, through the prosecution, has produced an incomplete set of Mr. al Baluchi's medical records, in that the production contains large gaps of time without records, redaction of all medical care providers, and no imaging. The government's denial of access to evidence and witnesses violates the broad discovery rights afforded in a capital case, by military commission rules, and by HIPAA/Privacy Rule regulations, as well as the spirit of the military commission's standing order to reveal health care providers to Mr. Mohammad.<sup>2</sup>

The government's response<sup>3</sup> to Mr. al Baluchi's motion to compel was filed on 8 January

<sup>1</sup> AE330(AAA) Defense Motion to Compel Production of Complete, Un-redacted Medical Records.

<sup>2</sup> AE200CC Order, Defense Motion to Compel the Production of Witnesses to Testify Regarding the Medical Evidence of Mr. Mohammad's Torture and His Attempts to Report the Torture.

<sup>3</sup> AE330A Government Response to Defense Motion to Compel Production of Complete, Un-redacted Medical Records.

2015; Mr. al Baluchi's reply<sup>4</sup> to that response was filed on 15 January 2015. Prior to 15 January 2015, the last government production of medical records was on 1 October 2014. Since that date, the government has produced medical records to Mr. al Baluchi's counsel on nine occasions. Counsel will describe those productions in more detail below, but as a general matter, the government continues to disregard Protective Order #2<sup>5</sup> as well as governing statutes and constitutional principles, both in what it has and has not produced.

**3. Argument:**

The government's notice attempts to disguise its noncompliance with fundamental discovery obligations by the use of numbers that create the appearance of compliance.<sup>6</sup> The notice provides an 11-line update to the court that contains three references to page amounts in the thousands, along with the refrain of "rolling" discovery. These pages numbers are misleading because, when placed in context (which the government purposefully does not do), it is clear how little material has actually been provided. The way the notice is written is an attempt to convey a good faith effort on the government's part, when, in fact, very little of the discovery to which Mr. al Baluchi is entitled has been provided, the government has redacted some of the most relevant information contained in what it has provided, and the government has continued to ignore Mr. al Baluchi's right to medical privacy.

- A. *Production of the requested medical records has been minimal, disorganized, and incomplete.*

<sup>4</sup> AE330B(AAA) Defense Reply to Government Response to Defense Motion to Compel Production of Complete, Un-redacted Medical Records.

<sup>5</sup> This Commission has set forth the guidelines for discovery of unclassified information with force protection considerations. Those guidelines do not contemplate the government unilaterally redacting the identities of witnesses in discovery productions to defense counsel. See AE014H; MCRE 506; AE330B(AAA) at 5-6.

<sup>6</sup> The government has not contested Mr. al Baluchi's interest in these materials, or its obligation to produce them. Both such principles are clearly established, and have been thoroughly laid out in the prior filings in this series.

Almost all of what was specifically requested in AE330, and in all of the discovery requests that preceded it, has yet to be provided. Every single name or set of initials of personnel treating Mr. al Baluchi has been redacted from every single record received. There are no X-ray films or CT scans included in these productions; indeed, despite very specific requests, the only images the government has produced are colonoscopy photographs.

The documents the government has provided are completely disorganized; the dates are out of order, the pages are out of order, and the dates jump between months and years.<sup>7</sup> For example, records from various dates in one month in 2014 or 2015 can be located in multiple discovery productions. The Bates numbers for these productions do not reflect chronology or any kind of order.<sup>8</sup>

Medical records from the following time periods remain entirely absent from any government production of discovery:<sup>9</sup>

*Doctor's Routine Orders*

April-June 2008, June-July 2009, April 2011, December 2012, January 2013, April-December 2013, January-September 2014, July 2015-Present.

*Chronological Records of Medical Care*

August – December 2007, January – June 2008, July 2011, October 2011, December 2011, all of 2012 and 2013, January-July 2014, August-November 2015, March 2016-Present.

*PRN & Variable Dose Medication and Medication Administration Records*

<sup>7</sup> In addition, some of the pages are of very poor copy quality, making them largely unreadable because the print is too faint. Several of the pages' margins are also cut off, likely from the manner in which they were scanned into PDF form, thus removing the actual dates and some other important language from the documents.

<sup>8</sup> While the manner of production has made it challenging to review and analyze the records, it is nonetheless clear that countless records are missing.

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July 2008, July-December 2012, January-June 2013, September 2013, November 2013, March 2014, December 2014, January 2015, November 2015, March 2016-Present.

*Staff Psychiatry Progress Notes*

April 2008, June-June 2008, December 2008, February-April 2009, October 2009, March 2010, August-December 2010, all of 2011, all of 2012, all of 2013, January-September 2014, November-December 2014, January 2015, August-December 2015, January 2016, March 2016-Present.

*Patient Lab Inquiry/Radiological Examination Reports*

March-April 2007, October 2007, January-February 2008, April-September 2008, November-December 2008, April 2009, June-December 2009, January-April 2010, September-December 2010, January-February 2011, April 2011, June-December 2011, January-March 2012, May-July 2012, November-December 2012, January 2013, August 2013, November-December 2013, February-March 2014, June-December 2014, January 2015, April-May 2015, August-2015-Present.

*DSMP Sessions Documents*

September 2006 - October 2007; December 2008 - February 2009; October - December 2012; 2015 - present.

The government also produced, on 11 June 2015, a series of declassified vague summaries of medical records. These summaries span 2003-2006, and have been stripped of all personnel information and most of the specific medical information that would be of use to Mr.

<sup>9</sup> This list is not a complete compilation of missing records, because if the government produced *any* records for a given month, the month is not listed here.

al Baluchi.<sup>10</sup> Finally, the DIMS records that have been produced in discovery continue to confirm the withholding of existing medical records. Specifically, upon cross-reference, at least 173 actual medical, dental, psychological or DSMP appointments occurred between September 2006 and February 2016 that are entirely absent from the medical records that have been produced.

B. *The continued redaction of the names of medical personnel is a denial of Mr. al Baluchi's fundamental rights, and must be addressed.*

Mr. al Baluchi is entitled to un-redacted copies of his medical records which include the identities of medical personnel, consistent with the reasoning in a similar previous order by the Commission relating to Mr. Mohammad.<sup>11</sup> The prosecution may not “unreasonably impede” the defense’s access to witnesses,<sup>12</sup> and individuals identified in Mr. al Baluchi’s medical records are clearly witnesses who can provide additional information not present in those records – both as to the medical information contained in the records, but also as to the circumstances and substance of statements made by Mr. al Baluchi. The government’s reliance on “force protection” measures has been addressed by Mr. al Baluchi in AE330B, and, as noted in that filing, the related redactions are in violation of this Commission’s Protective Order #2 and Military Commission Rules of Evidence.<sup>13</sup>

Without the names of the personnel, the defense cannot interview, challenge credibility, or request an appearance of any medical witness. Further, it is impossible for the defense to clarify discrepancies, omissions, or ambiguities within key medical documents without access to the identities of the medical personnel who provided care and created the documents. Given the

<sup>10</sup> Mr. al Baluchi maintains his objection to these summaries, as described more fully in AE330B, fn. 11.

<sup>11</sup> Chapter 47A of Title 10 U.S.C. § 949(j), Mil. Comm. R. Evid. 505.

<sup>12</sup> R.M.C. 701(j).

poor quality, cut-off margins, disorganized structure, and unreadability of many of the documents described above, this is of critical importance in this case.

- C. *The government continues to disregard Mr. al Baluchi's fundamental right to a reasonable expectation of privacy.*

It is uncontroversial that an individual's medical records are entitled to a reasonable expectation of privacy which generally prohibits sharing medical information with nonmedical personnel.<sup>14</sup> While Mr. al Baluchi continues to be denied complete access to his own medical records, the prosecution appears to have unfettered access for purposes of trial preparation and redaction in contradiction to clear legal precedent.<sup>15</sup> The government continues to access, review, redact, and then provide certain such records directly to Mr. al Baluchi, contrary to the specific request of counsel that any such review and production go through JTF-GTMO.

- D. *The Commission should compel production, as well as compliance with Protective Order #2.*

Mr. al Baluchi is entitled to a complete copy of his medical records under *Brady v. Maryland*,<sup>16</sup> the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"),<sup>17</sup> the Fifth, Sixth and Eighth Amendments to the U.S. Constitution, and the statutory mandate of R.M.C. 701. Among other reasons cited in prior filings in this series, Mr. al Baluchi's complete medical records provide exculpatory evidence by establishing his mental and physical state during his interrogation by the FBI and DOD, and mitigating evidence through the demonstrable long-term effects of past mistreatment and current conditions of confinement.

<sup>13</sup> See AE014H; MCRE 506; AE330B(AAA) at 5-6.

<sup>14</sup> *Whalen v. Roe*, 429 U.S. 589, 599 (1977); *Nixon v. Adm'r of General Servs.*, 433 U.S. 425, 457 (1977); *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 529 (1990) (Blackmun, J., dissenting); *Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001).

<sup>15</sup> Accordingly, Mr. al Baluchi requested the production of the medical records directly from JTF-GTMO, rather than through the prosecution. AE330, Attachment B (DR-017A-AAA).

For years now, the government has affirmatively evaded its obligation to provide these materials to Mr. al Baluchi. The government has denied Mr. al Baluchi access to basic evidence and witnesses, in violation of the discovery rights guaranteed him by statute, by the United States Constitution, and by principles of fundamental fairness. Indeed, access to one's own medical records – the simplest of discovery requests – in a capital case, with a reasonable amount of privacy, is uncontroversial. The government's obstruction of these requests must be addressed. Mr. al Baluchi respectfully reiterates his request that the Commission compel the production of his complete and un-redacted medical records, so that Mr. al Baluchi and his counsel can prepare to effectively defend against the capital charges levied against him.

**4. Attachments:**

A. Certificate of Service.

Very respectfully,

//s//  
JAMES G. CONNELL, III  
Detailed Defense Counsel  
  
Counsel for Mr. al Baluchi

//s//  
STERLING R. THOMAS  
Lt Col, USAF  
Detailed Military Counsel

<sup>16</sup> 373 U.S. 83 (1963).  
<sup>17</sup> 42 U.S.C. § 1320d-1.

# Attachment A

**CERTIFICATE OF SERVICE**

I certify that on the 18th day of May, 2016, 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*