

UNCLASSIFIED//FOR PUBLIC RELEASE  
MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA

---

UNITED STATES OF AMERICA

v.  
KHALID SHEIKH MOHAMMAD,  
WALID MUHAMMAD SALIH  
MUBARAK BIN ATTASH,  
RAMZI BINALSHIBH,  
ALI ABDUL AZIZ ALI,  
MUSTAFA AHMED ADAM AL  
HAWSAWI

AE 333A (GOV)

**Government Response to  
Defense Motion  
to Compel Discovery**

29 December 2014

---

**1. Timeliness**

This Response is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.d.(1).

**2. Relief Requested**

The Prosecution respectfully requests that this Commission deny the Defense's requested relief.

**3. Burden of Proof**

As the moving party, the Defense must demonstrate by a preponderance of the evidence that the requested relief is warranted. Rule for Military Commissions (R.M.C.) 905(c)(1)-(2).

**4. Facts**

On 15 December 2014, Learned Counsel for Mr. Hawsawi filed AE 332 (MAH), an Emergency Motion for Appropriate Medical Intervention and Return of Legal Files. Within the motion, counsel requested the immediate return of Mr. Hawsawi's medical devices and medications; immediate and appropriate medical testing [REDACTED]

[REDACTED] release of all medical records to date to counsel and to Mr. Hawsawi's treating physician(s); a meeting with Mr. Hawsawi's physician(s); and an order to medical personnel to provide whatever immediate medical procedures are necessary under established

standards of care in order to remedy Mr. Hawsawi's severe and chronic (long-standing) medical conditions. Mr. Hawsawi also sought an order from the Commission directing JTF-GTMO to return Mr. Hawsawi's legal bins and to immediately cease further interference with his access to legal materials. *See* AE 332 (MAH).

On 15 December, Learned Counsel also filed AE 333 (MAH), a motion to compel discovery, requesting copies of all reports stemming from the [REDACTED] use of force on Mr. Hawsawi. The relief requested included: all DIMS entries, incident reports, witness statements, preliminary inquiries, AR 15-6 or Command Investigations, medical reports, and scars and marks reports; the identities or pseudonyms of the guard force personnel that were involved in Mr. Hawsawi's use of force; personnel or service records of members involved in the use of force, including all training records associated with their duties and responsibilities at the detention facility, and previous training received to carry out detention facility duties; copies of all video, photographic, and audio recordings of the use of force; copies of all video, photographic, and audio recordings of Mr. Hawsawi's medical examination and treatment following the use of force; and the ability to examine, document, and photograph [REDACTED] [REDACTED]. *See* AE 333.

On 24 December 2014, the Prosecution responded to all of the requested relief set forth in both AE 332 (MAH) and AE 333 (MAH) in its response, AE 332B (GOV)<sup>1</sup>.

## **5. Law and Argument**

As the legal arguments surrounding the requested forms of relief are primarily the same, the Prosecution filed a consolidated response to Defense Motions AE 332 (MAH) and AE 333 (MAH). *See* AE 332B (GOV). The Prosecution hereby incorporates its facts, law and argument from AE 332B (GOV) to this response. For purposes of clarity of the record, the Prosecution

---

<sup>1</sup> The Prosecution originally filed its response as AE 322 (GOV) in error, as Mr. Hawsawi's original motion is electronically named AE 322 (MAH) (although styled as AE 332 (MAH) and on the filings inventory as such).

reiterates its positions first set forth in AE 332B (GOV), as set forth below in response to the specific requests for discovery set forth in AE 333 (MAH).

**A. Copies of all reports generated stemming from the [REDACTED] use of force on Mr. Hawsawi**

The Prosecution is prepared to disclose copies of all generated reports stemming from the [REDACTED] use of force on Mr. Hawsawi as soon as they are processed; however, some of these items will likely remain classified following the classification review. If counsel for Mr. Hawsawi had signed the Memorandum of Understanding pursuant to AE 013DDD, the Prosecution could have provided these materials by now. However, since counsel has not signed the MOU, these materials are currently undergoing a classification review and redaction process that takes longer. As such, this request appears to be moot (or will shortly be mooted) as the Prosecution has not declined to produce this information and will do so prior to litigation of this issue.

**B. Videos of the Use of Force**

As set forth in Attachment B to AE 332B (GOV), videos were not made of the necessary and entirely proportionate physical restraint of the Accused, as it was not a planned Forced Cell Extraction, but rather an immediate measure prompted by Mr. Hawsawi biting, thrashing, and kicking the guards as they attempted to return him to his cell. As such, this request is moot. *See* Attachment B.

**C. Videos of his Medical Examination Following the Use of Force**

As set forth in Attachment B to AE 332B (GOV), Mr. Hawsawi refused all medical attention following the use of force. As such, this request is moot. *See* Attachment B.

**D. Visit to the Confinement Facility to Examine, Document, and Photograph [REDACTED]**

Counsel for Mr. Hawsawi have not utilized their one visit to the confinement facility set forth in the Military Judge's Order in AE 108J; issued almost 2 years ago. Defense counsel may utilize their visit to the confinement facility to examine, document, and photograph [REDACTED]



401 and “is not cumulative and . . . would contribute to a party’s presentation of the case in some positive way on a matter in issue.” *See* R.M.C 703(f)(1), Discussion. Where the defense fails to present an adequate theory of relevance to justify the production of a given piece of evidence, a military judge properly acts within his or her discretion in denying such a request. *See Graner*, 69 M.J. at 107-08.

Within this legal framework, the Military Judge should deny the motion to compel the identities of the Guard force personnel or their service and personnel records.

The Prosecution has respectfully declined<sup>2</sup> to provide the identities of the guard force personnel; however, counsel for Mr. Hawsawi will have a mechanism to identify the specific guards in the documents he will be provided once the other documents are processed for discovery. The Prosecution does not intend to call these guards to the stand to testify on this issue. As these individuals are not Prosecution witnesses, the Prosecution has no obligation to seek out their service records or personnel files.<sup>3</sup>

The Defense has set forth zero evidence in its motion to compel that this incident with Mr. Hawsawi was anything other than what the Prosecution’s evidence establishes (as set forth in Attachment B to AE 332B (GOV); an attack on the guards where his client bit, thrashed, and kicked them. Mr. Hawsawi is not on trial for kicking or biting the guards, and the guards are not

---

<sup>2</sup> The Prosecution respectfully declined in its conference on the motion; there was no formal Defense request for the discovery.

<sup>3</sup> As the Military Judge has ruled, the Prosecution has no obligation to produce impeachment materials for witnesses the Defense intends to call:

In accordance with 10 U.S.C. 949j (b)(2), Military Commissions Act of 2009, 'The trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence that reasonably tends to impeach the credibility of a witness whom the government intends to call at trial.'...Neither Rule for Military Commissions (R.M.C). 701 nor *Brady v. Maryland*, 373 U.S. 83 (1963) (withholding of exculpatory evidence by the Government is prohibited), requires the Prosecution to disclose, without scope, every single document requested by the Defense. This is particularly true when the discovery pertains to witnesses who are testifying not against the accused but as Defense witnesses.

*See* AE 071B (Order).

on trial for having to use force to subdue Mr. Hawsawi. The issue of the use of force was first raised in litigation by the Defense, not the Prosecution. While the Prosecution must be able to both refute claims set forth by the Defense with competent evidence, and provide the Military Judge with facts that should convince him to defer to JTF-GTMO on what are purely detention matters, it cannot be the case that one of the Accused can simply attack the guards, [REDACTED] and then be permitted to litigate the issue as if the guards are on trial for doing their job.

If this issue is allowed to turn into full-blown litigation on this incident, it creates a perverse incentive for all of these capitally-charged Accused to intentionally and continuously create incidents with the guard force to maintain this Military Commission in a perpetual state of pre-trial litigation on purely collateral matters. The Defense Motion fails to establish why the information it seeks is discoverable, and their motion to compel the identities of the guards, and their personnel and service records, should be denied.

**6. Oral Argument**

The Prosecution does not request oral argument. The Military Judge should deny the Defense Motion to Compel without granting oral argument.

**7. Witnesses and Evidence**

The Prosecution does not anticipate requiring the testimony of any witnesses.

**8. Attachments**

A. Certificate of Service, dated 29 December 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 29th day of December 2014, I filed AE 333A(GOV), the **Government Response** to Defense Motion to Compel Discovery with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

\_\_\_\_\_  
//s//

Clay Trivett  
Managing Deputy Trial Counsel  
Office of the Chief Prosecutor  
Office of Military Commissions