

**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 373D (GOV)

Government Response

To Defense Motion to Compel Government
to Produce Discovery Regarding Its
Intrusion into Attorney-Client Relationship

9 March 2016

1. Timeliness

The Prosecution timely files this Response pursuant to the Commission's ruling in AE 373-2(RUL)(Gov), which established that any response to AE 373 (AAA) and AE 373A (AAA) is due no later than 9 March 2016.

2. Relief Sought

The Prosecution respectfully requests the Commission deny AE 373A (AAA), the Defense Motion to Compel Government to Produce Discovery Regarding Its Intrusion into the Attorney-Client Relationship.

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)-(2).

4. Facts

On 25 August 2014, Defense counsel for Mr. Ali submitted a discovery request to the Prosecution requesting that the Government produce "all information and documents that relate to material seized from [Mr. Ali] on 14 August 2014, including but not limited to emails, memoranda, JDIMS entries, and the results of any document exploitation." AE 373A (AAA), Attachment B. The Defense stated that its request was predicated on the fact that "[o]n or about

14 August 2014 . . . in the ELC holding cells, JTF security escorts seized privileged notes prepared by [Mr. Ali],” and “did not return the notes until the following day.” *Id.*

On 22 September 2014, the Prosecution responded to the Defense discovery request and disclosed responsive materials. *Id.*, Attachment C. Additionally, the Prosecution stated that it would “continue to conduct its due diligence for other requested information.” *Id.*

On 18 March 2015, the Defense filed AE 018QQ (AAA Sup.), Mr. Ali’s Supplement to Defense Motion for Government to Show Cause for Its Violation of AE 018U. In filing their Supplement, the Defense asserted that a violation of the Commission’s order in AE 018U occurred on 14 August 2014 and attached documentation received from the Prosecution in support of this contention. AE 018QQ (AAA Sup), Attachments B, C.

On 24 July 2015, Defense counsel for Mr. Ali submitted a discovery request to the Prosecution requesting the following:

- (1) Please produce all documents and information relating to any seizure and exploitation of materials associated with Mr. Ali subsequent to 14 August 2014, to include any and all notes, reports, and investigations materials by whatever name.
- (2) Please provide all documents and information relating to any policy or guidance, formal or otherwise, relating to the seizure and exploitation of materials associated with Mr. Ali subsequent to 14 August 2014.
- (3) Please produce any seized material associated with Mr. Ali which has not already been returned to Mr. Ali.

See AE 373A (AAA), Attachment F at 2. The Defense stated that “on information and belief, JTF-GTMO seized additional legal materials on or about 15 March 2015 and 18 June 2015,” and that “at least one disk remains out of [Mr. Ali’s] control as of this writing.” *Id.*, Attachment F at 2.

On 18 August 2015, Defense counsel for Mr. Ali renewed their 25 August 2014 request for discovery and requested the Government “produce all information and documents that relate to material seized from [Mr. Ali] on 14 August 2014, including but not limited to emails,

memoranda, JDIMS entries, and the results of any documentation exploitation.” AE 373A (AAA), Attachment D. The Defense asserted that it was renewing its 25 August 2014 request due to the Prosecution’s statement in its 22 September 2014 response that it would “continue to conduct its due diligence for other requested information.” *Id.*

On 21 September 2015, the Prosecution responded to the Defense’s 18 August 2015 request for discovery and stated the following:

In response to the initial requests from the Defense, the prosecution responded: “Attached please find documents responsive to your request. Two copies are attached: MEA-DR-185-0001 through 0003 is for Counsel, MEA-DR-185-0004 through 0006 is releasable to the accused. The Prosecution will continue to conduct its due diligence for other requested information.”

Any additional documentation responsive to your request is contained in the DIMS entries previously provided to the Defense on 20 February 2015 with Bates Numbers MEA-10018-00003819 through MEA-10018-00003820. The Prosecution is not aware of any document exploitation relating to any documents seized from Mr. Ali on 14 August 2014. However, out of an abundance of caution, the Prosecution is conducting additional due diligence regarding this matter. If the Prosecution is made aware of any exploitation relating to this request it will apprise the Defense.

Id., Attachment E at 1. Since the date of this response, the Prosecution has not identified any further information/material responsive to the Defense discovery request.

On 22 September 2015, the Defense filed the instant motion requesting the “military commission . . . compel the prosecution to produce discovery related to its seizure[] of [Mr. Ali’s] privileged materials on approximately 14 August 2014, 15 March 2015, and 18 June 2015.” *Id.* at 1. The Defense argued that “[t]he government documents describing the seizures, the procedures followed or not followed, and government review of the privileged documents are clearly material to the preparation of the defense, and the military commission should order the government to produce them without further delay.” *Id.* at 1.

On 25 September 2015, the Prosecution responded to the Defense's 24 July 2015 discovery request and disclosed responsive information to the Defense. *See* Attachment B.¹

On 1 October 2015, the Prosecution filed AE 373-1 (EXT)(GOV), Government Motion for Extension of Time to File a Response to AE 373 (AAA), Defense Motion to Dismiss for Government Intrusion into Attorney-Client Relationship, and AE 373A (AAA), Defense Motion to Compel Government to Produce Discovery Regarding Its Intrusion into Attorney-Client Relationship. Within its Motion, the Prosecution stated that "to better provide focus to the underlying issues contained within [AE 373 (AAA) and AE 373A (AAA)], it is necessary for the Prosecution to file an *ex parte* filing with the Military Judge regarding the 18 June 2015 seizure of materials." AE 373-1 (EXT)(GOV) at 2. The Prosecution, therefore, requested that the Commission grant "an extension of time to file a response to AE 373 (AAA) and AE 373A (AAA) until fourteen (14) calendar days after the Military Judge's resolution of the Prosecution's impending *ex parte* filing." *Id.* at 2.

On 24 February 2016, the Commission issued AE 365I, an Under Seal order. The Prosecution incorporates by reference the Commission's findings and conclusions contained within AE 365I.

On that same day, the Commission issued AE 373-2 (RUL)(Gov) establishing that any response to AE 373A (AAA) is due to the Commission no later than 9 March 2016.

¹ Within the instant motion, the Defense asserts that "[on] or about 15 March 2015, the government seized 44 small pages (consistent with a small legal pad) and 54 full-size pages of written materials created by Mr. Ali." AE373A (AAA) at 6. The Government has no record of any search of Mr. Ali's cell that resulted in a seizure of written materials occurring on 15 March 2015. Rather, it is believed that the material in question was seized on 30 January 2015 and subsequently returned to a Defense counsel representative on 2 April 2015. The Prosecution has previously provided a JTF-GTMO guard statement and an Evidence/Property Custody Document relevant to the 30 January 2015 search. *See* MEA-DR222-AAA-000021-24.

5. Law and Argument

I. **The Government's Discovery Obligations Are Defined By The Relevant Rules and Statutes**

The Military Commissions Act of 2009 ("M.C.A.") affords the Defense a reasonable opportunity to obtain evidence through a process comparable to other United States criminal courts. *See* 10 U.S.C. § 949j. Pursuant to the M.C.A., the Rules for Military Commissions ("R.M.C.") require that the government produce evidence that is material to the preparation of the defense. Specifically, R.M.C. 701(c)(1) requires the Prosecution to permit defense counsel to examine,

[a]ny books, papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, which are within the possession, custody, or control of the Government, the existence of which is known or by the exercise of due diligence may become known to trial counsel, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial.

See R.M.C. 701(c)(1). However, notwithstanding this requirement, no authority grants defendants an unqualified right to receive, or compels the government to produce, discovery merely because the defendant has requested it. Rather, the government's discovery obligations are defined by the relevant rules and statutes. *See generally United States v. Agurs*, 427 U.S. 97, 106 (1976) (noting that "there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor").

A criminal defendant has a right to discover certain materials, but the scope of this right and the government's attendant discovery obligations are not without limit. For example, upon request, the government must permit the defendant to inspect and copy documents in the government's possession, but only if the documents meet the requirements of R.M.C. 701. Similarly, due process requires the government to disclose evidence favorable to the accused, but only when the evidence is "material" to guilt or punishment, *see Brady v. Maryland*, 373 U.S. 83, 87 (1963), or may be used to impeach the credibility of government witnesses, *see Giglio v. United States*, 405 U.S. 150, 154 (1972).

Military courts have adopted a standard by which “relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” *United States v. Graner*, 69 M.J. 104, 107-108 (2010). In instances where the Defense did not present an adequate theory of relevance to justify the compelled production of evidence, C.A.A.F. has applied the relevance standard in upholding denials of compelled production. *See Graner*, 69 M.J. at 107-109. A defense theory that is too speculative, and too insubstantial, does not meet the threshold of relevance and necessity for the admission of evidence. *See United States v. Sanders*, 2008 WL 2852962 (A.F.Ct.Crim.App. 2008) (citing *United States v. Briggs*, 46 M.J. 699, 702 (A.F.Ct.Crim.App. 1996)). A general description of the material sought or a conclusory argument as to its materiality is insufficient. *See Briggs*, 46 M.J. at 702 (citing *United States v. Branoff*, 34 M.J. 612, 620 (A.F.C.C.A. 1992) (remanded on other grounds), citing *United States v. Cadet*, 727 F.2d 1453, 1468 (9th Cir. 1984)).

II. The Prosecution Has Disclosed to Defense Counsel Material Responsive To Their Discovery Requests

The Prosecution takes its discovery obligations seriously and will produce any/all documentation/material requested by the Defense that is material to the preparation of the Defense or is otherwise one of the enumerated categories of discoverable information under R.M.C. 701 and other applicable law. In consonance with this, the Prosecution, in this instance, disclosed all responsive information relevant to the Defense discovery requests referenced in the instant motion on 22 September 2014, 20 February 2015, and 25 September 2015, excepting certain materials subject to the Commission’s order in AE 365I.

With regards to those materials subject to AE 365I, the Defense has not demonstrated within the instant motion that the information contained within the materials “would be noncumulative, relevant, and helpful to a legally cognizable defense, rebuttal of the prosecution’s case, or to sentencing” *See M.C.R.E. 505(f)(1)(B)*. Further, the Prosecution posits that the content of the Commission’s order in AE 365I “provides the accused with

substantially the same ability to make a defense as would discovery of or access to,” *see* M.C.R.E 505(f)(2)(C), the *ex parte* information² that is subject to the provisions of AE 365I.

As such, where the Prosecution has already disclosed all responsive information that is subject to the instant motion, the Commission should deny the Defense Motion to Compel.

6. Conclusion

As set forth above, the Prosecution takes its discovery obligations seriously and will produce any documentation/material requested by the Defense that is material to the preparation of the Defense or is otherwise one of the enumerated categories of discoverable information under R.M.C. 701 and other applicable law. In this case, where the Prosecution has previously disclosed all responsive information to the Defense, the Commission should deny the Defense Motion.

7. Oral Argument

The Defense requests oral argument. The Prosecution objects under Trial Judiciary Rule of Court 3.9 because the Commission need not resolve any issues of fact to resolve the Motion. If the Commission nonetheless grants oral argument to the Defense, the Prosecution reserves the opportunity to be heard.

8. Witnesses and Evidence

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

9. Additional Information

The Prosecution has no additional information.

² The Prosecution incorporates by reference the Prosecution’s law and argument contained within AE 365F (GOV), the Government’s Response to Mr. Ali’s Motion to Unseal AE 365 (GOV) and AE 365A.

10. Attachments

- A. Certificate of Service, dated 9 March 2016
- B. Response to Defense Discovery Request (DR-222-AAA), dated 25 September 2015

Respectfully submitted,

//s//
Jeff Groharing
Trial Counsel

Christopher M. Dykstra
Major, USAF
Assistant Trial Counsel

Mark Martins
Chief Prosecutor
Military Commissions

ATTACHMENT A

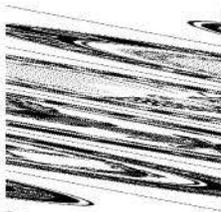
CERTIFICATE OF SERVICE

I certify that on the 9th day of March 2016, I filed **AE 373D (GOV), Government Response To Defense Motion to Compel Government to Produce Discovery Regarding Its Intrusion into Attorney-Client Relationship with Counsel with the Office of Military Commissions Trial Judiciary** and I served a copy on counsel of record.

//s//

Jeff Groharing
Trial Counsel
Office of the Chief Prosecutor
Office of Military Commissions

ATTACHMENT B



OFFICE OF THE
CHIEF PROSECUTOR

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

25 September 2015

MEMORANDUM FOR Defense Counsel for Mr. Ali

SUBJECT: Prosecution Final Response to 24 July 2015
Request for Discovery (DR-222-AAA)

1. The Prosecution received the Defense request for discovery on 24 July 2015. The Prosecution hereby responds to the Defense request.

2. The Defense requests production of the following:

(1) Please produce all documents and information relating to any seizure and exploitation of materials associated with Mr. al Baluchi subsequent to 14 August 2014, to include any and all notes, reports, and investigation materials by whatever name.

(2) Please provide all documents and information relating to any policy or guidance, formal or otherwise, relating to the seizure and exploitation of materials associated with Mr. al Baluchi subsequent to 14 August 2014.

(3) Please produce any seized material associated with Mr. al Baluchi which has not already been returned to Mr. al Baluchi.

Attached please find materials responsive to your request, Bates numbers MEA-DR222-AAA-000064 and MEA-DR222-AAA-000074 through MEA-DR222-AAA-000079. Additional classified materials responsive to this request were delivered to you on 25 September 2015 via e-mail and were stamped with Bates numbers MEA-DR222-AAA-000001 through MEA-DR222-AAA-000063 and MEA-DR222-AAA-000065 through MEA-DR222-AAA-000073.

Respectfully submitted,

//s//

Nicole A. Tate
Assistant Trial Counsel

UNCLASSIFIED//FOR PUBLIC RELEASE

Index for Material Responsive to DR222-AAA

Bates Begin	Bates End	Classification
MEA-DR222-AAA-000001	MEA-DR222-AAA-000032	S//NF
MEA-DR222-AAA-000033	MEA-DR222-AAA-000036	S//NF
MEA-DR222-AAA-000037	MEA-DR222-AAA-000063	S//NF
MEA-DR222-AAA-000064	MEA-DR222-AAA-000064	FOUO
MEA-DR222-AAA-000065	MEA-DR222-AAA-000070	S//NF
MEA-DR222-AAA-000071	MEA-DR222-AAA-000072	S//NF
MEA-DR222-AAA-000073	MEA-DR222-AAA-000073	S//NF
MEA-DR222-AAA-000074	MEA-DR222-AAA-000079	FOUO