

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

UNITED STATES OF AMERICA v. KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ‘ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI	AE 375L RULING Defense Motion to Compel Production of Discovery Requested on 1 August 2014 Concerning Interrogations and Other Matters 26 July 2017
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1. Mr. Hawsawi filed a motion¹ to compel production statements² made by himself, and other Accused, and “especially to produce original recordings and notes from the interrogations of the accused between 2003 and 2006; or, if that evidence has been lost or destroyed, evidence concerning that destruction or loss.” In the supplement attention was devoted to written statements by Mr. Mohammad, first identified in Attachment B of AE 375, containing information pertaining to Mr. Hawsawi. The Government response³ requested the Commission deny the motion predicated on the intent of the Government to provide all relevant discovery. In reply,⁴ Mr. Hawsawi reiterated his demand for due diligence on the part of the Government in seeking out and providing discovery that “must” exist.

2. Prior to the filing of Mr. Hawsawi’s motion, the Commission had directed⁵ the Government to file a consolidated litigation plan for all motions pertaining to the Central Intelligence Agency's

¹ AE 375 (MAH), Defense Motion to Compel Production of Discovery Requested on 1 August 2014 Concerning Interrogations and Other Matters, filed 1 October 2015; supplemented by AE 375 (MAH Sup), Defense Supplement to Motion to Compel Production of Discovery Requested on 1 August 2014 Concerning Interrogations and Other Matters, filed 2 May 2017.

² *Id.*, Attachment B.

³ AE 375A (GOV), Government Response To Defense Motion to Compel Production of Discovery Requested on 1 August 2014 Concerning Interrogations and Other Matters, filed 15 October 2015.

⁴ AE 375B (MAH), Reply to Government Response on Motion to Compel Production of Discovery Requested on 1 August 2014 Concerning Interrogations and Other Matters, filed 22 October 2015.

⁵ Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al* (2) Hearing Dated 12/11/2015 from 1:04 PM to 3:02 PM, p.10126.

(CIA) former Rendition, Detention, and Interrogation (RDI) Program. The Government response⁶ sought consolidation of motions to compel discovery including AE 375 and AE 308.⁷ The Commission approved the litigation plan and consolidation of discovery into a 10 point “construct.”⁸

3. In fulfilling this structured discovery plan, the Government served notice, in a series of motions,⁹ as to their intent to invoke procedures pursuant to Military Commissions Act 2009 § 949p-4 and Military Commission Rule of Evidence (M.C.R.E.) 505(f) in proposing summaries or substitutions as to statements of the Accused and requesting the Commission authorize the Government to produce to the Defense these summaries and substitutions as being responsive to the Government’s discovery obligations. After reviewing the Government submissions, the Commission granted the motions of the Defense to compel discovery pertaining to documents and information relating to the CIA RDI program and further granted the motions of the Government to invoke the procedures of M.C.R.E. 505(f) to propose summaries or substitutions in lieu of classified information pertaining to the RDI program.¹⁰

4. In the course of discovery being provided in accord with AE 397F, Mr. Hawsawi renewed¹¹ his effort to obtain discovery and filed a motion to compel testimony¹² from Dr. James E. Mitchell, Ph.D., to “confirm” statements in a book he authored. His testimony “provides a unique opportunity to obtain *informed* and direct answers about the existence and

⁶ AE 397 (GOV), Government Proposed Consolidation of Motions to Compel Information Relating to the CIA's Former Rendition, Detention, and Interrogation Program, filed 28 December 2015.

⁷ AE 308 (AAA), Defense Motion to Compel Discovery Regarding CIA Rendition, Detention and Interrogation Program, filed 30 June 2014.

⁸ AE 397F, Trial Conduct Order, Government Proposed Consolidation of Motions to Compel Information Relating to the CIA's Former Rendition, Detention, and Interrogation Program, dated 5 April 2016.

⁹ AE 308 *et seq.*

¹⁰ *Id.*

¹¹ See: Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Motions Hearing Dated 5/16/2017 from 3:22 PM to 4:07 PM p.15934.

¹² AE 375G (MAH Sup), Defense Motion to Compel Production of Dr. James Mitchell to Give Evidence Related to AE 375, filed 8 June 2017.

destruction of interrogation recordings.” The response¹³ of the Government requested the Commission deny the motion to compel testimony by Dr. Mitchell and provided his declaration that

I have no knowledge regarding the existence (either presently or at any time) of any videotapes, audiotapes, or transcripts of any videotapes or audiotapes of any of the accused in the case of *United States v. Mohammad* et al. during their interrogation, debriefing or at any other time.¹⁴

In reply,¹⁵ Mr. Hawsawi asserted Dr. Mitchell did not answer whether the interrogations and “debriefings” of the Accused were recorded in any way and, if so, what happened to the recordings.

5. Mr. Hawsawi requested argument in his original motion (AE 375). The Commission heard classified oral argument on 17 May 2017.¹⁶ In accordance with Rule for Military Commissions 905(h), the decision to grant oral argument on a written motion is within the sole discretion of the Military Judge. In this instance, further oral argument is not necessary to the Commission’s consideration of the issues before it. The Defense request for further oral argument in conjunction with AE 375 is **DENIED**. As to the motion to compel testimony by Dr. Mitchell, argument was conducted on 16 May 2017 (before the motion was formally filed).¹⁷

6. Findings and Ruling.

a. Dr. Mitchell, in his declaration, states he has no knowledge of any “videotapes, audiotapes, or transcripts” pertaining to the Accused. The Government, as officers of the court, asserted the CIA did not tape or otherwise memorialize the interrogations or debriefings except

¹³ AE 375I (GOV), Government Response To Defense Motion to Compel Production of Dr. James Mitchell to Give Evidence Related to AE 375, filed 7 July 2017.

¹⁴ *Id.*, Attachment B.

¹⁵ AE 375J (MAH), Defense Reply to Government Response to Motion to Compel Production of Dr. James Mitchell to Give Evidence Related to AE 375, filed 13 July 2017.

¹⁶ See AE 375F, Ruling Pursuant to Military Commission Rule of Evidence 505(h) and Rule for Military Commissions 806(b)(2), dated 17 May 2017.

¹⁷ Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed* et al. (2) Motions Hearing Dated 5/16/2017 from 3:22 PM to 4:07 PM p.15934.

through written reports;¹⁸ moreover, they have exercised due diligence in providing discovery in accord with AE 375 via AE 308 *et seq.* The Motion of Mr. Hawsawi to compel testimony by Dr. Mitchell in this motion (AE 375G) is **DENIED**.

b. The Government has exercised due diligence in trying to locate the original, Arabic version, of a statement made by Mr. Mohammad.¹⁹ The Defense has been provided with the English translation which affords them the opportunity to appropriately use it at trial for Mr. Hawsawi's defense. The Defense motion to compel further discovery regarding this statement is **DENIED**.

c. The Defense motion to compel discovery (AE 375) is **GRANTED**, subject to the Commission's authorizations to the Government to produce its proposed redacted or summarized versions in lieu of the original documents. By so doing, the Government will have met its discovery obligations in regard to these materials.²⁰

So **ORDERED** this 26th day of July, 2017.

//s//
JAMES L. POHL
COL, JA, USA
Military Judge

¹⁸ Unofficial/Unauthenticated Transcript of the *Khalid Shaikh Mohammed et al.* (2) Motions Hearing Dated 5/16/2017 from 3:22 PM to 4:07 PM p.15950.

¹⁹ Attachment E, AE 375 (MAH Sup).

²⁰ *Id.*