

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 394A (GOV)

Government Response
To Defense Motion to Compel Production
of Unredacted ICRC Letters (DR-235)

21 December 2015

1. Timeliness

The Prosecution timely files this Response pursuant to Military Commissions Trial Judiciary Rule of Court ("R.C") 3.7.

2. Relief Sought

The Prosecution respectfully requests the Commission deny without oral argument the requested relief contained within AE 394 (WBA), the Defense Motion to Compel Production of Unredacted ICRC Letters (DR-235).

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

The Commander, Joint Task Force-Guantanamo ("JTF-GTMO"), has been dutifully charged with the responsibility for the effective, safe, and secure conduct of detention operations at Naval Station Guantanamo Bay, Cuba; the force protection of over 1,600 assigned service members and civilians; and, the protection of national security information associated with the command's mission. *See* AE 008A at 11. JTF-GTMO satisfies these security responsibilities in

part by controlling the information and communications entering and exiting the detention facility and routinely inspecting information and other material for contraband. *Id.*

As alleged by the Defense, on or about July 2015, Mr. Bin ‘Attash received three letters through the International Committee of the Red Cross and Red Crescent (“ICRC”) purportedly sent to him by his sister [REDACTED] and/or his brother [REDACTED]. *See* AE 394 (WBA) at 2. The non-legal correspondence was substantively screened and minimally redacted before delivery to Mr. Bin ‘Attash, in accordance with JTF-GTMO standard operating procedures for non-legal mail. *See id.*, Attachment D.

On 9 November 2015, Defense counsel for Mr. Bin ‘Attash served the Prosecution with a discovery request pertaining to the ICRC letters received by Mr. Bin ‘Attash. *Id.*, Attachment B. Specifically, the Defense requested that the Prosecution produce “unredacted copies of [the] letters from his sister [REDACTED] and brother [REDACTED].” *Id.*, Attachment B. At the time of its request, the Defense reasoned that the unredacted letters were necessary “[i]n order to prove the arbitrary nature of JTF-GTMO’s non-legal mail screening process, which denies Mr. Bin ‘Attash the ability to exercise his right to communicate with family members and, in turn, threatens his ability to participate in the preparation of his defense. . . .” *Id.*, Attachment B.

On 10 November 2015, the Prosecution timely responded and respectfully denied the Defense discovery request. *See id.*, Attachment C. In doing so, the Prosecution noted that “Defense counsel’s request fails to meet [the] burden under R.M.C. 701 to establish the relevance and materiality of redacted information existing in non-legal letters from the Accused’s siblings.” *Id.*, Attachment C at 1. Further, the Prosecution stated that “[s]ince non-legal mail is, by definition, not related to the legal proceedings, the Defense cannot cite to any specific theory of relevance that would reasonably warrant production of the unredacted copies of non-legal mail from siblings to the Accused, pursuant to R.M.C. 701.” *Id.*, Attachment C at 2.

On 14 December 2015, the Defense filed the instant motion, AE 394 (WBA), requesting that “the Commission compel the Government to produce unredacted copies of letters from family members sent to him through the International Committee of the Red Cross and Red

Crescent (“ICRC”).” *See* AE 394 (WBA). The Defense represents that the letters are relevant because “[i]t is well-established that defense counsel need to identify and develop potential witnesses at trial and sentencing.” *Id.* at 2. The Defense further asserts that “[c]orrespondence from the family to the defendant is an established avenue to accomplish this goal” and, therefore, the letters are “relevant and material to the defense.” *Id.* at 2.

5. Law and Argument

I. **The Prosecution Will Comply With Its Discovery Obligations As Informed By Applicable Statutory and Case Law**

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) (emphasis added). 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 discovery 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 that 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, United States Court of Appeals for the Armed Forces ("C.A.A.F.") has applied the relevance standard in upholding denials of compelled production. *See id.* 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 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)).

As the Defense has failed to adequately demonstrate the relevancy and materiality of the requested materials to an issue before this Commission, the Commission should deny the Defense Motion, without oral argument.

II. The Defense Has Failed to Demonstrate the Relevancy and Materiality of the Redacted Information

Without question, the Prosecution takes its discovery obligations seriously and will produce, after exercising its due diligence, any book, paper, document, photograph, or any other evidence, which is within the possession, custody or control of the Government, and *is material*

to the preparation of the Defense. See R.M.C. 701(c)(1). However, the Prosecution has no obligation, nor can the Defense demonstrate otherwise, to search for, examine, and disclose non-legal communications between third parties and the Accused that bear no apparent relevancy (and the Defense has demonstrated none) to any issue before this Commission. See AE 018U. While it is quite evident that Defense counsel for Mr. Bin ‘Attash are interested in discovering the nature of non-legal communications that their client may have with outside third-parties, of which JTF-GTMO redacts in accordance with its standard operating procedures, the Defense has offered nothing more than bald conclusory arguments and legal talismans (see “development of mitigation evidence”) in an attempt to support their request. This Commission must and should demand more before concluding that the Defense have satisfied their burden and demonstrated that redacted portions of Mr. Bin ‘Attash’s non-legal mail are both relevant to an issue before this Commission and material to the preparation of his Defense.

Attempting to satisfy their burden within the instant Motion, Defense counsel for Mr. Bin ‘Attash argue that unredacted non-legal correspondence between Mr. Bin ‘Attash and outside third parties, namely with members of his own family, is discoverable because “[i]t is well-established that defense counsel need to identify and develop potential witnesses at trial and sentencing,” AE 394 (WBA) at 2, and that doing so “is required in order to provide effective assistance of counsel” *Id.* at 5 (citing R.M.C. 701(c)(1); 703(f)(1)). However, in making this conclusory argument, the Defense fails by every measurable standard to actually address the relevancy and materiality of the redacted information itself that they are now requesting this Commission to compel. See *Briggs*, 46 M.J. at 702 (“A general description of the material sought or a conclusory argument as to their materiality is insufficient”). Indeed, the Defense have in their possession all the information they require “to identify and develop” the authors of the letters as potential witnesses.

While not acknowledged within the motion itself, Defense counsel for Mr. Bin ‘Attash have admitted within their own discovery request that they have already identified that the ICRC letters are “from his sister [REDACTED] and brother [REDACTED]”

██████████” AE 394 (WBA), Attachment B at 1. Consequently, revealing information contained within JTF-GTMO’s *de minimis* redactions will not provide additional information that the Defense may use “to identify and develop potential witnesses at trial and sentencing” beyond that which is already in their possession. Certainly, if Counsel for Mr. Bin ‘Attash truly desire to identify and develop witnesses for mitigation purposes they can utilize the information already in their possession and the substantial resources they have at their disposal and make positive contact with the Accused’s family members. The redacted information simply will neither help them nor will the fact that the information is redacted hinder them in this pursuit. As the Defense have not, and cannot, provide any substantive argument demonstrating otherwise,¹ this Commission should deny the Defense Motion.

III. The Accused Should Not Be Permitted to Circumvent The JTF-GTMO Non-Legal Mail Process Through The Discovery Process

JTF-GTMO’s redactions of ICRC correspondence, which is by definition non-legal and, as such, unrelated to this Commission, was done to prevent the Accused from receiving whatever message caused them concern. Such redactions are solely a penological function within the purview of the detention facility, and not this Commission.

¹ The Prosecution notes that the Defense only provide the following substantive arguments in support of their request seeking discovery of the information JTF-GTMO redacted from the ICRC letters to Mr. Bin ‘Attash:

-“The unredacted letters sent by his family are relevant and necessary for defense counsel to identify and develop witnesses and potential mitigation and assist Mr. Bin ‘Attash in his defense at trial and, if need be, sentencing.” AE 394 (WBA) at 1.

-“Mr. Bin ‘Attash and defense counsel have limited contact with his family, who reside in Saudi Arabia. It is well-established that defense counsel need to identify and develop potential witnesses at trial and sentencing. Correspondence from the family to the defendant is an established avenue to accomplish this goal. The correspondence, therefore is relevant and material to the defense.” *Id.* at 2.

-“Furthermore, as explained above, correspondence by family members is one of only a few methods by which defense counsel may develop mitigation evidence. As the development of mitigation is required in order to provide effective assistance of counsel, it is, by definition, relevant and material to the preparation of the defense.” *Id.* at 5 (citing R.M.C. 701(c)(1); 703(f)(1)).

The Prosecution and JTF-GTMO have limited resources and cannot expend such resources chasing down every non-legal document the Defense requests in discovery. Nothing prevents Defense counsel from conducting his or her own mitigation investigation with Mr. Bin ‘Attash’s family members. The redacted letters, which clearly implore the authors to discuss “family news only,” are not the sole source of such evidence. *See id.*, Attachment D. However, the Accused cannot be allowed to circumvent JTF-GTMO’s non-legal mail policy by requiring the government to provide the un-redacted letters to his attorney, and put his attorneys in the position where they can simply inform him of messages that were redacted. Taking the Defense argument that such information constitutes “mitigation evidence” to its logical conclusion, the Prosecution would have to provide un-redacted copies of all non-legal documentation in its possession if the Defense simply deigned it as “mitigation evidence.” That is not the standard, and the case would never be tried if it was.

While it may be true that the Prosecution is forced to expend resources either way (by either having to request the un-redacted ICRC materials from JTF-GTMO and put it through the discovery and classification process, or in answering this motion) it must still insist on only providing information required under R.M.C. 701, due to the unending collateral litigation such documents will inevitably spawn.² As such, the Defense must and should be forced to articulate that there would be some sound legal basis for their claim that the Commission has cognizance over JTF-GTMO’s non-legal mail screening process, or that Mr. Bin ‘Attash, an Alien Unlawful Enemy Belligerent, has some cognizable right before this Commission to unfettered written communication with family members (the denial of which threatens his ability to participate in the preparation of his defense). The Defense should be forced to establish said legal rights, via a

² The Defense threatens such litigation over the “arbitrary nature” of JTF-GTMO’s redaction policies in its Discovery request. *See* AE 394 (WBA), Attachment B (“In order to prove the arbitrary nature of JTF-GTMO’s non-legal mail screening process, which denies Mr. bin ‘Atash the ability to exercise his right to communicate with family members and, in turn, threatens his ability to participate in the preparation of his defense, Mr. Bin ‘Attash requests unredacted copies of these letters from his sister [REDACTED] and brother [REDACTED]”)

separate motion, before the Military Commission entertains this Defense request that it embroil itself in yet another JTF-GTMO detention matter.

6. Conclusion

The Prosecution takes its discovery obligations seriously and will produce any relevant documentation requested by the Defense that is material to the preparation of the Defense or is otherwise one of the enumerated categories of discovery information under R.C.M. 701 and other applicable law. However, where the Defense merely offers conclusory arguments that material is relevant and material to mitigation, and fails to demonstrate that the information sought is actually mitigating, the Prosecution will dutifully object, as it does here, and request that the Commission deny the Defense Motion, without oral argument.

7. Oral Argument

The Prosecution does not request oral argument. Further, the Prosecution strongly posits that this Commission should dispense with oral argument as the facts and legal contentions are adequately presented in the material now before the Commission and argument would not add to the decisional process. However, if the Military Commission decides to grant oral argument to the Defense, the Prosecution requests an opportunity to respond.

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.

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 21st day of December 2015, I filed AE 394A (GOV) **Government Response To Defense Motion to Compel Production of Unredacted ICRC Letters (DR-235)** with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

 //s//

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