

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 BINALSHIBH;
ALI ABDUL AZIZ ALI;
MUSTAFA AHMED ADAM
AL HAWSAWI**

AE 409A (GOV)

Government Response

To Defense Motion to Compel Discovery of
Documents Captured During the Raid in
Which Osama bin Laden Was Killed

7 March 2016

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 or hold in abeyance AE 409 (WBA), the Defense Motion to Compel Discovery of Documents Captured During the Raid in Which Osama bin Laden Was Killed, as it is premature.

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 11 March 2015, Defense counsel for Mr. Bin 'Attash submitted a discovery request to the Prosecution requesting that the Government produce any books, documents, papers, photographs, videos, tangible objects, or other materials which are within the possession or control of the Government or any agency of the Government from the raid executed in Abbottabad, Pakistan that resulted in the death of Osama bin Laden (hereinafter "Abbottabad raid") and which:

- a. Reference, either explicitly or implicitly, Mr. Bin 'Attash or any co-accused, to include but not limited to:
 - i. His role or position in the Al Qaeda organization.
 - ii. Work he did on behalf of the organization at any time.
 - iii. Communications between Mr. Bin 'Attash and members or leaders of the organization.
 - iv. Any of the aforementioned information in relation to members of Mr. Bin 'Attash's family, to include his father and brothers.
- b. Includes, in part or in full, information about the conception, planning, execution, aftermath, or otherwise related to an Al Qaeda conspiracy for a planned "second wave" attack on the United States after the attacks of September 11, 2001, regardless if Mr. Bin 'Attash is referenced in the document.
- c. Includes, in part or in full, information about the conception, planning, execution, aftermath, or otherwise related to an Al Qaeda conspiracy for the attack that occurred on September 11, 2001 in New York, NY, Washington, DC, and Shanksville, PA, regardless if Mr. Bin 'Attash is referenced in the document.
- d. Includes, in part or in full, information about the conception, planning, execution, aftermath, or otherwise related to an Al Qaeda conspiracy for the considered Asia part of attacks of September 11, 2001, regardless if Mr. Bin 'Attash is referenced in the document.
- e. Includes, in part or in full, information about the conception, planning, execution, aftermath, or otherwise related to an Al Qaeda conspiracy for the attack on the USS Cole that occurred on October 12, 2000 in Aden, Yemen, regardless if Mr. Bin 'Attash is referenced in the document.
- f. Includes, in part or in full, information about the conception, planning, execution, aftermath, or otherwise related to an Al Qaeda conspiracy for the failed attempt to attack the USS The Sullivans on January 3, 2000 in Aden, Yemen, regardless if Mr. Bin 'Attash is referenced in the document.
- g. Includes, in part or in full, information about the conception, planning, execution, aftermath, or otherwise related to an Al Qaeda conspiracy for the attack on the US Embassies in Dar es Salaam, Tanzania, and Nairobi, Kenya that occurred on August 7, 1998, regardless if Mr. Bin 'Attash is referenced in the document.

AE 409 (WBA), Attachment B at 1-2. The Defense asserted that “Osama bin Laden is an uncharged co-conspirator in this case and was the head of the Al Qaeda organization, making the documents uncovered in the Abbottabad raid material to the preparation of the defense.” *Id.*, Attachment B at 1.

On 19 March 2015, in accordance with its obligations under R.M.C. 701(c), the Prosecution diligently responded and stated:

The Prosecution continues to review information in its possession, custody, or control for information that is relevant and “material to the preparation of the defense,” R.M.C. 701(c); that is exculpatory and reasonably tends to negate the Accused’s guilt of an offense charged, reduce his degree of guilt “with respect to an offense charged,” or reduce his punishment, if any, R.M.C. 701(e)(1); that “reasonably tends to impeach the credibility of a witness whom the [Prosecution] intends to call at trial,” R.M.C. 701(e)(2); and “that reasonably may be viewed as mitigation evidence at sentencing,” R.M.C. 701(e)(3). Where materials are classified, the Prosecution will produce responsive materials that are 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).

The Prosecution has reviewed items recovered from the 2 May 2011 mission referenced above. *To the extent that there is information contained therein that is discoverable consistent with the standards set forth above, the Prosecution will produce the materials.*

Id., Attachment C at 2-3 (emphasis added).

On 22 February 2016, the Defense filed the instant motion requesting, “that the Commission compel production of all previously requested documents that were obtained during the United States’ raid on May 2, 2011 in Abbottabad, Pakistan in which al Qaeda leader Osama bin Laden was killed.” *Id.* at 1. However, in filing its motion Defense counsel for Mr. Bin ‘Attash acknowledge that there is no current issue and that they are merely requesting “expedited production” of all responsive material. *See id.* at 2, 6.

As of the date of this filing, the Prosecution continues to conduct its due diligence and has reviewed materials from the Abbottabad raid. The Prosecution has identified certain items it intends to use in its case-in-chief from this raid that will be provided to the Defense. The Prosecution also intends to file an M.C.R.E. 505 filing on the Abbottabad raid materials.

Accordingly, the Prosecution will provide any responsive information to the Defense that is discoverable within any of the materials seized from the Abbottabad raid, consistent with the standards set forth in its 19 March 2015 discovery response.

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 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 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 Previously Agreed to Provide Responsive Material to the Defense that is Noncumulative, Relevant and Helpful

The Commission should deny, or at a minimum hold in abeyance, the instant Motion to Compel as it is premature and there is no issue ripe for this Commission’s disposition. As stated above, in response to the Defense’s 11 March 2015 discovery request, the Prosecution agreed “[t]o the extent that there is information . . . that is discoverable consistent with the [applicable discovery standards], the Prosecution will produce the materials.” AE 409 (WBA), Attachment C at 3; *see also id.* at 2 (“the Prosecution responded stating it had reviewed the documents from the bin Laden raid and, insofar as the materials are discoverable, the documents will be provided to [Mr. Bin ‘Attash]”).

To be clear, the Prosecution will not be providing the stated “more than 1 million documents and files” that were captured during the Abbottabad raid, *see id.* at 1, 3, *in toto*, but will rather be providing any relevant information contained within those materials after reviewing them pursuant to R.M.C. 701, utilizing the standard set forth in M.C.R.E. 505(f)(1)(B) and *United States v. Yunis*, 867 F.2d 617, 622-23 (D.C. Cir. 1989) for any of the information that remains classified, and availing itself of the protections of M.C.R.E. 505(f)(2)(A) as necessary. While no responsive materials specific to this request have been produced to the Defense at the time of this filing, the Prosecution continues to conduct its due diligence and will provide responsive materials to the Defense that are noncumulative, relevant, and helpful. *See* M.C.R.E. 505(f)(1)(B); *United States v. Yunis*, 867 F.2d 617, 622-23 (D.C. Cir. 1989). As the Prosecution has not declined the Defense request for discovery, and anticipates filing an M.C.R.E. 505 filing relating to these matters, the Defense motion should be denied or at a minimum held in abeyance until resolution of any M.C.R.E. 505 matters, and provision of the material deemed discoverable by the Prosecution.

Finally, and although it has no obligation to call the Defense’s attention to publicly-released documents (and is often then criticized by the Defense during oral argument for providing or identifying publically-released documents for the Defense during discovery), the Office of the Director of National Intelligence (ODNI) has declassified and released many documents relating to the Abbottabad raid which the Defense can begin to review, which can be found at <http://www.dni.gov/index.php/resources/bin-laden-bookshelf?start=3>.

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 agreed “[t]o the extent that there is information [responsive to the Defense discovery request] . . .

that is discoverable consistent with the [applicable discovery standards], the Prosecution will produce the materials,” AE 409 (WBA), Attachment C at 3, the Commission should deny the Defense Motion or at a minimum hold the motion in abeyance until resolution of any M.C.R.E. 505 matters, and provision of the material deemed discoverable by the Prosecution from the Abbottabad raid.

7. Oral Argument

The Prosecution does not request oral argument.

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.

10. Attachments

A. Certificate of Service, dated 7 March 2016

Respectfully submitted,

//s//

Clay Trivett
Managing Trial Counsel

Christopher M. Dykstra
Major, USAF
Assistant Trial Counsel

Mark Martins
Chief Prosecutor
Military Commissions

ATTACHMENT A

