

**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 419A (GOV)****Government Response**To Defense Motion to Compel Production
of Medical Records from Mr. al Hawsawi's
CIA Captivity

13 April 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 the requested relief sought by the Defense in AE 419 (GOV).

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 31 May 2011 and 26 January 2012, pursuant to the Military Commissions Act of 2009 ("M.C.A."), charges relating to the murder of 2,976 innocent men, women, and children were sworn against Mustafa Ahmed Adam al Hawsawi and his four co-conspirators. These charges were referred jointly to this capital Commission on 4 April 2012. During the course of the investigation into the charges before the Commission, the Prosecution reviewed classified information in satisfaction of its discovery obligations.

On 26 April 2012, the Government filed a Motion To Protect Against Disclosure of National Security Information, and requested the Military Judge to issue a protective order pursuant to Military Commission Rule of Evidence (“M.C.R.E.”) 505(e). *See* AE 013 (App. 1-46). M.C.R.E. 505(e) provides: “Upon motion of the trial counsel, the military judge shall issue an order to protect against the disclosure of any classified information that has been disclosed by the United States to any accused or counsel, regardless of the means by which the accused or counsel obtained the classified information, in any military commission under [the M.C.A.], or that has otherwise been provided to, or obtained by, any such accused in any such military commission.” M.C.R.E. 505(e); 10 U.S.C. § 949p-3 (same).¹ The motion and its accompanying declarations set forth the classified information at issue in this case, the grave harm to national security that unauthorized disclosure of such information would cause, and the narrowly-tailored remedies sought to protect this national security information. *See* AE 013.

On 6 December 2012, the Military Judge issued a Ruling on Government Motion To Protect Against Disclosure of National Security Information (AE 013O) and entered Protective Order #1 (AE 013P). In his 6 December 2012 ruling, the Military Judge made certain findings as required by law, *see* AE 013O at 3-5, including that the information classified by the government was, as a matter of law, “properly classified by the executive branch pursuant to Executive Order 13526, as amended, or its predecessor Orders, and [was] subject to protection in connection with this military commission.”

Also in the 6 December 2012 Protective Order, the Military Judge made certain findings; namely, that “this case involves classified national security information . . . the disclosure of which would be detrimental to national security.” The Protective Order established procedures

¹ The requirement of appropriate protective orders is substantially identical to that enforced in federal civilian criminal trials involving classified information. *See* Section 3 of the Classified Information Procedures Act (“CIPA”), 18 U.S.C. App. 6 (“Upon motion of the United States, the court shall issue an order to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case in a district court of the United States.”).

applicable to all persons who have access to, or come into possession of, classified information regardless of the means by which those persons obtained that classified information. *Id.* ¶ 1.a. Specifically, the Protective Order required that members of the Defense obtain a security clearance prior to accessing classified information; that the Defense be precluded from disclosing classified information without prior authorization; that they provide notice of intent to disclose classified information during any pretrial or trial proceeding in accordance with M.C.R.E. 505(g); and that the Commission could order the closure of proceedings to the public when necessary to protect against the disclosure of classified information. Those procedures “apply to all aspects of pre-trial, trial, and post-trial stages in this case, including any appeals.” *Id.* ¶ 1.a.

On 9 February 2013, after considering certain Defense motions to amend the Protective Order, the Military Judge issued a Supplemental Ruling on the Government’s Motion To Protect Against Disclosure of National Security Information (AE 013Z) and entered Amended Protective Order #1 (AE 013AA). The 9 February 2013 Amended Protective Order modified (1) paragraph 2.k. (defining “[u]nauthorized disclosure of classified information”) and (2) paragraph 8.a.(1) (setting forth notice requirements in military commission proceedings) of the 6 December 2012 Protective Order. *See* Amended Protective Order #1.

On 23 April 2013, the Prosecution filed, *ex parte* and *in camera*, a motion seeking entry of a protective order to withhold, substitute, or summarize certain classified information. *See* AE 156. The Prosecution filed notice of that *ex parte* filing with the Defense.

On 16 August 2013, Mr. Hawsawi sought complete medical records including records while the Accused was in CIA custody.

On 25 September 2013, the Defense submitted a 21-page discovery request seeking a wide array of materials and information, including all medical records.

On 8 November 2013, after producing nearly 240,000 pages of unclassified discovery, the Prosecution informed Mr. Hawsawi’s counsel that it could not provide a detailed response to its 25 September 2013 request for discovery until the Defense signed the Memorandum of

Understanding (MOU) pertaining to classified information as required pursuant to Protective Order #1.

On 23 December 2013, the Defense filed AE 260 (MAH) seeking a detailed response to its 25 September 2013 discovery request.

On 6 January 2014, the Prosecution responded to AE 260 (MAH) explaining that by choosing to forego the signing of the MOU, defense counsel were making a tactical decision to delay receipt of classified information through the discovery process. *See* AE 260A, at 1. The Prosecution further explained that it could not produce classified information until the Defense signed the MOU. *Id.*

In 29 April 2014, after completing its M.C.R.E. 505 review, the Military Judge approved the Prosecution's proposed summaries and substitutions, including summaries of information related to the medical care of Mr. Hawsawi, as adequate alternatives to discovery of certain classified documents. By granting the Prosecution's request, the Commission found that the summary statements provided the Accused with substantially the same ability to make a defense as would discovery of or access to the specific classified information. *See* AE 156M.

On 14 December 2014, the Legislative Branch of the U.S. Government released a report from the Senate Select Committee on Intelligence, titled *Committee Study of the Central Intelligence Agency's Rendition, Detention, and Interrogation Program*. (hereinafter "SSCI Report"); the release of which coincided with the Executive Branch's agreement to declassify certain information relating to the conditions of confinement experienced by detainees that were detailed in the report.

On 10 June 2015, the Prosecution produced 163 documents pertaining to the Accused's medical care while in CIA custody. Although these documents were originally classified and summaries of these documents were approved by the Military Judge for classified discovery, *see* AE 156M, the Prosecution sought further classification review of the documents following the release of the SSCI Report. Of the 171 summaries approved by the Military Judge in this case,

163 of these documents were determined to be FOUO and releasable to the Accused, and eight documents remained classified following the review.

On 14 September 2015, two years after the original discovery request, and more than two years and 9 months after the Military Judge first ordered that an MOU be signed before the defense teams could receive classified information, counsel for Mr. Hawsawi signed the MOU that allowed him to receive classified information.

On 19 October 2015, the eight additional classified documents that were summarized and approved by this Commission were provided in discovery to cleared defense counsel for Mr. Hawsawi. This completed discovery of all 183 pages of CIA medical records. *See* MEA 10011 00002869-3052.

On 1 February 2016, counsel for the United States informed the United States Court of Appeals for the District of Columbia Circuit that Mr. Hawsawi's counsel (Mr. Ruiz and Ms. Lachelier) in *Al-Hawsawi v. Obama*, No. 15-5267, had "received all medical records through October 7, 2015." Attachment B.

On 3 February 2016, two days before scheduled argument in *Al-Hawsawi v. Obama*, Mr. Hawsawi's counsel—the same attorneys representing the Accused in this Commission— withdrew Mr. Hawsawi's appeal from the United States Court of Appeals for the District of Columbia Circuit. In doing so, counsel for Mr. Hawsawi informed the federal appellate court that counsel accepted the Government's representations that "Mr. al Hawsawi has received all medical records through October 7, 2015." Attachment C.

On 12 February 2016, the Prosecution provided the Defense with a detailed 29-page classified response to its 25 September 2013 discovery request.

On 15 February 2016, the Defense withdrew AE 260 (MAH). *See* AE 260C (MAH).

On 16 February 2016, the Commission determined that AE 260 was moot. *See* AE 260D (Order).

On 5 April 2016, the Commission issued a Trial Conduct Order adopting the ten-category construct for discovery of information relating to the CIA's former Rendition, Detention, and

Interrogation (RDI) program. *See* AE 397F. In his Order, the Military Judge determined that the 10 categories of discovery, coupled with the unclassified discovery being provided by the Government, and previous orders to provide classified discovery, satisfy the basic discovery obligations of the United States relating to information from the CIA's former RDI program. *See id.* The Commission also indicated that the Commission will entertain motions for further discovery *after the Defense has received, and had an opportunity to assimilate, what has been or is being provided at this time.* *Id.* (Emphasis added).

That same day, counsel for Mr. Hawsawi filed AE 419 (MAH) requesting that this Commission compel the Prosecution to produce complete, un-redacted medical records from Mr. Hawsawi's time in CIA custody.

Since May 2012, the Prosecution has disclosed 6,737 pages of medical records and Detainee Information Management System records since the Accused's arrival at Naval Station Guantanamo Bay in September 2006 through 3 December 2015. Additional records prepared after 3 December 2015 will be turned over on a rolling basis following an appropriate classification review.

5. Law and Argument

I. The Defense Request is Tantamount to a Request for Reconsideration of an Issue That This Commission Already Addressed in a Previous Defense Motion for Reconsideration

The Defense request in AE 419 (MAH) is essentially a motion to reconsider the Commission's order in AE 156M, which in turn pertained to a joint Defense motion to reconsider the Commission's order in AE 156C. Accordingly, the requested relief in AE 419 (MAH) constitutes something akin to double reconsideration.² The Defense has not presented any information to justify a third bite of the apple.

² This Commission has consistently noted that “[g]enerally, reconsideration should be limited to a change in the facts or law, or instances where the ruling is inconsistent with case law not previously briefed.” *See, e.g.*, AE 155F, at 1; AE 009H, at 1 (both citing to R.M.C. 905(f)); *see also* AE 156M, at 2 (“Either party has the right to move for reconsideration, but granting the request is in the Military Judge's discretion”).

In AE 419 (MAH), and generally before that in the AE 156 series, the Defense eschews the Prosecution's production of relevant information contained within summarized documents in favor of complete, un-redacted records containing information that this Commission, upon review, deemed not to be material to the preparation of the defense. The statute and implementing rules governing discovery in military-commission proceedings are clear. *See, e.g.*, R.M.C. 701. The Prosecution is required to produce enumerated categories of discoverable information regardless of whether the information is classified or unclassified.³ While the Prosecution recognizes its continuing obligation to provide such discoverable information to the Defense, national security interests preclude the wholesale disclosure of information in the government's possession. The discovery rules set forth in R.M.C. 701 and M.C.R.E. 505 already strike the appropriate balance between the accused's right to information necessary for the preparation of the defense and the public's interest in safeguarding other classified and sensitive information immaterial to that preparation. Neither the statute nor the rules were intended to alter that balance by creating new discovery obligations or rights.

Provisions regarding the use and protection of classified information, in pretrial, trial, and appellate proceedings are contained within the M.C.A. *See* 10 U.S.C. §§ 949p-1 through 949p-7. With respect to the medical records subject to the Defense request in AE 419 (MAH), the Prosecution identified classified information discoverable to the Defense and, as such, it exercised its statutory right to produce substitutions and summaries. To that end, the Prosecution filed an *ex parte* submission with the Commission seeking authorization to substitute classified summaries for the original classified documents to which the summaries relate. *See* AE 156; 10 U.S.C. § 949p-4(b)(2); M.C.R.E. 505 (f)(2)(B).

³ The Government's discovery obligations with regard to classified information extend only to that which is actually relevant and helpful to the material preparation of the defense. *See United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989) (stating "classified information is not discoverable on a mere showing of theoretical relevance."); *see also, United States v. Mejia*, 448 F.3d 436 (D.C. Cir. 2006) (applying *Yunis*); R.M.C. 701(c), Discussion (citing *Yunis* to define what information is material to the preparation of the defense).

On 29 April 2014, after completing its M.C.R.E. 505 review, this Commission approved the Prosecution's proposed summaries and substitutions as an adequate alternative to discovery for certain classified documents. By granting the Prosecution's request, the Commission found that the summary statements provided the Accused with substantially the same ability to make a defense as would discovery of or access to the specific classified information. *See* AE 156M. In denying the Defense request for reconsideration, the Commission noted that "[t]his Commission does not agree with Defense's presumptions regarding the intent of Congress to allow Defense access to the underlying subject of Government's invocation of the classified information privilege." *Id* at 4. The Defense in AE 419 (MAH) offers nothing to change the Commission's position.

II. The Defense Has Received All of the Requested Medical Records

Despite the Commission's decision in AE 156M, the Defense once again seeks "complete, un-redacted medical records." AE 419 (MAH), at 1. As an initial matter, the Prosecution agrees that medical records concerning the Accused are discoverable. For this reason, the Prosecution produced such medical records to the Accused—to include all medical records that the Defense characterizes as "from the three and a half years (March 1, 2003-September 6, 2006) [Mr. Hawsawi] was imprisoned under the control of the U.S. Government." *See* AE 419 (MAH), at 1. But, again, when documents are classified, the Prosecution may seek entry of a protective order to withhold, substitute, or summarize certain classified information. Despite the Defense averment, none of the documents provided to the Defense are "carefully parsed snippets." AE 419 (MAH), at 7. To the contrary, they are Military Judge-approved summaries of documents which the Military Judge has seen in their entirety. *See* AE 156M.

The Prosecution asserts that it has diligently reviewed all CIA medical records concerning Mr. Hawsawi, and reasserts that the Prosecution understands its discovery obligations. But as the Commission acknowledged during the first iteration of this issue, Mr. Hawsawi has no right to un-redacted records of those summaries he already possesses. In AE

156C, for example, the Commission articulated the statutory procedures for protecting classified information in military commissions, noting that “[t]he M.C.A. requires the Commission to grant the Government request to substitute a summary or a statement admitting relevant facts if the military judge finds that the summary, statement, or other relief would provide the accused with substantially the same ability to make a defense as would discovery of or access to the specific classified information.” AE 156C, at 2-3, citing 10 U.S.C. § 949p-4(b)(3). In this instance, the Prosecution followed those procedures with respect to the pertinent medical records, and the Commission approved the summaries that were proposed to the Commission; consequently, the Defense already has in its possession summaries of the complete, relevant set of medical records for Mr. Hawsawi (through December 2015).

Moreover, although the Defense in AE 419 (MAH) did not see fit to inform this Commission of its rationale for withdrawing an appeal with the United States Court of Appeals for the District of Columbia, in the Defense’s own words, the withdrawal was based on the Defense acceptance of the Government’s representations that “Mr. al Hawsawi has received all medical records through October 7, 2015.” Attachment C. The Prosecution is at a loss to understand why counsel told one court that it has received the medical records subject to the instant motion but then—without including any mention of this fact in AE 419 (MAH)—requests that this Commission order the Prosecution to produce those same medical records that, again, the Defense already acknowledges is in its possession. Based on the Prosecution’s production of all Commission-approved medical records to the Defense, as well as the Defense’s stated acceptance of the fact that “Mr. al Hawsawi has received all medical records through October 7, 2015,” this Commission should deny the requested relief in AE 419 (MAH).

In addition, the Defense also references the use of enhanced interrogation techniques and the SSCI Report. *See, e.g.* AE 419 (MAH), at 2, 6-8. The Defense cites to these items to support its position that there is a link between the materiality of the medical records and the Defense’s unfounded characterization that the Government has an interest in “maintaining a cloak of secrecy over this relevant evidence.” AE 419 (MAH), at 7. It should be noted that the Defense

will receive additional discovery concerning conditions of confinement as part of the ten-category discovery construct identified in AE 397F. The Prosecution has on several occasions stated on the record that all material subject to AE 397F, among other discovery, will be produced either directly to the Defense or submitted to the Commission pursuant to M.C.R.E. 505 by 30 September 2016. Accordingly, some of the questions the Defense asks in AE 419 (MAH) are answered by the very documents counsel already possesses, or will be answered through documents that counsel will possess with respect to AE 397F. The Defense, however, simply chooses to ignore this fact. Because the Defense already has in its possession, or will possess in the coming months, all relevant material of a medical nature pertaining to Mr. Hawsawi, this Commission should deny the requested relief in AE 419 (MAH).

6. Conclusion

As stated previously, the Prosecution takes its obligations under R.M.C. 701 seriously and will produce all documents that are relevant and necessary. The Prosecution will also produce any document that is “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.” R.M.C. 701(a)(2)(A). In addition, the Prosecution will disclose to the Defense the existence of evidence known to the trial counsel which reasonably tends 1) to negate guilt of the accused of any offense charged; 2) reduce the degree of guilt of the accused of any offense charged, or; 3) reduce the punishment. The Prosecution has done that with the delivery (and planned future delivery) of the documents in question.

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.

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 13th day of April 2016, I filed **AE 419A (GOV) Government Response To Defense Motion to Compel Production of Medical Records from Mr. al Hawsawi's CIA Captivity** with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

//s//

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

ATTACHMENT B



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February 1, 2016

Hon. Mark Langer
District of Columbia Circuit Court of Appeals
E. Barrett Prettyman United States Courthouse and William B. Bryant Annex
333 Constitution Avenue NW
Room 5205
Washington, DC 20001

RE: *Al-Hawsawi v. Obama*, No. 15-5267

Dear Mr. Langer:

This appeal is scheduled for oral argument on Friday, February 5, 2016, before Chief Judge Garland, Judge Brown, and Judge Williams. I write to correct a misstatement in the government's brief.

The government's brief stated that as of November 16, 2015, the date of our filing, counsel for Mr. Al-Hawsawi "has been provided all medical records through August 2015 and will be provided with additional medical records through October 7, 2015 shortly." Br. 7 n.1. In the course of preparing for oral argument, it has come to my attention that eight documents predating August 2015 had not yet been provided to Mr. Al-Hawsawi's counsel at the time the government filed its brief. Those documents were provided to Mr. Al-Hawsawi's counsel on December 11, 2015. I regret the inadvertent misstatement in the government's brief. It is my understanding that, as of the date of this letter, Mr. Al-Hawsawi's counsel has received all medical records through October 7, 2015.

Sincerely,

/s/ Sonia K. McNeil
SONIA K. MCNEIL
Counsel for Appellees

cc: All counsel by ECF

ATTACHMENT C

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**MUSTAFA AHMED ADAM
AL-HAWSAWI,**

Appellant,

v.

BARACK H. OBAMA, *et al.*,

Appellees.

No. 15-5267

PETITIONER-APPELLANT'S MOTION TO WITHDRAW APPEAL

Petitioner-Appellant, Mr. al Hawsawi, respectfully moves this Court to withdraw his appeal, pursuant to Federal Rule of Appellate Procedure 42(b) (Voluntary Dismissal, Dismissal in the Court of Appeals) and Circuit Rule 27(g)(1) (Dispositive Motions, Timing).

Pursuant to Federal Rule of Appellate Procedure 42(b), the parties stipulate that they will bear their own costs and fees.

Respondent Appellee does not oppose this motion.

In moving to withdraw, Mr. al Hawsawi relies on the Government's representations to this Court in the letter it submitted to the Court on February 1, 2016, under FRAP 28(j), and in footnote 1 (p. 7) of its brief, wherein it indicates

