

**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 523J ORDER Mr. al Baluchi’s Motion to Compel Production of Identities of Witnesses Referred to by Pseudonym in Discovery 17 August 2018
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1. Procedural History.

a. On 25 September 2017, Mr. Ali (a.k.a. al Baluchi) filed a motion¹ to compel the Government to produce the identities of witnesses referred to by pseudonym in discovery. Specifically, Mr. Ali sought to compel the Government to produce “identities, including but not limited to full names, addresses, phone numbers, and email addresses, of those persons the [G]overnment has hidden with so-called Unique Functional Identifiers (UFIs) and other pseudonyms contained within Discovery Request DR-333-AAA, filed on 13 July 2017 . . .”² Mr. Ali argued the Government must produce these identities because they are “relevant and helpful to his defense,” which “overcomes the [G]overnment’s national security privilege.”³ Mr. Ali also argued the Due Process Clause of the Fifth Amendment to the United States Constitution and the Military Commission Rule of Evidence (M.C.R.E.) 507 require the Commission to compel the Government to identify these individuals.

b. On 10 October 2017, the Government responded,⁴ requesting the Commission deny the motion because the Commission had already approved UFIs to protect the identities of

¹ AE 523 (AAA), Mr. al Baluchi’s Motion to Compel Production of Identities of Witnesses Referred to by Pseudonym in Discovery, filed 25 September 2017.

² *Id.* at 1.

³ *Id.*

certain individuals through the M.C.R.E. 505 process and, therefore, the Defense is foreclosed from moving the Commission to reconsider.⁵

c. On 12 October 2017, Mr. Ali replied⁶ arguing the Commission should grant his motion to compel because:

(1) contrary to the government's mischaracterization, Mr. [Ali's] motion to compel is not a motion to reconsider . . . (2) even if it were . . . , the prohibition on [Accused's] ability to request reconsideration. . . is unconstitutional; and (3) [the] motion to compel additional discovery to remedy inadequate earlier discovery conforms with the current law of the case.⁷

Mr. Ali also claimed he was seeking the identities of "pseudonymous witnesses found, mainly, in medical records (Dr. 1, Dr. 10, and Dr. 21) and the MEA-2D-00000001-152 discovery."⁸ Unlike the UFI pseudonyms approved by the Commission pursuant to the M.C.R.E. 505 process, Mr. Ali asserted these pseudonyms were created and used by the Government in discovery without approval by the Commission through the M.C.R.E. 505 process.

d. On 30 March 2018, the Commission issued an Order⁹ directing the parties to brief the following specified issue:

Assuming the Defense averment is accurate, under what authority did the Government use pseudonyms in lieu of the true identity of witnesses in discovery materials provided to the Defense as identified in AE 523C (AAA) that was not an approved substitution by the Commission pursuant to 10 U.S.C. § 949p-4 and [M.C.R.E.] 505?¹⁰

⁴ AE 523B (Gov), Government Response to Mr. Ali's Motion to Compel the Production of Identities of Witnesses Referred to by Pseudonym in Discovery, filed 10 October 2017.

⁵ See 10 U.S.C. § 949p-4(c) (Reconsideration.— An order of a military judge authorizing a request of the trial counsel to substitute, summarize, withhold, or prevent access to classified information under this section is not subject to a motion for reconsideration by the accused, if such order was entered pursuant to an ex parte showing under this section.).

⁶ AE 523C (AAA), Mr. al Baluchi's Reply to Government's Response to His motion to Compel Production of Identities of Witnesses Referred to by Pseudonym in Discovery, filed 12 October 2017.

⁷ *Id.* at 3.

⁸ *Id.* at pp. 5-6.

⁹ AE 523F (Order-Specified Issue), Mr. al Baluchi's Motion to Compel Production of Identities of Witnesses Referred to by Pseudonym in Discovery, dated 30 March 2018.

¹⁰ *Id.* at 2.

e. On 6 April 2018, the Government filed a response¹¹ to the Commission's Order on the specified issue stating, "to the extent the Government did not provide the true identity of a healthcare provider within discovery provided to the Defense, the [Government] determined the identities of these individuals, absent further justification from the Defense, was not material to the preparation of the defense."¹² The Government proffered that "should the Defense articulate the reason a particular healthcare provider's true identity is required to be disclosed pursuant to R.M.C. 701 (whether that person's identity is redacted or represented by a pseudonym), the [Government] has maintained . . . that it will consider such requests on a case-by-case basis."¹³ The Government also added that upon receiving a "sufficiently detailed" Defense discovery request associated with litigation in the AE 502¹⁴ series, they had already provided the true names and contact information for Dr. 1, Dr. 10, and Dr. 21. via email correspondence between 16 and 18 October 2017.¹⁵

f. On 13 April 2018, Mr. Ali filed a response¹⁶ to the Commission's Order on the specified issue arguing the Government "had no authority to use pseudonyms in the Department of Defense medical records or the 2.d summaries."¹⁷ Mr. Ali stated that the Government "has concealed the identity of every medical witness in the redacted medical records [they] have produced."¹⁸ According to Mr. Ali, "[e]very name, signature, or other identity of medical

¹¹ AE 523G (Gov), Government Response to AE 523F, Order-Specific Issue, Mr. Ali's Motion to Compel Production of Identities of Witnesses Referred to by Pseudonym in Discovery, filed 6 April 2018.

¹² *Id.* at 2. (The Government also incorporated, by reference, its law and argument contained in the AE 330 (AE 330 (AAA) Defense Motion to Compel Production of Complete, Unredacted Medical Records, filed 12 December 2014) motion series).

¹³ *Id.* at 3.

¹⁴ AE 502 (MAH), Defense Motion to Dismiss for Lack of Personal Jurisdiction Due to the Absence of Hostilities, filed 7 April 2017.

¹⁵ AE 523G (Gov), at 3.

¹⁶ AE 523H (AAA), Mr. al Baluchi's Response to Order – Specified Issue, filed 13 April 2018.

¹⁷ *Id.* at 4.

¹⁸ *Id.* at 8.

witnesses in the medical records is redacted, even those [the Government] eventually revealed.”¹⁹ To illustrate this point, Mr. Ali provided an excerpt from a discovery request he sent the Government on 26 August 2013, requesting the identities of certain individuals:

(5) Un-redacted, un-obscured, and un-changed copies of the already-produced records. The produced medical records contain redactions of important witness information, including the full names of all the treatment providers, including, but not limited to: 2; 3; JTF Anes; Blondie; Bourbon; Ford; HW C.B.; COC; Cornbread; Dr. Deer; Dr. B; Dr. Hy; Dr. Jeep; Dr. Rubble; Dr. Shelby; Dr. Spock; Dr. 1, Dr. 5; Dr. 10; Dr. 13; Dr. 18; Dr. 19; Dr. 21; Dr. 22; Dr. 23; Dr.24; Dr. 29; Dr. 36; Dr. 50; Dr. 53; DR. 54; Dr. 55; Dr. 56; Dr. 57; Dr. 62; DSMP Manager Bones, DSMP Manager T-Boy; DSMP Manager Uncle; DSMP Manager Opa; DSMP Manager Bean; H.M. 1; H.M. 2; H.M. 3; H.M. 6; H.M. 10, H.M. 12; H.M. 14; H.M. 15; H.M. 16; H.M. 17; H.M. 18; H.M. 19; H.M. 20; H.M. 21; H.M. 22; H.M. 23; H.M. 24; H.M. 25; H.M. 29; H.M. 30; H.M. 31; H.M. 32; H.M. 33; H.M. 34; H.M. 35; H.M. 41; H.M. 43; H.M. 45; H.M. 48; H.M. 50; H.M. 51; H.M. 52; H.M. 54; H.M.C.; HM Hollywood; HW, L.A. 1; M7; M.H. 14; M.H. 21; M.P. 16; M.P. 2; M.P. 26; M.P. 35; P.C.M.; PNT; Princess; Forensic Psychiatrist; Staff Psychiatrist; Q; Robin; and Shrek. Additionally, important portions of the records are redacted or obscured by artifacts of the copying process. I understand that un-redacted copies may be classified.²⁰

g. On 13 April 2018, Mr. bin ‘Attash filed a reply²¹ to the Government’s response to the Commission’s Order on the specified issue requesting the Commission “reject the Government’s argument and order the Government to cease their practices of redaction and substitution without the approval of the Commission upon a showing as required by law.”²²

¹⁹ *Id.*

²⁰ *Id.* at 2.

²¹ AE 523I (WBA), Defense Reply to AE 523G(GOV) Government Response to AE 523F, Order-Specified Issue, Mr. Ali’s Motion to Compel Production of Identities of Witnesses Referred to by Pseudonym in Discovery, filed 13 April 2018.

²² *Id.* at 4.

h. On 10 January 2018,²³ the Commission heard oral argument on the matter. The oral argument primarily addressed matters with the Government's use of Commission approved UFIs.²⁴

2. Law.

a. "Defense counsel in a military commission....shall have a reasonable opportunity to obtain witnesses and other evidence as provided in regulations provided by the Secretary of Defense. The opportunity to obtain witnesses and evidence shall be comparable to the opportunity available to a criminal defendant in a court of the United States under Article III of the Constitution." 10 U.S.C. § 949j(a)(1).

b. "Each party shall have an adequate opportunity to prepare its case and no party may unreasonably impede the access of another party to a witness or evidence." R.M.C. 701(j).

c. "The military judge may specify the time, place, and manner of discovery and may prescribe such terms and conditions as are necessary to the interests of justice, the protection of national security, and the safety of witnesses." R.M.C. 701(a)(3). "If at any time during the military commission it is brought to the attention of the military judge that a party has failed to comply with this rule, the military judge may take one or more of the following actions:" "[o]rder the party to permit discovery. . ." R.M.C. 701(l)(3)(A).

d. The government must disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to (1) negate the guilt of the Accused of an offense charged, (2) reduce the degree of guilt of the Accused of an offense charged, or (3) reduce the punishment. *United States v. Graner*, 69 M.J. 104, 107 (C.A.A.F. 2010). "'Relevant evidence' means evidence having any

²³ Unofficial/Unauthenticated Transcript of the *U.S. v. Khalid Shaikh Mohammad et al* Hearing Dated 10 January 2018 from 1:02 P.M. to 3:15 P.M. at pp. 18521-18541.

²⁴ Similar issues were raised and argued in the AE 524 series. See AE 524 (AAA), Mr. al Baluchi's Motion to Dismiss, or in the Alternative, to Compel the Government to Produce Witnesses for Interview, filed 25 September 2017.

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." *Id.*

e. In a military commission, the Government, as is true in all criminal cases, has the responsibility to determine what information it must disclose in discovery. R.M.C. 701(b)-(c); *United States v. Briggs*, 48 M.J. 143 (C.A.A.F. 1998); *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987).

"[T]he prosecutor's decision on disclosure is final. Defense counsel has no constitutional right to conduct his own search of the State's files to argue relevance." *Ritchie*, 480 U.S. at 59. It is incumbent upon the Government to execute this duty faithfully, because the consequences are dire if it fails to do so. *See United States v. Stellato*, 74 M.J. 473 (C.A.A.F. 2015) (finding no abuse of discretion in military judge's dismissal with prejudice of charges due to a Government discovery violation); *United States v. Bowser*, 73 M.J. 889 (A.F. Ct. Crim. App. 2014), *summarily aff'd* 74 M.J. 326 (C.A.A.F. 2015) (same).

f. The Military Commission Act (M.C.A.) of 2009 requires the Commission to limit the discovery of and access to classified information if the Government submits the appropriate declaration: (A) invoking the classified information privilege; (B) setting forth the potential damage to national security; and (C) signed by a "knowledgeable United States official with the authority to classify information." *See* 10 U.S.C. § 949p-4(a)(1); M.C.R.E. 505(f)(1)(A).

g. If the Government files a declaration meeting these standards, the Commission "may not authorize the discovery of or access to such classified information *unless* the [Commission] determines that such classified information would be noncumulative, relevant, and helpful to a legally cognizable defense, rebuttal of the prosecution's case, or to sentencing, in accordance with standards generally applicable to discovery of or access to classified information in Federal criminal cases." 10 U.S.C. § 949p-4(a)(2) (emphasis added); M.C.R.E. 505(f)(1)(B).

h. If the Commission finds that the classified information meets these requirements and plans to authorize Defense discovery of or access to the information, the Commission must provide the

Government with the opportunity “(A) to delete or withhold specified items of classified information; (B) to substitute a summary for classified information; or (C) to substitute a statement admitting relevant facts that the classified information or material would tend to prove.” 10 U.S.C. § 949p-4(b)(1); M.C.R.E. 505(f)(2).

i. The Commission must authorize the Government’s substitutions or summaries if they provide the Defense with “substantially the same ability to make defense as would discovery of or access to the specific classified information.” 10 U.S.C. § 949p-4(b)(3); M.C.R.E. 505(f)(2)(C).

j. 10 U.S.C. § 949p-4(c) and M.C.R.E. 505(f)(3) prohibit Defense motions to reconsider a military judge’s order authorizing the Government to substitute, summarize, withhold, or prevent access to classified information, if the order was entered pursuant to an *ex parte* showing by the Government. However, the Commission can, either *sua sponte* or upon motion to compel discovery, review the summarized information to determine if additional information should be added to the summary to provide the Defense with sufficient information to give it “substantially the same ability to make a defense as would discovery of or access to the specific classified information.”²⁵

k. M.C.R.E. 506 affords the Government a privilege from disclosure of government information where disclosure would be detrimental to the public interest. The rule provides procedures for the Government to invoke the privilege.

3. Analysis – Commission Approved UFI.

a. Mr. Ali’s position is that the Government has no authority to withhold the identities of individuals who are mentioned in discovery but referred to by pseudonym, whether or not those individuals were assigned Commission-approved UFIs or by the Government’s unilateral

²⁵ 10 U.S.C. § 949p-4(b)(3). See AE 164C Order, Defense Motion to Stay all Review Under 10 U.S.C. § 949p-4 and to Declare 10 U.S.C. § 949p-4(c) and M.C.R.E. 505(f)(3) Unconstitutional and In Violation of UCMJ and Geneva Conventions, dated 16 December 2013.

assignment of pseudonym. Mr. Ali also argues that the Government's national security privilege is overcome by his right to access discovery that is relevant and helpful to his defense.

b. In AE 308HHHH,²⁶ the Commission approved the Government's request to assign UFI's to certain individuals involved in the CIA's Rendition, Detention, and Interrogation (RDI) Program using the process established by 10 U.S.C. § 949p-4 and M.C.R.E. 505 *et seq.* Although the Defense is prohibited from requesting reconsideration of Commission approved substitutions, the Commission may revisit approved substitutions *sua sponte* or in consideration of a Defense motion to compel discovery.

c. 10 U.S.C. § 949p-4(a)(2) and 10 U.S.C. § 949p-4(b)(1) prohibit military judges from authorizing disclosure of classified information to the Defense without a finding that "such classified information would be noncumulative, relevant, and helpful to a legally cognizable defense, rebuttal of the prosecution's case, or to sentencing...." Thus, without these findings, the summary and substitution process for classified information is not triggered. In other words, these authorities specifically contemplate the substitution and/or summary of classified discovery that is relevant and helpful to the Defense. Consequently, the Defense's argument that the Government's national security privilege is overcome because the discovery is relevant and helpful to the defense is unpersuasive. The Government is not required to identify individuals with Commission approved UFI's.

4. Analysis – Government Initiated Pseudonyms In Medical Records

a. The Government has taken the position that it may unilaterally assign pseudonyms to certain individuals who are found in otherwise discoverable medical records of the Accused

²⁶ AE 308HHH Order, Government Amendment to Government Motion To Request Substitutions And Other Relief Regarding Classified Information Responsive to Paragraphs 2.d., 2 f., and 2.g. of the Commission's Ten-Category Construct, dated 19 May 2017.

upon a Government determination that the individual's identity is not material to the preparation of the defense.

b. As a general rule, the Commission agrees the Government is responsible for determining what information it must disclose in discovery. R.M.C. 701(b)-(c); *United States v. Briggs*, 48 M.J. 143 (C.A.A.F. 1998); *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987). Normally, the Commission declines to intervene and review information the Government does not provide to the Defense. However, in this instance, the Government has determined the discovery materials themselves are relevant but has, nevertheless, chosen to withhold the identities of certain potential witnesses named in the discovery without invoking a privilege under M.C.R.E. 505 or 506.

c. The Government has asserted that pseudonyms provided in medical treatment records were used in lieu of actual identities when these records were created and that the Government provides the Defense the records as they currently exist. The Government currently requires the Defense to request particular names of persons identified by pseudonym in the medical records and essentially prove to the Government that the particular individual's identity is material to the preparation of the defense.

d. The Commission finds the Government position unreasonably impedes the Defense access to witnesses. Accordingly, the Commission will issue an order requiring the Government to disclose to the Defense the names, military email addresses, and military telephone numbers of all persons identified by pseudonym in the Accused's medical records or, if appropriate, invoke a privilege under M.C.R.E. 505 or 506. The Commission declines to order disclosure of the additional identifying information requested by the Defense.

e. The Commission is cognizant that the Commander of U.S. Southern Command has filed a declaration²⁷ regarding his determination that certain identifying information of former Joint Task Force – Guantanamo personnel is classified or “Sensitive but Unclassified.” Accordingly, all parties shall protect the identities of these persons from further disclosure in accordance with the Commission’s Protective Orders #1²⁸ and #2.²⁹

5. **Ruling.** Mr. Ali’s motion to compel is **GRANTED IN PART** as provided in this Ruling.

6. **Order.**

a. Unless the Government invokes a privilege under M.C.R.E. 505 or 506, the Government will provide the Defense with the names, military email addresses, and military telephone numbers for all persons identified by pseudonym in the Accuseds’ medical records provided in discovery. If the Government cannot locate the identifying information for any of these individuals it will notify the Commission. The Government will (1) invoke a privilege under M.C.R.E. 505 or 506, or (2) provide the identifying information to the Defense, or (3) otherwise notify the Commission it cannot locate the identifying information, not later than **90 days** from the issuance of this Order.

b. Going forward, the Government will provide identifying information to the Defense for any person identified by pseudonym in otherwise discoverable information or invoke a privilege under M.C.R.E. 505 or 506.

c. This Order does not modify any previous Rulings or Orders from the Commission authorizing the assignment of UFI’s.

²⁷ See AE 523G at 2, fn. 2.

²⁸ AE 013BBBB, *Third Amended Protective Order #1, To Protect Against Disclosure of national Security Information*, dated 6 July 2015.

²⁹ AE 014H, *Protective Order #2 To Protect Unclassified Discovery Material Where Disclosure is Detrimental to the Public Interest*, dated 20 December 2012.

d. The parties shall protect against further disclosure of the identity of persons whose identity has been determined to be classified or “sensitive but unclassified” in accordance with Protective Order #1 (classified) and Protective Order #2 (sensitive but unclassified).

So **ORDERED** this 17th day of August, 2018.

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