

**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 534M RULING Defense Motion to Compel Interrogator Statements, Summaries, Reports, Logs, and Notes 8 February 2019
---	--

1. Procedural Background.

a. On 5 April 2016, the Commission issued a Trial Conduct Order (TCO), AE 397F (TCO),¹ granting the Government’s motion to adopt a 10-category construct for the discovery of information relating to the Central Intelligence Agency (CIA) former Rendition, Detention, and Interrogation (RDI) program. Paragraph (¶) 2 of that TCO delineates the 10 categories of discoverable information pertaining to the RDI program. The categories relevant to this motion series are:

2.a. A chronology identifying where each Accused was held in detention between the date of his capture and the date he arrived at Guantanamo Bay, Cuba, in September 2006 . . .

2.d. The identities of medical personnel (examining and treating physicians, psychologists, psychiatrists, mental-health professionals, dentists, etc.), guard force personnel, and interrogators, whether employees of the United States Government or employees of a contractor hired by the United States Government, who had direct and substantial contact with each Accused at each location and participated in the transport of the Accused between the various locations . . .

2.f. The employment records of individuals identified in paragraph (d), limited to those documents in the file memorializing adverse action and positive recognition in connection with performance of duties at a facility identified in paragraph (a) or in transporting the Accused between the various facilities . . .

¹ AE 397F (TCO), Government Proposed Consolidation of Motions to Compel Information Relating to the CIA’s Former Rendition, Detention, and Interrogation Program, dated 5 April 2016.

2.g. The records of training in preparation for the performance of duties of the individuals identified in paragraph (d) at the various facilities or during transport of the Accused;² [and]

2.h. Statements obtained from interrogators, summaries of interrogations, reports produced from interrogations, interrogation logs, and interrogator notes of interrogations of each Accused and all co-conspirators identified in the Charge Sheet[.]³

b. On 6 November 2017, Mr. Ali (a.k.a. al Baluchi) moved⁴ the Commission to compel the Government to produce interrogator statements, summaries, reports, logs, and notes pertaining to the Accused as required in ¶ 2.h. of AE 397F (TCO). Mr. Ali proffered that on 2 June 2017, the Government produced discovery to the Defense consisting of profiles (hereinafter RDI ¶¶ 2.d/f/g Profiles) of certain individuals who had contact with the Accused. The discovery indicated that it was provided to the Defense “in compliance with . . . AE 397F, ¶¶ 2.d., 2.f., and 2.g.”⁵ Mr. Ali argued some of the material provided in that discovery marked as ¶ 2.d. responsive were “summaries” that referenced information from ¶ 2.h. but did not include the information required to satisfy the Government’s discovery obligations. He also asserted that the RDI ¶¶ 2.d/f/g Profiles “were not reviewed by the [Commission] prior to production to the defense. . .”⁶ Mr. Ali argued the Commission should compel the Government to “immediately produce original information and documents pertaining to Mr. [Ali]’s interrogations under [¶ 2.h.]”⁷ To support his argument, Mr. Ali included various excerpts to highlight areas in the discovery where he believes information responsive to ¶ 2.h was missing.

c. On 20 November 2017, the Government responded,⁸ opposing Mr. Ali’s motion. The

² *Id.* at 2.

³ *Id.* at 3.

⁴ AE 534 (AAA), Defense Motion to Compel Interrogator Statements, Summaries, Reports, Logs, and Notes, filed 6 November 2017. (SECRET).

⁵ AE 534 (AAA) at 5.

⁶ *Id.* (Presumably arguing that the summaries were not authorized by the Commission pursuant to Military Commission Rule of Evidence (M.C.R.E.) 505, an argument bolstered in Mr. Ali’s reply, AE 534B (AAA), Mr. al Baluchi’s Reply to Government Response to Mr. Ali’s Defense Motion to Compel Interrogator Statements, Summaries, Reports, Logs, and Notes, filed 26 January 2018. (TOP SECRET)).

⁷ AE 534 (AAA) at 24.

⁸ AE 534A (GOV), Government Response to Mr. Ali’s Defense Motion to Compel Interrogator Statements, Summaries, Reports, Logs, and Notes, filed 20 November 2017. (TOP SECRET).

Government asserted Mr. Ali received all of the pertinent discovery responsive to ¶ 2.h, and that Mr. Ali's motion was an attempt to undermine the prohibition on requesting reconsideration of the Commission-approved summaries and substitutions. Specifically, the Government claimed Mr. Ali was provided with the requested ¶ 2.h. material in discovery marked with Bates numbers⁹ containing "STA" in the serial number. According to the Government, STA is an abbreviation for "statements" made by the Accused to interrogators and Mr. Ali has "hundreds of documents responsive to" ¶ 2.h. with the STA Bates serial number affixed.¹⁰ The Government stated that these documents were Commission-approved summaries and/or substitutions of underlying classified information. The Government further proffered that they created an index listing the discovery material in chronological order to help the Defense track and review the ¶ 2.h. discovery for those persons identified by the Government as having direct and substantial contact with the Accused during a particular event (RDI Index).¹¹

d. With respect to the ¶ 2.d. discovery, the Government declared that the Commission (in AE 308HHHH)¹² approved a table identifying individuals in the RDI program having direct and substantial contact with Mr. Ali. Moreover, the Government stated that the Commission approved summaries of training and employment records for the individuals listed on the table (in accordance with ¶¶ 2.f. and 2.g.) after reviewing the original classified documents forming the basis for these summaries. In addition to providing the Defense the Commission-approved ¶¶ 2.d., 2.f., and 2.g. discovery, the Government asserted they had gratuitously created the ¶¶ 2.d/f/g. Profiles, which were synopses of the Commission-approved discovery, to assist each Accused in understanding the relevance of those individuals listed on the ¶ 2.d. table. The

⁹ "Bates serial numbers" are a numbering system used by the Government to mark discovery.

¹⁰ AE 534A (GOV) at pp. 5-6.

¹¹ See AE 534A (GOV), Attach. B.

¹² AE 308HHHH 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.

Government reiterated that neither the RDI ¶¶ 2.d/f/g Profiles nor the RDI Index was required by the Commission's Orders in AE 397F (TCO) or AE 308HHHH.

e. On 26 January 2018, Mr. Ali replied,¹³ asserting that there were many substantial discrepancies between the RDI Index and the underlying documents to which the RDI Index refers. Further, Mr. Ali countered the Government's contention that the RDI Index was not required by the Commission because without the RDI Index, Mr. Ali had no way to link most of the Commission-approved RDI summaries and substitutions with the ¶¶ 2.d./f./g. Profiles.

f. On 21 May 2018, Mr. Ali filed a supplement¹⁴ to his original motion adding new information pertaining to a set of documents the Defense received from an outside source (reporter) pursuant to a Freedom of Information Act (FOIA) release/declassification of information relating to the CIA's RDI program. Mr. Ali used these documents to support his argument that the RDI Index, and a revised RDI Index received on 16 May 2018 (Second RDI Index), contradicted each other and other available documents on the same subject. Mr. Ali also alleged that the RDI indices demonstrated that the Government used documents not turned over in discovery to compile the indices.

g. On 21 June 2018, Mr. Ali filed a motion¹⁵ to compel the production of witnesses in support his original motion in AE 534 (AAA)—specifically, two former U. S. officials who were involved in detainee interrogations and who are mentioned in discovery who would testify about the discrepancies between discovery and other available information highlighted in Mr. Ali's motion.

h. On 29 June 2018, the Government responded¹⁶ to Mr. Ali's motion to compel

¹³ AE 534B (AAA), Mr. al Baluchi's Reply to Government Response to Mr. Ali's Defense Motion to Compel Interrogator Statements, Summaries, Reports, Logs, and Notes, filed 26 January 2018. (TOP SECRET).

¹⁴ AE 534 (AAA Sup), Supplement to Defense Motion to Compel Interrogator Statements, Summaries, Reports, Logs, and Notes, filed 21 May 2018. (TOP SECRET).

¹⁵ AE 534G (AAA), Motion to Compel the Production of Black Site Witnesses, filed 21 June 2018. (TOP SECRET).

¹⁶ AE 534I (GOV), Government Response to Mr. Ali's Motion to Compel Government Production of Black Site Witnesses, filed 29 June 2018.

witnesses, arguing the testimony of the witnesses is not relevant or necessary for the matters at issue in AE 534 (AAA). The Government again asserted that Mr. Ali's motion is an improper request for reconsideration of summaries and substitutions previously approved by the Commission.

i. On 19 October 2018, Mr. Ali filed a second supplement¹⁷ to his original motion adding new information and argument based on the Defense's receipt of the Second RDI Index. Mr. Ali highlighted inconsistencies between the Second RDI Index and the discovery at issue to bolster his argument that the discovery was misleading, contained numerous gaps, and one-sidedly strips out individuals associated with particular time periods or agencies. Accordingly, Mr. Ali averred that the summaries are not adequate substitutions for the original documents because other information possessed by the Defense—such as documents obtained through FOIA—contain information conflicting with those approved summaries.

j. The Commission heard oral argument on this motion series on 1 March 2018¹⁸ and 12 November 2018¹⁹ at U.S. Naval Station, Guantanamo Bay, Cuba. During oral argument on 12 November 2018, the Government stated that the RDI ¶¶ 2.d/f/g Profiles and RDI indices were created using only Commission-approved summaries.²⁰ The Government also offered to confer with the Defense to clarify any mistakes or ambiguities found by the Defense in discovery materials, the RDI indices, or the RDI ¶¶ 2.d/f/g Profiles.²¹

¹⁷ AE 534 (AAA 2nd Sup), Supplement to Defense Motion to Compel Interrogator Statements, Summaries, Reports, Logs, and Notes, filed 19 October 2018. (TOP SECRET).

¹⁸ Unofficial/Unauthenticated Transcript of the *U.S. v. Khalid Shaikh Mohammad, et al.*, Motions Hearing (Transcript) Dated 1 March 2018 from 9:05 A.M. to 9:54 A.M. at pp. 18970-19028.

¹⁹ Transcript Dated 12 November 2018 from 1:06 P.M. to 2:15 P.M. at pp. 21042-21077.

²⁰ *Id.* at 21054.

²¹ Transcript Dated 1 March 2018 from 10:13 A.M. to 11:55 A.M. at p. 19016 and 12 November 2018 from 1:06 P.M. to 2:15 P.M. at pp. 21058-21061.

2. Findings of Fact.

a. In response to the discovery obligations set forth in ¶ 2. of the Commission's Order in AE 397F (TCO), the Government submitted²² proposed summaries and substitutions pursuant to Military Commission Rule of Evidence (M.C.R.E.) 505 for certain original classified information regarding the RDI program.

b. The Military Judge thoroughly reviewed the original classified information and the proposed summaries and substitutions and determined²³ that the proposed summaries and/or substitutions provided the Accused with substantially the same ability to make a defense as though they had access to the underlying classified information. The Order reflecting this review is AE 308HHHH.

c. The RDI ¶¶ 2.d/f/g Profiles and RDI indices were not explicitly required by the Commission's Order in AE 397F, but were created by the Government to assist the Defense in understanding and synthesizing the RDI discovery. In creating the RDI ¶¶ 2.d/f/g Profiles and RDI indices, the Government represented to the Commission that they did not use summaries or substitutions that had not been approved by the Commission per M.C.R.E. 505.

3. Law.

a. In the realm of classified discovery, the military judge is required to grant the request of trial counsel to substitute a summary or 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 specified classified information." M.C.R.E. 505(f)(2)(C).

b. "An order of a military judge authorizing a request of the trial counsel to substitute,

²² See AE 308FF (GOV Amend), 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, filed 23 March 2017; AE 308FF (GOV SUP), Government Supplement to 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, filed 18 April 2017.

²³ See AE 308AAA (Corrected Copy) Ruling, AE 308BBB (Corrected Copy) Ruling, AE 308III Order, AE 308MMMM Order, AE 308RRRR Order.

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.” 10 U.S.C. 949p-4(c); M.C.R.E. 505(f)(3).

c. “[T]he trial counsel shall, as soon as practicable . . . , disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to: (A) negate the guilt of the accused of an offense charged; (B) reduce the degree of guilt of the accused of an offense charged; or (C) reduce the punishment.” Rule for Military Commissions (R.M.C.) 701(e)(1)(A-C).

d. “The defense shall have reasonable opportunity to obtain witnesses and other evidence as provided in these rules.” R.M.C. 703(a). “Each party is entitled to the production of any available witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary.” R.M.C. 703(b)(1).

e. “The Commission can, either *sua sponte* or upon a motion to compel discovery, review the summarized information, to determine if additional information should be added to the summary in order to provide 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.’”²⁴

4. Analysis.

a. Counsel for Mr. Ali stated in oral argument²⁵ that Mr. Ali seeks all of the original underlying classified information used to create the RDI ¶¶ 2.d/f/g Profiles and the RDI indices, regardless of whether or not the information had been approved for summary or substitution by the Commission. As set forth in the AE 308 series, the Commission reviewed the original documents pertaining to the RDI discovery and approved certain summaries and substitutions in accordance with the procedures set forth in M.C.R.E. 505. In doing so, the Military Judge determined that the

²⁴ 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 at ¶ 6.

²⁵ See Transcript Dated 1 March 2018 from 9:05 A.M. to 9:54 A.M. at pp. 19003, 19007.

summaries and substitutions provided the Accused substantially the same ability to make a defense as would discovery of or access to the original classified information. Title 10 U. S. Code, § 949p-4(c) and M.C.R.E. 505(f)(3) state: “[a]n 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.” Here, Mr. Ali’s motion for the underlying original documents of Commission approved summaries and substitutions equates to a motion for reconsideration of the summaries and substitutions approved under M.C.R.E. 505.

b. Possible inaccuracies, gaps, or inconsistencies between the RDI ¶¶ 2.d/f/g Profiles, the RDI indices, and other discovery provided to the Defense do not justify revisiting the Commission’s approved summaries and substitutions.²⁶ First, the Commission finds no factual basis to support the Defense contention that the Government intentionally misled them through provision of flawed RDI ¶¶ 2.d/f/g Profiles or RDI indices, or by intentionally mischaracterizing summaries and substitutions of original classified information. The record establishes that many of the apparent inconsistencies or contradictions between the RDI ¶¶ 2.d/f/g Profiles or RDI indices and other documents could likely have been explained or resolved had the parties communicated prior to raising these issues with the Commission. The Defense admittedly made no such effort in this matter. The Commission recognizes that in an adversarial proceeding it would be unrealistic to expect the parties to fully cooperate and work all issues out on their own. Nevertheless, the Commission does expect the parties to at least make reasonable efforts to resolve questions (or apparent inconsistencies) using protocols

²⁶ The Defense repeatedly argued that the need for the underlying original documents is tied to the Government’s provision of flawed RDI indices. The Defense conceded, however, that “[they] have long been frustrated with the quality of the summaries of the CIA documents that the government has produced to the defense, long prior to the production of the RDI index, where lengthy interrogations have been boiled down to one sentence.” Transcript Dated 12 November 2018 from 1:06 P.M. to 2:45 P.M. at p. 21066. This concession supports the notion that what the Defense is really attacking is not the RDI indices, but the Commission-approved summaries and substitutions already vetted through the procedures of M.C.R.E. 505.

established by the Government at the time they provided the discovery to the Defense before bringing time-intensive litigation before the Commission.²⁷

c. Additionally, the Defense contention that the RDI ¶¶ 2.d/f/g Profiles and RDI indices did not go through the M.C.R.E. 505 process, and hence were not approved by the Commission, lacks merit. The Government represented that all of the underlying material used to compile the RDI ¶¶ 2.d/f/g Profiles and RDI indices went through the M.C.R.E. 505 summary/substitution process, or was turned over to the Defense in its original form. Neither the RDI ¶¶ 2.d/f/g Profiles nor the RDI indices are required as part of the Commission's ten-category construct. Rather, the Government provided the profiles and indices to the Defense in order to assist them in making sense of the voluminous discovery provided under the 10-category construct, and to better establish a chronology for each Accused.²⁸ While Mr. Ali has succeeded in demonstrating possible flaws contained within the RDI ¶¶ 2.d/f/g Profiles and indices, these possible flaws do not justify throwing out the abundant time invested by the Commission to ensure that adequacy of the summaries and substitutions approved pursuant to M.C.R.E. 505. At best, these issues highlight possible limitations within the current 10-category construct that may require the Commission to expand the breadth of tools available to the Defense to provide a clear and accurate picture of what transpired during the RDI time-frame.

d. The Commission's order in AE 164C notes, "[t]he Commission can, either *sua sponte* or upon a motion to compel discovery, review the summarized information, to determine if additional information should be added to the summary in order to provide 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.'"²⁹ Mr. Ali does not request the Commission to compel the Government to add information to any particular summary, but instead, asks the Commission to

²⁷ Trial Counsel indicated during oral argument "if the defense perceives a mistake or something that doesn't make sense with their own discovery that could be handled through a discovery request." See Transcript at p. 21061.

²⁸ The Defense asserted during oral argument that the RDI Index is required under ¶ 2.a. of the 10-category construct, which requires the Government to provide a chronology of each accused's detention. Transcript at p. 21065. An approved version of that chronology, however, was provided to the Defense in AE 308V.

²⁹ AE 164C at 3.

order the Government to produce all of the original underlying classified information used to create the discovery materials. This is beyond what was contemplated in AE 164C.

e. The Defense has failed to meet its burden to establish the relevance and necessity of the witnesses requested in AE 534G (AAA) to a matter at issue in this AE series at the present time.

5. Ruling.

a. AE 534 (AAA) is **DENIED**.

b. AE 534G (AAA) is **DENIED**.

6. Order. Going forward, the Defense will make reasonable efforts to coordinate with the Government to resolve apparent discrepancies in discovery materials prior to moving the Commission for relief. The Defense will attest to this as part of any motion requesting the Commission to compel the production of additional information relating to classified discovery.

So **ORDERED** this 8th day of February, 2019.

//s//
K. A. PARRELLA
Colonel, U. S. Marine Corps
Military Judge