

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 BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI	AE 562R RULING Defense Motion to Compel Documents Regarding Interrogation Personnel 8 February 2019
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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’s (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

¹ AE 397F, TRIAL CONDUCT ORDER, Government Proposed Consolidation of Motions to Compel Information Relating to the CIA's Former Rendition, Detention, and Interrogation Program, dated 5 April 2016.

facility identified in paragraph (a) or in transporting the Accused between the various facilities; . . .

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 16 March 2018, Mr. Ali (a.k.a. al Baluchi) moved⁴ the Commission to compel documents regarding interrogation personnel. Specifically, Mr. Ali requested all original documents underlying the personnel profile summaries provided by the Government in discovery marked ¶ 2.d. Mr. Ali asserted that the Commission should compel production of the originals because the ¶ 2.d. personnel profile summaries (1) were never a part of the Military Commission Rule of Evidence (M.C.R.E.) 505 process, (2) demonstrate the existence of discoverable information not yet turned over, (3) are not adequate summaries of the original documents, and (4) are incomplete in that no summaries were provided for certain personnel.

c. On 30 March 2018, the Government responded,⁵ asserting that the Commission had approved a table of individuals as an appropriate summary and substitution of the original underlying classified information at issue under ¶ 2.d.⁶ Moreover, the Government stated the Commission had approved summaries of training and employment records for the individuals listed on the ¶ 2.d table (in accordance with ¶¶ 2.f. and 2.g.) after reviewing the original classified documents that formed the basis for these summaries. The Government advised the commission that, in addition to the

² *Id.* at 2.

³ *Id.* at 3.

⁴ AE 562 (AAA), Mr. al Baluchi's Motion to Compel Documents Regarding Interrogation Personnel, filed 16 March 2018. (TS//CODEWORD).

⁵ AE 562A (GOV), Government Response to Defense Motion to Compel Documents Regarding Interrogation Personnel, filed 30 March 2018 (TS//CODEWORD).

⁶ See 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.

Commission-approved summarized ¶¶ 2.d., 2f., and 2.g. discovery, the Government used this discovery to gratuitously create synopses to assist the Defense in understanding the relevance of the individuals listed on the ¶ 2.d. table (the synopses are hereinafter referred to as the “RDI ¶¶ 2.d/f/g. Profiles”). In sum, the Government argued that the Defense received Commission-approved summaries or substitutions for all of the original material used to create the RDI ¶¶ 2.d/f/g Profiles and the gratuitously created RDI ¶¶ 2.d/f/g Profiles were not required by the Commission’s Orders in AE 397F (TCO) or AE 308HHHH. Finally, the Government stated that to the extent an individual associated with the RDI program was assigned a unique functional identifier (UFI), but not a RDI ¶¶ 2.d/f/g Profile, the Defense could make a particularized request to the Government to create an RDI ¶¶ 2.d/f/g Profile for that individual.

d. On 13 April 2018, Mr. Ali replied,⁷ reemphasized his claims that the Commission never approved the RDI ¶¶ 2.d/f/g Profiles through comparison with the original documents, the original documents underlying the RDI ¶¶ 2.d/f/g Profiles were not all Commission-approved summaries, and the RDI ¶¶ 2.d/f/g Profiles were incomplete.

e. On 5 October 2018, Mr. Ali supplemented⁸ his original motion after conducting interviews of two RDI personnel assigned a UFI. Mr. Ali submitted declarations from his defense investigators pertaining to those interviews as further evidence of why the Commission cannot rely on the RDI ¶¶ 2.d/f/g Profiles in satisfaction of the Government’s discovery responsibility.

f. On 19 October 2018, the Government responded⁹ to Mr. Ali’s supplement. The Government response added reference to AE 542K (GOV),¹⁰ an *ex parte* in camera submission by

⁷ AE 562B (AAA), Mr. al Baluchi’s Reply to Government Response to Mr. al Baluchi’s Motion to Compel Documents Regarding Interrogation Personnel, filed 13 April 2018 (TS//CODEWORD).

⁸ AE 562 (AAA Sup), Mr. al Baluchi’s Supplement to Motion to Compel Documents Regarding Interrogation Personnel, filed 5 October 2018 (TS//CODEWORD).

⁹ AE 562G (GOV), Government Response to Defense Supplement, filed 19 October 2018 (TS//CODEWORD).

¹⁰ AE 542K (GOV), Government Unclassified Notice Of *Ex Parte*, *In Camera*, Under Seal Classified Filing, filed 13 August 2018.

the Government proposing to provide additional discovery to the Defense relevant to the issues raised in this AE series. The Government also reiterated the fact that the RDI ¶¶ 2.d/f/g Profiles were non-compulsory and non-exhaustive.

g. On 26 October 2018, Mr. Ali replied¹¹ restating his earlier argument that the original documents underlying the RDI ¶¶ 2.d/f/g Profiles are not all summarized elsewhere, nor do other summaries contain the omitted material.

2. Findings of Fact.

a. In response to the discovery obligations set forth in ¶¶ 2.d, 2.f, and 2.g, of the Commission's Order in AE 397F (TCO), the Government submitted¹² proposed summaries and substitutions pursuant to 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 determined¹³ 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. Using both information contained in the ¶ 2.d. responsive table, as well as Commission-approved summaries responsive to ¶¶ 2.f. and 2.g., the Government created the RDI ¶¶ 2.d/f/g Profiles to assist the Defense in understanding the relevance of the individuals listed on the ¶ 2.d. table. The RDI ¶¶ 2.d/f/g Profiles are not explicitly required by the Commission's Order in AE 397F

¹¹ AE 562H (AAA), Mr. al Baluchi's Reply to AE 562G, filed 26 October 2018.

¹² 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.

¹³ See AE 308AAA (Corrected Copy), Ruling; 308BBB (Corrected Copy), Ruling; 308III, Order; 308MMMM, Order; 308RRRR, Order.

(TCO), but rather are a compilation of other discovery approved by the Commission pursuant to M.C.R.E. 505.

d. In creating the RDI ¶¶ 2.d/f/g Profiles, the Government used either information contained in Commission approved summaries and substitutions per M.C.R.E. 505, or other discovery provided to the Defense.

e. The Government did not produce a RDI ¶¶ 2.d/f/g Profile for every individual assigned a UFI; the Government produced a RDI ¶¶ 2.d/f/g Profile only for individuals assigned a UFI who the Government determined had direct and substantial contact with the Accused.

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, 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. “The 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 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.’”¹⁴

4. Analysis.

a. Title 10 U. S. Code, § 949p-4(c) and M.C.R.E. 505(f)(3) provide: “[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.” 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 summaries and substitutions – specifically relevant here the ¶ 2.d. table and ¶¶ 2.f and 2.g summaries – provided the accused substantially the same ability to make a defense as would discovery of or access to the original classified information. Accordingly, the Commission considers this motion an improper request for reconsideration and declines to order production of the original documents for which it has already approved summaries and substitutions pursuant to M.C.R.E. 505.

b. Importantly, Mr. Ali’s motion focuses almost entirely on the inadequacy of the RDI ¶¶ 2.d/f/g Profiles, information the Government was not required to create or produce to the Defense in discovery. The Government voluntarily provided the RDI ¶¶ 2.d/f/g Profiles to assist the Defense in understanding the relevance of the personnel listed on a rather insipid table. While the Government certainly cannot provide gratuitous information that is intentionally false or misleading, the Commission finds no evidence that the RDI ¶¶ 2.d/f/g Profiles constitute either. The Defense has gone through great pains to demonstrate gaps or flaws within the RDI ¶¶ 2.d/f/g Profiles, and the

¹⁴ 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.

Government has conceded that mistakes are possible given the sheer volume of discovery synthesized in compiling the RDI ¶¶ 2.d/f/g Profiles. Nevertheless, the Defense may choose to either ignore the profiles, supplement or improve the profiles using information at their disposal, or request additional information and clarification from the Government.

c. Possible inaccuracies, gaps, or inconsistencies between the RDI ¶¶ 2.d/f/g Profiles and other discovery provided to the Defense does not justify revisiting the Commission's approved summaries and substitutions. To the extent that the RDI ¶¶ 2.d/f/g Profiles demonstrate the existence of other information that the Defense believes is discoverable, the Defense should then seek that specific information – not all underlying original documents already vetted through the M.C.R.E. 505 process.¹⁵ 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.¹⁶ 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 established by the Government at the time they provided the discovery to the Defense before bringing time-intensive litigation before the Commission.

d. Additionally, the Defense contention that the RDI ¶¶ 2.d/f/g Profiles 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

¹⁵ 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 Unofficial/Unauthenticated Transcript of the *U.S. v. Khalid Shaikh Mohammad, et al.*, Motions Hearing Transcript Dated 12 November 2018 from 1:06 P.M. to 2:15 P.M. at p. 21061.

¹⁶ See AE 534M, Ruling, Defense Motion to Compel Interrogator Statements, Summaries, Reports, Logs, and Notes, dated 8 February 2019.

Profiles went through the M.C.R.E. 505 summary/substitution process, or was turned over to the Defense in its original form. As noted above, the RDI ¶¶ 2.d/f/g Profiles are not required as part of the Commission's ten-category construct and hence submission to the Commission for approval is unnecessary.

e. 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.'"¹⁷ Mr. Ali does not request the Commission to compel the Government to add information to any particular summary, but instead, asks the Commission to 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.

5. **Ruling.** AE 562 (AAA) is **DENIED**.

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

//s//

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

¹⁷ AE 164C at 3.