

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 568 (MAH)

Defense Motion to Compel Discovery of
Business Records Correspondence

Filed: 9 April 2018

1. **Timeliness:** This motion is timely filed.
2. **Relief Sought:** The Defense for Mr. Hawsawi moves for an order compelling the Government to produce records regarding communications the FBI had with, and records it obtained from, third parties during its investigation of this case. These communications and documents were referenced during FBI Special Agent Abigail Perkins' testimony, which this Commission received on 6 December 2017. *See* Attachment B, DR-0085-MAH.
3. **Burden and Standard of Proof:** As the moving party, the Defense bears the burden of establishing that it is entitled to the requested relief. *See* R.M.C. 905(c). "The burden of proof of any factual issue the resolution of which is necessary to decide a motion shall be by a preponderance of the evidence." R.M.C. 905(c)(2).
4. **Overview:** On 6 December 2017, FBI Special Agent Abigail Perkins was called to testify on behalf of the Prosecution regarding the FBI's investigation and interrogation of Mr. al Hawsawi. During this testimony, it was revealed to the defense for the first time that the banking and

financial records and business records' declarations the Prosecution has offered as potential evidence in its case-in-chief against Mr. al Hawsawi were not collected by the FBI from the businesses themselves; rather, they were provided to the FBI by foreign government intermediaries. Following this revelation, the defense sent to the prosecution a request for

all FBI "Form 302s", notes, letters, emails or other materials memorializing or containing requests or responses between the FBI, CITF, CID, NCIS, or other law enforcement agency of foreign governments, businesses, or other entities, involved in obtaining documents, business records certificates, or other information in the investigation of the case against Mr. al Hawsawi.

Attachment B, DR-0085-MAH.

This discovery had been previously requested in an earlier, broad discovery request. *See* AE 491C, Defense Response to Government Motion for the Admission of Hijacker Activity Records into Evidence, at att. B. (filed 14 March 2017). As of the date of this motion, the Defense has not received a response from the Prosecution. The production of the requested discovery is relevant and necessary for the Defense to fully investigate and develop Mr. Hawsawi's case, as required by the American Bar Association Guidelines for the Performance of Counsel in Death Penalty Cases.¹

5. **Facts:**

A. On 9 March 2017, the defense requested the production of business records discovery from the prosecution. *See* Attachment C, DR-0073-MAH. On 23 August 2017, the prosecution

¹ *See* ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003)[hereinafter ABA Guidelines], Guideline 10.7 The Police and Prosecution ("Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports, autopsy reports, photos, video or audio tape recordings, and crime scene and crime lab reports together with the underlying data therefor. Where necessary, counsel should pursue such efforts through formal and informal discovery.")

responded to that request, indicating that the prosecution was conducting its due diligence regarding the request. *See* Attachment D.

B. On 6 December 2017, Special Agent Perkins testified on behalf of the prosecution as follows:

Q. Did the United Arab Emirates -- did the government of the United Arab Emirates assist you in this investigation?

A. They did.

Q. Did you have an opportunity to review all of the banking and travel documents we're going to discuss today prior to your testimony?

A. I did.

Q. Were all of these documents gathered as part of the FBI's investigation?

A. They were.

Q. Were the banking and travel documents all business records of various different companies kept in the course of their regular business?

A. They were.

Q. And how did the FBI come into receipt of these documents?

A. So initially, probably just based on cooperation, a request was made, but then we would have followed that back up with an official request.

Q. So did they initially come to you as certified business records or were they later certified?

A. They were subsequently certified.

Q. And are you aware of the process by which the FBI had records certified from the UAE?

A. We would have gathered the documents that we were interested in getting certified, provided those to the United Arab Emirates

government, who would have then proceeded to whatever business would have been needed to certify those records.²

C. On 12 December 2017, the Defense submitted a discovery request to the Prosecution for

all FBI “Form 302s”, notes, letters, emails or other materials memorializing or containing requests or responses between the FBI, CITF, CID, NCIS, or other law enforcement agency of foreign governments, businesses, or other entities, involved in obtaining documents, business records certificates, or other information in the investigation of the case against Mr. al Hawsawi.

Attachment B, DR-0085-MAH.

D. As of the date of this motion, Defense has not received production of the documents requested in December 2017, or a response from the Prosecution regarding that request.

6. **Law and Argument:**

A. Standard for Discovery

Rule for Military Commission (R.M.C.) 701(j) establishes: “Each party shall have adequate opportunity to prepare its case and no party may unreasonably impede the access of another party to a witness or evidence.” In passing the Military Commissions Act (MCA) of 2009, Congress mandated this process. *See* 10 U.S.C. § 949j (“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.”). R.M.C. 701(c)(1) provides that the Government shall permit the defense counsel to examine any books, papers, documents, photographs, tangible objects, buildings, or places so long as they are: (1) under the control of the government, and (2) material to the preparation of the defense or intended for use by the trial

² Transcript at 17578-79.

counsel as evidence in the prosecution case-in-chief.

Demonstrating materiality in an Article III court “is not a heavy burden,”³ and the standard of materiality is broadly construed.⁴ Material evidence is not limited to exculpatory evidence,⁵ as the language and spirit of the Rule are designed to provide a criminal defendant, in the interests of fairness, the widest possible opportunity to inspect and receive such materials in the possession of the government as may aid him in presenting his side of the case.”⁶ The scope of materiality is also not limited by admissible evidence alone, as objects and information that are not admissible may nonetheless lead to other admissible information and evidence.⁷ Additionally, the scope of materiality is not limited only to information that is favorable to the defense, but also includes information that is unfavorable, as “a defendant in possession of such evidence may later shift the quantum of proof in his favor in several ways: by preparing a strategy to confront the damaging evidence at trial; by conducting an investigation to attempt to discredit that evidence; or by not presenting a defense which is undercut by such evidence.”⁸

The United States Supreme Court has repeatedly emphasized that the Sixth Amendment right to effective representation demands, in a capital case, that the Defense thoroughly investigate the case and develop mitigating circumstances. *See Strickland v. Washington*, 466 U.S. 668, 690-91 (1984) (under constitutional standards, counsel must either thoroughly investigate the facts, or make a reasonable professional judgment that makes the investigation unnecessary); *United States v. Kreutzer*, 59 M.J. 773 (A.C.C.A. 2004), *aff’d* 61 M.J. 293

³ *United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir 1998).

⁴ *United States v. NYNEX Corp.*, 781 F. Supp. 19, 25 n.8 (D.D.C. 1991).

⁵ *United States v. Marshall*, 132 F.3d 63, 67 (D.C. Cir. 1998); *United States v. Libby*, 429 F. Supp. 2d 1, 7 (D.D.C. 2006).

⁶ *United States v. Poindexter*, 737 F.Supp. 1470, 1473 (D.D.C. 1989).

⁷ *Lloyd*, 992 F.2d at 351.

⁸ *Marshall*, 132 F.3d at 67.

(C.A.A.F. 2005); ABA Guideline 10.7 (“Barring exceptional circumstances, counsel should seek out and interview potential witnesses.”).

B. Materiality of the Requested Discovery

The requested discovery is critical to evaluating the evidentiary foundation of the documents and information the Prosecution plans to use against Mr. al Hawsawi at trial; as such, it is clearly material to the preparation of the defense and must be provided in discovery. *See United States v. Bess*, 75 M.J. 70, 75 (C.A.A.F. 2016) (finding that “giving controverted [business records] evidence to the factfinder with no opportunity for the accused to examine or cross-examine witnesses or in any way to rebut that evidence in front of the members is unprecedented in our legal system, and cannot be reconciled with due process.”).

M.C.R.E. 803(a) provides that “[h]earsay evidence may be admitted in trials by military commission if the evidence would be admitted under the rules of evidence applicable in trial by general courts martial.” The rules of evidence applicable in general courts-martial are contained in the Military Rules of Evidence. Military Rule of Evidence 902(11) allows for the self-authentication of certified domestic records of regularly conducted business activity or copies thereof without extrinsic evidence of authenticity, but only provided that the records are admissible under Military Rule of Evidence 803(6) -- the business records exception to the hearsay rule -- and provided that they are accompanied by a certificate that meets the rule’s standards.

The business records exception is based on a presumption of accuracy accorded because the information is part of a regularly conducted activity, kept by those trained in the habits of precision, and customarily checked for correctness, and because of the accuracy demanded in the conduct of the nation’s business. *See United States v. Baker*, 693 F.2d 183, 188 (D.C. Cir. 1982)

(citing *McCormick, Evidence*, § 306, at 720 (2d ed. 1972)). It is also well-established that one who prepares a document in anticipation of litigation is not acting in the regular course of business. See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 321 (2009) (“Documents kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status But that is not the case if the regularly conducted business activity is the production of evidence for use at trial.”).

Documents and reports generated in response to a government request are not business records under the hearsay exception. See *United States v. Kim*, 595 F.2d 755, 761-762 (D.C. Cir. 1979) (holding bank record was inadmissible under Rule 803(6) because it was generated in response to a government subpoena); *United States v. Gwathney*, 465 F.3d 1133, n.11 (10th Cir. 2006) (“We note, however, the difficulty of establishing Western Union’s response to the subpoena as a business record even if a proper foundation were laid. From all appearances, the document was prepared in advance of litigation and was not regularly produced by Western Union.”).

In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), the Supreme Court discussed that “[b]usiness and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because--having been created for the administration of an entity’s affairs and not for the purpose of establishing or proving some fact at trial--they are not testimonial.” *Id.* at 324. However, where the documents are “prepared specifically for use at petitioner’s trial” they are testimonial and the foundation witnesses must be subject to confrontation under the Sixth Amendment. *Id.*; see also, *United States v. Moore*, 651 F.3d 30, 72 (D.C. Cir. 2012) (holding that “solemn declarations or affirmations made for the purpose of establishing or proving some fact are testimonial statements Put another way, ‘[a]

document created solely for an 'evidentiary purpose,' . . . made in aid of a police investigation, ranks as testimonial.'").

The Defense has an obligation to perform an independent investigation for both the guilt and penalty phase of the trial, which includes an obligation to investigate the weight and admissibility of evidence the Prosecution intends on presenting. The Prosecution has already indicated that it plans to use business records and business records certificates in this case against Mr. al Hawsawi. Many if not most of the records it intends to introduce are from foreign or overseas entities that relate to financial transactions the Government alleges Mr. al Hawsawi conducted or was involved with. These financial transactions are the gravamen of the Government's claims against Mr. al Hawsawi. As Special Agent Perkins testified, the Government got assistance from third parties in order to locate these records and to get authenticating documents for these records. Most of the authenticating documents were obtained years after the underlying records were generated. The circumstances under which the business records were obtained, and how they were later authenticated, are relevant and material to the preparation of Mr. al Hawsawi's defense.

The requested records and associated documents are plainly discoverable under R.M.C. 701(c)(1), and pursuant to the Due Process Clause of the Constitution. Accordingly, Mr. al Hawsawi requests that this discovery be ordered produced.

7. **Request for Oral Argument:** The Defense requests oral argument on this motion.
8. **Conference with Opposing Counsel:** Conference request sent to Prosecution 6 April 2018 at 0847. There has been no response.
9. **Witnesses:** None at this time.

10. **Attachments:**

- A. Certificate of Service;
- B. Defense Request for Discovery dated 12 December 2017, DR-0085-MAH;
- C. Defense Request for Discovery dated 9 March 2017, DR-0073-MAH;
- D. Prosecution Discovery Response dated 23 August 2017.

//s//
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Learned Defense Counsel for
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//s//
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CERTIFICATE OF SERVICE

I certify that on the 9th day of April 2018, I electronically filed **AE 568 (MAH) - Defense Motion to Compel Discovery of Business Records Correspondence**, with the Clerk of the Court and served a placeholder on all counsel of record by e-mail.

 //s//

WALTER B. RUIZ

Learned Counsel for Mr. Hawsawi

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DEPARTMENT OF DEFENSE
MILITARY COMMISSIONS DEFENSE ORGANIZATION
1620 DEFENSE PENTAGON
WASHINGTON, DC 20301-1620

9 Mar 2017

From: Defense Counsel for Mr. al Hawsawi, *United States v. Khalid Shaikh Mohammad, et al.*
To: Trial Counsel
Subj: MR. AL HAWSAWI'S REQUEST FOR DISCOVERY ICO U.S. v. MOHAMMAD,
et al., DR-0073-MAH

1. Counsel for Mr. al Hawsawi request the production of the following information pertaining to the 20 items the Prosecution seeks to pre-admit in AE 491 (GOV):
 - a. Copies of all law enforcement investigative reports explaining how these documents were obtained;
 - b. Copies of all law enforcement investigative reports explaining how the declarations were obtained;
 - c. Copies of all emails which were sent to, or received from, the declarants regarding their declarations;
 - d. Contact information for the declarants.
2. This information is material to the preparation of the defense so that the defense may determine whether the source of the information and the circumstances of preparation are trustworthy.
3. Should you require further information regarding this discovery request, please contact LtCol Sean Gleason at [REDACTED] or Sean.gleason@milcom.defense.mil [REDACTED]

/s/
Sean M. Gleason
LtCol, USMC
Detailed Defense Counsel

DR-0073-MAH

D



OFFICE OF THE
CHIEF PROSECUTOR

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF PROSECUTOR OF MILITARY COMMISSIONS
1610 DEFENSE PENTAGON
WASHINGTON, DC 20301-1610

23 August 2017

MEMORANDUM FOR Defense Counsel for Mr. Hawsawi

SUBJECT: Prosecution Response to 9 March 2017 Request for
Discovery (DR-0073-MAH)

1. The Prosecution received the Defense request for discovery on 9 March 2017. The Prosecution hereby responds to the Defense request, below, in bold:
2. The Defense asserts and requests production of the following information pertaining to the 20 items the Prosecution seeks to pre-admit in AE 491 (GOV):
 - a. Copies of all law enforcement investigative reports explaining how these documents were obtained;
 - b. Copies of all law enforcement investigative reports explaining how the declarations were obtained;
 - c. Copies of all emails which were sent to, or received from, the declarants regarding their declarations;
 - d. Contact information for the declarants.

This information is material to the preparation of the defense so that the defense may determine whether the source of the information and the circumstances of preparation are trustworthy.

The Prosecution continues to conduct its due diligence. While the Prosecution will provide the Defense with a final response upon completion of its due diligence, it can now verify that it will provide some of the requested materials.

Respectfully submitted,

 //s//
Nicole A. Tate
Assistant Trial Counsel