

**MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA**

**UNITED STATES OF AMERICA**

**v.**

**ABD AL HADI AL IRAQI**

**AE 079F**

Defense Status Update Responding to the  
Military Commission's Order in AE 079E

**21 February 2018**

**1. Timeliness.**

This Status Update is filed timely pursuant to Military Commissions Trial Judiciary Rule of Court 3.7 (c) and AE79E Order dated 14 February 2019.

**2. Defense Status Update**

On 25 January 2017, the Defense served its Sixteenth Supplemental Request for Discovery on the Government.<sup>1</sup> The Defense requested a response to its Sixteenth Supplemental Request for Discovery “no later than 23 March 2017, to allow for sufficient time to litigate a motion to compel at the next hearing” if necessary. This allowed the Government a period of two months to respond to the request.<sup>2</sup>

On 31 March 2017, the Government responded to the request for position email, stating that “The Government is in the process of responding to the Defense's Sixteenth Supplemental Discovery Request; therefore, the Government objects to the proposed motion.”<sup>3</sup> Consequently, on 31 March 2017, the Defense filed AE 079, Defense Motion to Compel Discovery of Sixteenth

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<sup>1</sup> AE 079 Att. B.

<sup>2</sup> *Id.*

<sup>3</sup> AE 079 Att. C, Email from Trial Counsel to Defense Counsel dated 31 March 2017.

Supplemental Request for Discovery dated 25 January 2017. The Government responded in AE 079A, dated 14 April 2017, and the Defense replied in AE 079B dated 20 April 2017. And on 25 April 2017, the Commission heard oral argument from both parties on AE 079.<sup>4</sup>

In AE 079D, dated 4 August 2017, the Commission decided that, “because there is still discovery pending the MCRE 505 review process” the Defense motion should be deferred.<sup>5</sup> It should be noted that recently, in AE 141, Defense Motion to Compel Proper Reclassification of Discovery Materials, the Defense respectfully requested the Court have the Government reevaluate discovery materials, including material provided in the MCRE 505 process.<sup>6</sup>

On 14 February 2019, in AE 079E, the Commission noted the deferred ruling and ordered the parties to file an additional pleading “articulating their views on the status of resolution of the discovery requested in AE 079.”<sup>7</sup>

As previously briefed and argued before this Commission, these requests were indeed relevant and material within the meaning of RMC 701.<sup>8</sup> The same issues that presented themselves in 2017 persist to this day. In January of 2017, the Defense provided the Government with their 16<sup>th</sup> Supplemental discovery request.<sup>9</sup> In light of the charging documents provided to

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<sup>4</sup> See Unofficial/Unauthenticated Transcript of the Abd al Hadi al-Iraqi Motions Hearing (Transcript) dated 25 April 2017 from 2:04 P.M. to 2:36 P.M. at pp. 1328–49.

<sup>5</sup> See AE 079D at 2.

<sup>6</sup> See AE 141.

<sup>7</sup> AE 079E.

<sup>8</sup> Materiality is not a heavy burden to demonstrate for discovery purposes and there need only be some indication that the pretrial disclosure of the disputed evidence would enable the defendant significantly to alter the quantum of proof in his favor. See *United States v. Lloyd*, 992 F.2d 348, 351 (D.C. Cir. 1993); *United States v. George*, 786 F. Supp. 56, 58 (D.D.C.1992)); see also *United States v. Stone*, 40 M.J. 420, 422 n.1 (C.M.A. 1994) (RCM 701 “described a similar right to discovery provided in Fed. R. Crim. P. 16 . . . [The RCM 701] ’materiality standard normally ‘is not a heavy burden,’ . . . ; rather, evidence is material as long as there is a strong indication that it will ‘play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal’”) (internal cites omitted)); see also *United States v. NYNEX Corp.*, 781 F. Supp. 19, 25 n.8 (D.D.C. 1991).

<sup>9</sup> AE 079 Att. B.

Mr. al-Tamir, Defense Counsel identified discreet categories of information that are essential to the effective presentation of Mr. al-Tamir's case.<sup>10</sup>

To date, the Government has not provided a written response to the 16th Supplemental Request for Discovery, dated 25 January 2017. During the 25 April 2017 session, the Commission, as well as trial counsel, acknowledged the difficult position the Defense is placed in while waiting for the Government to produce evidence, in this case through either normal course of the MCRE 505 process.<sup>11</sup>

Notwithstanding the inadequacy of the MCRE 505 process which is still a subject ongoing litigation in this case,<sup>12</sup> Mr. al-Tamir has still not been provided the discovery at issue in the original motion to compel.<sup>13</sup> This material is clearly discoverable, as thoroughly briefed in the AE 079 series and argued before this Commission, and essential to the presentation of an adequate defense.

### **3. List of Attachments.**

A. Certificate of Service, dated 21 February 2019.

Respectfully Submitted,

//s//  
SUSAN HENSLER  
Detailed Defense Counsel

//s//  
DAHOUD ASKAR  
LT, JAGC, USN  
Detailed Defense Counsel

//s//  
CHARLES BALL  
LT, JAGC, USN  
Detailed Defense Counsel

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<sup>10</sup> *Id.*; see also Referred Charge Sheet.

<sup>11</sup> "MJ [Col RUBIN]: It sounds like we're in agreement: Until the defense gets those documents, it's pending. ATC [LCDR LINCOLN]: It is pending, Your Honor. Yes, Your Honor. I think it's difficult to have an articulable conversation regarding motions to compel because they don't know everything that will be in their hands once those 505s" Unauthenticated Transcript dated 25 April 2017 at pg. 1343

<sup>12</sup> See AE 141.

<sup>13</sup> See AE 079; see also AE 079B.

# **ATTACHMENT A**

**CERTIFICATE OF SERVICE**

I certify that on **21 February 2019**, I caused **AE 079F** Defense Status Update Responding to the Military Commission's Order in AE 079E to be filed with the Office of the Military Commissions Trial Judiciary and I served a copy on Government counsel of record.

//s//

Dahoud Askar  
LT, JAGC, USN  
Detailed Defense Counsel