

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

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>ABD AL HADI AL-IRAQI</p>	<p>AE 079T</p> <p>Government Response to Defense Supplement and Motion for Appropriate Relief Regarding Government Non-Compliance with AE 0790</p> <p>25 November 2022</p>
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1. Timeliness

This response is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court (“RC”) 3.7.d.(1) and AE 219I/AE 220I. The Government notes that the Defense filing included a supplement requiring a response by 25 November 2022. *See* AE 219I/AE 220I.

2. Relief Sought

The Government requests the Commission deny the Defense’s supplement and motion for appropriate relief under de novo reconsideration to enforce compliance with AE 0790. Furthermore, the Government requests the Commission vacate its order in AE 0790.

3. Burden of Proof

As the moving party, the Defense must demonstrate by a preponderance of the evidence that the requested relief is warranted. Rule for Military Commissions (“R.M.C.”) 905(c)(1)–(2).

4. Overview

The Defense's supplement and motion for appropriate relief should be denied because 1) the Accused waived his right to discovery to such materials as part of his pretrial agreement with the Convening Authority; 2) The Government produced to the Defense over 400 pages of responsive materials, including organizational charts and leadership structure regarding al Qaeda; and 3) the Accused's admitted to his role in the al Qaeda conspiracy pursuant to a stipulation of fact such that the issue is no longer in controversy. *See generally* AE 217 (Under Seal).

5. Facts

The Government declines to adopt the statement of facts in the Defense's motion.

The Government incorporates the facts contained in AE 079G, AE 079K, and AE 079R.

In addition to the efforts described in those filings, the Government produced 421 pages of organizational charts and other materials depicting the organizational structure of al Qaeda and the U.S. Government intelligence estimates regarding the Accused's role in al Qaeda. These were produced to Defense on 23 October 2020 and 28 October 2020 with the following BATES numbers: HADI-4-027424 through HADI-4-027743; HADI-4-027599 through HADI-4-027620; and HADI-4-027664 through HADI-4-027676.

As part of a common plan from in or about 1996 to on or about 1 November 2006, the Accused knowingly conspired and agreed with Usama bin Laden, Ayman al Zawahiri, Mohammed Atef, Khalid Shaikh Mohammad and others to commit substantive offenses triable by military commission. *See* Charge Sheet, Charge V; AE 217J. The Accused, knowing the unlawful objectives and purposes of the agreement, willfully joined the

agreement with the intent to further its unlawful objectives and purposes and committed one or more overt acts in furtherance of the agreement. *See* Charge Sheet, Charge V; AE 217J.

On 9 June 2022 the Accused signed and adopted a stipulation of fact. *See* AE 217 (Under Seal). Sections IV, V, VI, VII, VIII, IX, and X of this document contains multiple factual statements of his participation within the al Qaeda conspiracy.

On 13 June 2022, the Accused's entered pleas of guilty to the aforementioned charges.

On 24 August 2022, the Defense requested the Military Commission conduct de novo reconsideration of AE 079O, claiming the Government has not fully complied with this order and requesting de novo review "to determine whether additional relief is necessary to ensure government compliance." AE 220A.

On 4 November 2022, the Defense filed a motion to supplement and to request appropriate relief regarding a claim of Government non-compliance with AE 079O. *See* AE 079S.

6. Law and Argument

I. The Accused waived his right to discovery beyond R.M.C. 701(b)(1) and (d) as part of his PTA with the Convening Authority.

According to the terms of the PTA, the Accused waived production of "any discovery beyond what the Government is obligated to provide pursuant to R.M.C. 701(b)(1) and (d)." AE 217 (Under Seal). Limitation to R.M.C. 701(b)(1) and (d) is a bargained-for benefit for the Government given the volumes of materials involved in a highly complex national security litigation case with a charged timeframe spanning 10 years. This includes the extensive litigation involving AE 079, which has now

spanned a five-year timeframe. R.M.C. 701(b)(1) relates to papers accompanying charges, convening orders, and statements, and R.M.C. 701(d) relates to information that the Government intends to offer at sentencing. The Defense waived further discovery, having already received a significant amount of material. The Defense waiver of further discovery was therefore informed with the benefit of having this material. Given the voluminous scope and sensitivity of information in a highly complex national security case, the waiver of discovery is a material provision of the PTA from which the Government is entitled to a benefit.

Despite having waived production of discovery beyond R.M.C. 701(b)(1) and (d) and having signed a PTA just six months ago with the Convening Authority, the Defense has now stated it is entitled to discovery relief based on mitigation evidence. *See* AE 079 at 6 (“This information will provide powerful mitigating evidence . . .”). The Military Judge should deny the Defense’s requested relief because the basis for the relief has been waived based on the Accused’s agreement with the Convening Authority.

II. The Defense’s Supplement and Motion under de novo review for Appropriate Relief Regarding Government Non-Compliance should be denied because the Government has produced over 400 pages of discovery to the Defense regarding organizational charts and leadership structure of al Qaeda.

The Government has produced over 400 hundred pages of discovery¹ in response to the Commission’s order in AE 0790. The classified materials contain a large swath of organizational charts and intelligence information related to the hierarchy of al Qaeda, and the U.S.’s understanding of the Accused’s place in al

¹ HADI-4-027424 through HADI-4-027743 and HADI-4-027758 through HADI-4-027861.

Qaeda. *See generally* HADI-4-027424 through HADI-4-027743; HADI-4-027599 through HADI-4-027620; HADI-4-027664 through HADI-4-027676. A prosecutor's disclosure obligations are not based on a monolithic view of government where any information held by any government agency must be disclosed; "[r]ather, a prosecutor is only obligated to disclose information of which he has either actual or constructive knowledge." *United States v. Bin Laden*, 397 F. Supp. 2d 465, 481 (S.D.N.Y. 2005); *see also United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998) (stating that to the extent the prosecutor knows of material evidence favorable to the defendant in a criminal prosecution, the government has a due process obligation to disclose that evidence). As discussed in AE 079R, the Government identified organizational charts that were non-cumulative and varied to provide the Defense a representative sample of materials in compliance with AE 079O.

III. The Accused has entered pleas of guilt and has admitted to his role in the al Qaeda conspiracy pursuant to a stipulation of fact such that the issue has been placed out of controversy.²

The Defense's motion for appropriate relief based on Government non-compliance relies upon a Military Judge's pre-findings order that was issued based upon a pre-finding Defense theory to contest the Accused's level of involvement in al Qaeda. Once the Accused entered pleas, the legal basis for the Military Judge's order appears to have been obviated because the element of his involvement in the conspiracy is no longer in dispute. *See generally* AE 217 Stipulation of Fact (Under Seal). Because of this, the nature of AE 079 has changed such that upon consideration of AE 079 in light of the Accused's waiver of discovery in the PTA and admission of involvement in the al Qaeda conspiracy, the

² *See generally* AE 217 (Under Seal).

Military Judge should vacate the AE 079 order because the basis for the requested relief is no longer applicable.

7. Conclusion

Based on the foregoing, the Military Judge should deny the Defense's request to compel unspecified relief. It is the Government's obligation to conduct discovery under R.M.C. 701, which it carried out through searches of the Government's repository of materials, producing over 400 pages of responsive material to the Defense. Since the issuance of AE 079 and the production of those materials, the Accused waived his right to further discovery on these matters. *See generally* AE 217 (Under Seal) (waiving discovery beyond R.M.C. 701(b)(1) and (d)). Further, since the issuance of AE 079O, the Accused has entered pleas of guilty to the conspiracy charge and entered into a stipulation of fact concerning his role in al Qaeda such that there is no longer a basis for the AE 079 order let alone the Defense's requested relief.

8. Oral Argument

The Government does not request oral argument but is prepared to provide oral argument if the Commission finds that it would be helpful in making its ruling.

9. Witnesses and Evidence

The Government does not intend to call witnesses or present evidence with this response.

10. Additional Information

The Government has no additional information.

11. List of Attachments

A. Certificate of Service dated 25 November 2022.

Respectfully submitted,

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ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 25th day of November 2022, I filed AE 079T, **Government Response to Defense Supplement and Motion for Appropriate Relief Regarding Government Non-Compliance with AE 079O**, with the Office of Military Commissions Trial Judiciary, and I served a copy on counsel of record.

//s//

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