

UNITED STATES ARMY TRIAL JUDICIARY  
SECOND JUDICIAL CIRCUIT, FORT BRAGG, NORTH CAROLINA

---

UNITED STATES OF AMERICA	)	
	)	
v.	)	Findings of Fact, Conclusions of Law
	)	and Ruling -- Defense Fourth Motion to
SGT Robert B. Bergdahl	)	Compel Production
HHC, STB, U.S. Army FORSCOM	)	
Fort Bragg, NC 28310	)	20 September 2016
	)	

---

1. The accused moves this court to order the government to provide copies of all requests for information (RFI) and all prudential search terms used by Department of Defense entities, intelligence community organizations and other U.S. governmental organizations to generate documents for the trial counsel as part of their disclosure/discovery obligations in this case.

**FINDINGS OF FACT**

2. I considered the pleadings and arguments of the parties, as well as all appellate exhibits submitted on the matter and not objected to by the parties. I find the following facts by a preponderance of the evidence:

a. From the time that the accused went missing from his unit (on or about 30 June 2009) until he was recovered to U.S. control on 31 May 2014, numerous U.S. Government agencies and military organizations gathered information and intelligence and generated numerous documents concerning finding and recovering the accused.

b. Since the charges were preferred in this case on 25 March 2015, and, even more significantly, since the charges were referred to court-martial on 14 December 2015, the prosecution has sent numerous RFIs to the agencies involved in those efforts to recover the accused. In response, the government has received over 300,000 documents, reviewed most of those in order to determine which were disclosable/discoverable and begun the process of providing over 35,000 documents determined to be discoverable to the defense.

c. On 4 May 2015 and again on 28 July 2016, the defense filed discovery requests with the government requesting the government provide the RFI and search terms used to obtain the documents. The prosecution responded both times denying all such requests.

## LAW AND ANALYSIS

3. Discovery and disclosure obligations in the Military Justice system are broad and are designed to enhance the orderly administration of justice and avoid surprises and delays. Article 46, UCMJ; *U.S. v. Luke*, 69 MJ 309 (CAAF 2011). Discovery is described as "open," with some limited exceptions. See Moyer, Procedural Rights of the Military Accused: Advantages Over A Civilian Defendant, 51 Mil. L. Rev. 1, 11-14 (1971). Trial counsel's obligation under Article 46, UCMJ, includes removing obstacles to defense access to information and providing such other assistance as may be needed to ensure that the defense has an equal opportunity to obtain evidence. *U.S. v. Stellato*, 74 MJ 473 (CAAF 2015). The government must take all reasonable steps to obtain and disclose evidence to the defense and, if they fail to do so, they are subject to significant remedies including dismissal of charges with prejudice or, if discovered after trial is complete, reversal of a conviction on appeal. See, e.g. *Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963); and *Stellato*, *supra*.

4. The defense has cited no law, and the court is unaware that any law exists, that provides the defense the right to dictate to the government the terms or methods they use to search for evidence that might meet their disclosure obligations or answer a specific discovery request or to discover what terms the government used to obtain the documents they do provide. As officers of the court, and attorneys practicing under at least two sets of rules of professional responsibility, all attorneys in this case are presumed -- until shown to have acted otherwise -- to follow the law regarding discovery and disclosure obligations in letter and spirit. The question before the court here is whether the defense has the right to look over the government's shoulder to insure they are really searching for the things they should and that they are doing a thorough job of it. The defense cites no law for the proposition that they have the right to do this. Indeed, they do not even cite examples of things they have received so far that would indicate the government is doing less than a thorough job of searching for items either responsive to specific discovery requests or responsive to particular disclosure obligations. Indeed, the sheer volume of documents the government has or will soon turn over to the defense (by some estimations reaching into the hundreds of thousands of pages) belies any implication or inference that the government is doing anything less than searching under every rock.

5. Whether that is true or not, the law simply does not require the government to provide the defense the search terms and RFIs used to meet their discovery/disclosure obligations.<sup>1</sup> In fact, it is true that the law provides that if the


---

<sup>1</sup> While it is true that the defense has no right to discover or even dictate search terms or RFI used by the government to meet their discovery/disclosure obligations, prudence would dictate that the government seek and strongly consider defense recommendations for such search terms/RFI. Such practice is a much preferred method for ensuring that everything is found, disclosed and considered that should be. This practice has the added benefit of reducing the need to litigate motions like this one.

defense becomes aware of matters that the government should have but did not disclose, they are entitled to relief ranging from an order compelling the government disclose to dismissal of charges with prejudice, depending on the circumstances. See, *Stellato, supra*. What is required of the government in meeting their discovery/disclosure obligations is "due diligence." *U.S. v. Simmons*, 38 MJ 376, 381 (1999). "Due diligence" does not require the government to "search for the proverbial needle in a haystack." *Id* at 382. The process does allow the defense to ask for certain things and requires to government to provide those as well as other things even if not asked for. Nowhere does the law say that the defense gets to look over the government's shoulder to make sure they are searching properly. Without evidence to the contrary, and, to the contrary, with evidence before the court of the quantity of discovery/disclosure already provided by the government, there is simply no justification in allowing the defense to check the governments work by reviewing the RFI and search terms the government used.

**RULING**

6. Defense motion is DENIED.

  
JEFFERY R. NANCE  
COL, JA  
Military Judge