

**IN A GENERAL COURT-MARTIAL
IN THE SECOND JUDICIAL CIRCUIT, U.S. ARMY TRIAL JUDICIARY
FORT BRAGG, NORTH CAROLINA**

UNITED STATES)	
)	
v.)	
)	Government Motion for Partial Extension
BERGDAHL, ROBERT BOWDRIE)	of MRE 505(h) Pretrial Order Deadline
(BOWE))	
SGT, U.S. Army)	
HHC, Special Troops Battalion)	25 July 2016
U.S. Army Forces Command)	
Fort Bragg, North Carolina 28310)	

RELIEF SOUGHT

The Government requests that the Court grant a 90-day partial extension to the 1 August 2016 deadline for filing any motion for *in camera* proceedings in accordance with Military Rule of Evidence (MRE) 505(h), specified in paragraph 2.e of the Court's Pretrial Order. The Government does not request oral argument.

BURDEN OF PERSUASION AND BURDEN OF PROOF

The Government as the moving party bears the burden of persuasion on any factual issue whose resolution is necessary to decide this motion. The burden of proof is a preponderance of the evidence. Rule for Courts-Martial (RCM) 905(c).

FACTS

On 30 June 2009, the Accused deserted from his place of duty at Observation Post Mest, while deployed as part of Task Force Yukon, Combined Joint Task Force-82/Regional Command-East. After leaving the observation post, he was captured by enemy forces and remained in captivity until 31 May 2014, when he was returned to military control.

Between 30 June 2009 and 31 May 2014, multiple entities from the United States Government gathered intelligence, physically searched for the Accused and attempted diplomatic solutions to affect his return. Due to the duration of the Accused's captivity, these entities generated large amounts of information, most of it classified, pertaining to the Accused.

Charges were preferred against the Accused on 25 March 2015, and an Article 32 Preliminary Hearing was conducted on 17 and 18 September 2015. The matter was referred to a general court-martial on 14 December 2015.

To date, the Government has processed and reviewed nearly all of the over 300,000 documents it received from Department of Defense entities, intelligence community organizations, and other U.S. governmental organizations in response to Government requests for information and prudential search requests. In the course of its review, the Government identified approximately 35,000 disclosable documents totaling over 270,000 pages of content. The Government returned those documents to the governmental organizations responsible for the classified information (CI) so that those organizations could review the CI and determine whether they would provide consent for Defense counsel to view the documents or whether they would invoke the United States government's CI privilege in accordance with MRE 505(h).

Several organizations have completed their reviews of the CI sent to them by the Government and have consented to allowing appropriately cleared members of the Defense team to view their disclosable CI. The Government has already disclosed over 15,000 documents to the Defense and is in the process of preparing to disclose approximately 10,000 more documents to the Defense, leaving approximately 10,000 documents left to be reviewed by governmental organizations to determine if they will invoke the CI privilege.

The Government anticipates that the following six organizations may invoke the CI privilege:

1. Intelligence Community (IC) Organization 1¹ will invoke the CI privilege on the disclosable documents it provided to the Government in response to a prudential search request. This invocation will occur prior to the 1 August 2016 deadline. IC Organization 1 is currently reviewing approximately 450 documents in a second batch of disclosable CI provided to it by the Government on 16 May 2016 and will not complete its review and determination whether to invoke privilege prior to the 1 August 2016 deadline. The Government anticipates sending IC Organization 1 a third batch of disclosable CI, provided to the Government by a different Original Classification Authority (OCA), within the next 30 days.
2. IC Organization 2² will invoke the CI privilege on the disclosable documents it provided to the Government in response to a prudential search request. This invocation will occur prior to the 1 August 2016 deadline. IC Organization 2 is currently reviewing approximately 150 documents in a second batch of disclosable CI provided to it by the Government on 13 May 2016 and will not complete its review and determination whether to invoke privilege prior to the 1 August 2016 deadline. The Government anticipates sending IC Organization 2 a third batch of disclosable CI, provided to the Government by a different OCA, within the next 30 days.

¹ The Government cannot identify this organization by name in an unclassified document.

² The Government cannot identify this organization by name in an unclassified document.

3. A military unit³ is currently reviewing approximately 5,000 documents in two batches of disclosable CI provided to it by the Government on 13 May 2016 and 30 June 2016, and is unlikely to complete its review and determination whether to invoke privilege prior to the 1 August deadline.
4. Defense Intelligence Agency (DIA) is currently reviewing a batch of approximately 1,300 disclosable CI documents provided to it by the Government on 13 May 2016. DIA has reviewed over half of these documents to date, but will likely not complete its review and determination whether to invoke privilege prior to the 1 August 2016 deadline.
5. The Federal Bureau of Investigation provided approximately 2,200 documents to the Government for review in response to a prudential search request on 30 June 2016. The Government has not completed its review of these documents. Consequently, the Federal Bureau of Investigation will not complete its review and determination whether to invoke privilege prior to the 1 August 2016 deadline.
6. The Department of State is currently reviewing approximately 250 documents in two batches of disclosable CI provided to it by the Government on 17 June 2016 and 22 June 2016, and will likely not complete its review and determination whether to invoke privilege prior to the 1 August deadline.

Due to the collaborative nature of intelligence work, CI provided by one organization may be based upon information classified by another organization. As a result, one document may be the product of CI from several organizations and require the consent of each organization to be disclosed to the Defense. As organizations complete their reviews of disclosable CI sent to them by the Government, several have identified information that needs to be reviewed by a different organization. To expedite their review, organizations receive multiple batches of CI on a rolling basis from the Government and may need to submit multiple declarations invoking the CI privilege as they review each batch. While most organizations have completed review of the disclosable CI from the initial batches they provided to the Government, the Government has subsequently sent them additional batches of CI in which they were identified as an OCA by another organization. Some organizations require more time to review this additional CI.

WITNESSES/EVIDENCE

No evidence is required for the resolution for this motion.

³ The Government cannot identify this military unit by name in an unclassified document.

LEGAL AUTHORITY AND ARGUMENT

MRE 505(h)(1)(A) states that “the trial counsel must submit a declaration invoking the United States’ classified information privilege and setting forth the damage to the national security that the discovery of or access to such information reasonably could be expected to cause.” The Army Court of Criminal Appeals has held that “the agency head or designee must be provided with the opportunity to assert the government privilege under Mil. R. Evid. 505(h)(1)(A) before any classified information is released to any party.” *United States v. Bergdahl*, 2016 CCA LEXIS 274, 10 (Army Ct. Crim. App. 2016).

The Government is not seeking a continuance and does not believe that granting the requested extension would result in any delay to the currently scheduled February 2017 trial date. The standard laid out in the discussion to RCM 906(b) should nevertheless be illustrative to the Court’s determination of the extension request. “The military judge should, upon a showing of reasonable cause, grant a continuance to any party for as long and as often as is just.” Discussion to RCM 906(b).

In the Government’s 11 May 2016 Proposal for a New Pretrial Order, the Government laid out a suggested timeline culminating in a 5 December 2016 trial date. At the hearing regarding the Order, the Court proposed a January 2017 trial date, and the Defense then requested a February 2017 date to accommodate Civilian Defense Counsel’s schedule. As a result, there is a period of approximately 60 additional days between the Government’s proposed time line and the current Order.

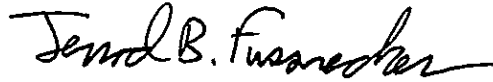
The Government anticipates that most of the approximately 10,000 documents left to be reviewed by OCAs for determination of privilege invocation will be reviewed and disclosed to the Defense on a rolling basis over the next 60 days and that a minority of the documents will require the full 90-day extension to be reviewed. Consequently, the Government does not anticipate that granting this extension would necessitate any delay in the trial.

The Government requests the Court extend the 1 August 2016 deadline in order to provide all relevant organizations with the time and opportunity to properly review their disclosable CI and determine whether to provide consent for Defense counsel to view the CI or assert the CI privilege. This portion of discovery has been a time consuming process due to the sheer amount of CI the Government has reviewed and forwarded to various organizations, the continuing identification of new OCAs as organizations review the CI, and the senior level at which the CI privilege must be evaluated and invoked. Although these organizations have worked to process their reviews as expeditiously as possible, they must do so in balance with their continuing missions and functions. Notwithstanding these challenges, the Government has worked with these organizations to obtain consent for the Defense to review the majority of the disclosable CI identified in this case. A partial extension will permit the agencies, consistent with the Court’s Order, to complete the task of deciding whether or not to

invoke privilege, therefore allowing these organizations to properly safeguard the classified information at issue in this case.

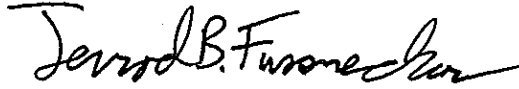
CONCLUSION

The majority of the discovery will have either been turned over to the Defense or will be subject to an invocation of privilege prior to the 1 August 2016 deadline. Given the relatively small volume of documents that are the subject of this request, granting the requested extension will not adversely impact the currently scheduled trial date. The Government requests that the Court grant a 90-day partial extension to the 1 August deadline for filing any motion for *in camera* proceedings in accordance with MRE 505(h), specified in paragraph 2.e. of the Court's Pretrial Order. Based upon the information currently available to the Government, this extension would provide governmental organizations the opportunity to assert the United States government's CI privilege as contemplated by MRE 505(h)(1)(A).



JERROD B. FUSSNECKER
MAJ, JA
Trial Counsel

I certify that I have served or caused to be served a true copy of the above Government Motion for Partial Extension of MRE 505(h) Pretrial Order Deadline to Defense counsel via email on 25 July 2016.



JERROD B. FUSSNECKER
MAJ, JA
Trial Counsel

