

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

UNITED STATES )

v. )

BERGDAHL, ROBERT BOWDRIE )  
(BOWE) )

SGT, U.S. Army )

HHC, Special Troops Battalion )

U.S. Army Forces Command )

Fort Bragg, North Carolina 28310 )

) Government Response to Fourth  
) Defense Motion to Compel

) 17 August 2016

**RELIEF SOUGHT**

The Government requests that the Court deny the Defense motion to compel discovery of copies of all requests for information (RFIs)<sup>1</sup> and all prudential search terms that were used by Department of Defense entities, intelligence community organizations, and other U.S. governmental organizations to generate potentially discoverable information in this case. The Government joins the Defense request for oral argument.

**BURDEN OF PERSUASION AND BURDEN OF PROOF**

The Defense 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.

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<sup>1</sup> RFI is synonymous with the term Prudential Search Request (PSR). Most DOD agencies use the term RFI and most non-DOD governmental agencies use the term PSR.

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.

The Government has sent RFIs to several governmental agencies involved in the search and recovery efforts of SGT Bergdahl. In response, the Government has received over 300,000 documents, reviewed almost all of the documents to determine which documents are disclosable under RCM 701 and other applicable law, and determined that approximately 35,000 of the documents are disclosable to defense, subject to the requirements of Military Rule of Evidence (MRE) 505 and other rules of privilege.

The Government agrees with the Defense's recitation of the facts regarding the content of the Defense Request for Evidence dated 4 May 2015 and the Fourth Defense Discovery Request dated 28 July 2016 as well as the Government response to each of these requests denying disclosure of the PSRs, RFIs, search terms, and contact information of personnel at governmental agencies who provided discovery materials to the Government in this case.

### **WITNESSES/EVIDENCE**

No evidence or witnesses are required for the resolution for this motion.

### **LEGAL AUTHORITY AND ARGUMENT**

The Defense seeks to compel copies of all RFIs and all prudential search terms used by various U.S. governmental organizations to assist the Government in meeting its discovery obligations. The Court should deny the Defense's motion. It is a baseless attempt to usurp the Government's role in determining what information is discoverable without any showing that the discovery the Government has provided to the Defense is deficient. The Defense also fails to show that the RFIs and prudential search terms are material to the preparation of the Defense.

#### **I. The Defense is not Entitled to Supervise the Government in the Exercise of Its Discovery Obligations**

The Defense's stated purpose in attempting to compel disclosure of RFIs and search terms is to "ensure that the Defense receives all information specifically requested by the Defense through discovery and all of the information that the Government is required to disclose regardless of a specific request." D APP 33 at 3. The Defense is seeking to check the Government's work in discharging its discovery obligations without making any factual showing that the Government's work to date has been deficient. This request would result in needless intrusion into the operations of governmental entities and is not supported by the law. The law is clear: "Unless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's

attention, the prosecutor's decision on disclosure is final." *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987).

As with every other discovery issue in military practice or federal court, the Government either complies with the requirements of discovery or the Government fails to meet the requirements and, upon a proper showing by the Defense, an appropriate remedy is imposed judicially. See, e.g. *Giglio v. United States*, 405 U.S. 150 (1972) (reversing and remanding a conviction based on prosecution discovery violations). Here, the Defense offers no evidence that the Government is failing to meet its discovery obligations. As demonstrated by the enormous volume of information the Government has received from various U.S. governmental organizations (over 300,000 documents), the Government has cast a wide net when requesting information through the RFI process to ensure that it receives all potentially discoverable information. Accordingly, the Government has identified a large amount of information it has already disclosed to the Defense (approximately 15,000 documents) or is in the process of disclosing to the Defense (approximately 20,000 documents).

With no showing that the Government is failing to meet its discovery obligations, the Defense complains that it "was never consulted in the drafting of the requests for information or the prudential search terms and does not have any information regarding specifically what those requests entailed." D APP 33 at 3. The Defense essentially seeks to conduct its own search of government records, which it is not entitled to do. See *Ritchie*, 480 U.S. at 59 ("Defense counsel has no constitutional right to conduct his own search of the [government's] files to argue relevance.").

The Government alone is obligated to determine whether information in its possession must be disclosed to the Defense. "Ordinarily, the government alone determines whether material in its possession must be turned over to a defendant. When the defense requests exculpatory material under *Brady v. Maryland*, 373 U.S. 83 (1963), for example, the government decides which information must be disclosed." *United States v. Campa*, 529 F.3d 980, 995 (11th Cir. 2008); see also *United States v. El-Hanafi*, 2012 U.S. Dist. LEXIS 23403, 2-3 (S.D.N.Y. 2012) ("The Court recognizes that Defendants and their counsel are in the best position to know whether information would be helpful to their defense, but notes that in the ordinary course of proceedings, neither the defense counsel nor the Court would be reviewing materials that the Government believes are not discoverable.").

The process of searching for, reviewing, and producing information is a prosecutorial function. Providing the Defense with the Government's RFIs and search terms would circumvent the Government's role in the discovery process altogether. The process itself is not subject to discovery and the Defense cites no rule or case law that would permit it to conduct its own search of the Government's files in search of this information. Therefore, the Court should deny the Defense motion. Doing otherwise would place the Defense in the position of supervising the Government in the execution of a duty that belongs solely to the Government.

## II. The Requested Information Is Not Material to the Preparation of the Defense

The Defense fails to demonstrate that the RFIs and search terms are material to the preparation of the Defense. RCM 701(a)(2) requires, upon Defense request, trial counsel to disclose or permit examination of "books, papers, documents... any results or reports of physical or mental examinations... within the possession, custody or control of military authorities, and **which are material to the preparation of the defense** or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial" (emphasis added). Items that are material to the preparation of the Defense include those that would affect decisions on how to plead (see *United States v. Adens*, 56 M.J. 724 (Army Ct. Crim. App. 2002); *United States v. Trigueros*, 69 M.J. 604, 611 (Army Ct. Crim. App. 2010)) or to pursue lines of investigation, defenses, or trial strategies (see *United States v. Eshalomi*, 22 M.J. 12, 27 (C.M.A. 1986); *United States v. Webb*, 66 M.J. 89 (C.A.A.F. 2008)).

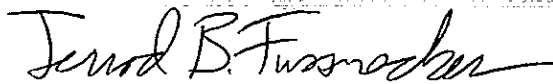
However, the Defense does not argue that it seeks the RFIs and search terms for any of these reasons. Rather, the Defense seeks the RFIs and search terms in an effort to ensure it receives all discovery it is entitled to receive. Checking the Government's work is not material to the preparation of the Defense, nor a basis for compelling discovery. The Government's RFIs and search terms are attorney work product created in anticipation of litigation and designed to collect potentially discoverable information. The Defense asks the Court to compel the Government to produce all RFIs and search terms on nothing more than its speculation that "there is a significant danger that the Government has chosen search terms and requests for information that do not adequately gather the information requested by the Defense or required to be disclosed." D APP 33 at 4. The Defense has already been provided 15,000 documents. If there really were a danger that the Defense had not received the information it has requested, it could provide specific examples of omitted information from the 15,000 documents already in its possession.

Though the Government has disclosed, and continues to disclose, all relevant and responsive discovery in accordance with the rules for discovery, there are limits on what is discoverable. The Defense essentially admits that it is on a fishing expedition to prove that the discovery process as a whole is defective by claiming it "is concerned the pool of documents created by the Government is deficient" while failing to demonstrate any failure of the Government to respond to its specific requests or to provide the Defense with any information it is otherwise entitled to receive. D APP 33 at 4. The Defense seeks to needlessly enlarge the already enormous pool of documents without showing the pool is deficient in providing them the information they seek.

The Defense's request is unnecessary. The Court has already directed the Government to identify information by Bates number that is responsive to each Defense discovery request. Upon receiving this discovery from the Government, the Defense should then submit discovery requests to the Government, as necessary, if it identifies information it believes the Government has not disclosed.

**CONCLUSION**

The Defense seeks to compel the Government to produce all RFIs and search terms used by the Government in meeting its discovery obligations. The Defense is not seeking substantive information material to the preparation of its case. The process the Government uses to provide disclosable information to the Defense is not disclosable. Defense is entitled to receive information under the rules of discovery, but it fails to demonstrate that the Government has not provided the information to which it is entitled. Rather, the Defense is simply trying to check the Government's work. The Defense has no legal basis for its requested relief. Therefore, the Court should deny the Defense motion.



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 Response to Fourth Defense Motion to Compel to Defense counsel via email on 17 August 2016.



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Trial Counsel