

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

UNITED STATES)	
)	
v.)	GOVERNMENT REPORT REGARDING
)	DISCOVERY PROCESS
BERGDAHL, ROBERT BOWDRIE)	
(BOWE))	9 March 2017
SGT, U.S. Army)	
HHC, Special Troops Battalion)	
U.S. Army Forces Command)	
Fort Bragg, North Carolina 28310)	

During the 13 February 2017 Article 39(a) session, the Court directed the Government to provide a brief outline of the training and procedures the Government uses in reviewing documents.

Prudential search requests (PSRs) and requests for information (RFIs) were sent to various government agencies known to have information concerning SGT Bergdahl beginning in May 2015. These agencies conducted electronic searches of their records and provided the Government with over 1.5 million pages of potentially disclosable information. Review of that material began in October 2015.

I. DOCUMENT REVIEW SYSTEM AND TRAINING

The Government contracted with the e-discovery software company Kcura for "Relativity," a commercial document review software. Relativity ingests files in their native format and then allows reviewers to make discoverability determinations, place redactions as appropriate over discoverable documents, and then produce the documents in PDF format.

After ingesting documents, Relativity can assign them to individual reviewers in batches. The system is capable of conducting multiple levels of review, allowing some users to act as "first level reviewers" and others to act as "second level reviewers." Second level reviewers are able to conduct a quality control review of samples of documents reviewed by first level reviewers.

In addition to the attorney's assigned on a long term basis to the case (referred to as "permanent party attorneys"), the Government utilized a team of Judge Advocates on temporary duty to conduct the initial review. All attorneys who have reviewed material in this case are qualified and certified under Article 27(a) and

sworn under Article 41(a), UCMJ. In addition to the training they received at The Judge Advocate General's Legal Center and School, prior to reviewing documents in this case they received additional training on the Rules for Courts-Martial and Military Rules of Evidence pertaining to discovery. They were also given case specific information, including review of the charge sheet, elements of the offenses, timeline of the case, map orientation, and general facts of the case. The attorneys were then trained on their duties as a first level reviewer, which include determining whether a document is disclosable, reasons for disclosure, and, if disclosable, how to identify Original Classification Authorities (OCAs) of classified documents. The attorneys were trained to redact classified information that is not disclosable to prevent the disclosure of classified information to individuals without a need to know the information. Finally, the attorneys were trained to use the Relativity software system. Top Secret documents were reviewed electronically but without the assistance of Relativity due to network restrictions.

II. REVIEW OF THE DOCUMENTS

Once attorneys begin reviewing documents, they use radio buttons within Relativity to annotate whether a document is disclosable and the basis for disclosure (e.g. material to the preparation of the Defense under MRE 701(a)(2), favorable to the Defense under MRE 701(a)(6), or responsive to a specific discovery request¹). Radio buttons are also used to identify which OCAs are required to approve the release of disclosable classified information to the Defense under MRE 505. Since Article 46 requires equal access to evidence amongst the parties, great efforts have been made to give effect to Article 46 within the bounds of MRE 505. Additionally, since Defense requested open file discovery but much of the review was conducted before receiving specific Defense discovery requests, reviewers broadly construed MRE 701(a)(2)'s requirement to disclose evidence material to the preparation of the Defense in order to attempt to adhere to the Defense request for open file discovery within the bounds of MRE 505.

Attorneys utilize a function within Relativity called persistent highlighting to assist in identifying information in a document that is likely to have disclosable information by highlighting terms attorneys pre-selected that are particularly relevant to the case. The attorneys also use redaction tools within Relativity to redact non-disclosable classified information. Once first level reviewers complete assigned documents, they inform a second level reviewer, who utilizes Relativity to select a sampling of documents and review the sample to ensure the documents were properly reviewed. The second level reviewer provides immediate feedback to the document review attorney if any issues are identified and directs any required remediation on documents already reviewed by that attorney. The second level

¹ Because the vast majority of the review was conducted prior to the existence of any defense discovery request, these radio buttons did not exist for those documents.

reviewer also provides guidance to all document review attorneys on any potentially global issues or concerns.

Classified documents determined to be disclosable are sent back to the appropriate OCAs for their determination of whether they will approve disclosure of the documents to the Defense or whether they will invoke privilege over classified information under MRE 505. Classified documents approved for disclosure to Defense are Bates numbered and transmitted to Defense via hard drive with an electronic index of the documents for ingestion into the Defense's electronic discovery system.

III. Additional Quality Control

In addition to the functions discussed above, Relativity is capable of creating statistical sampling sets, which produce a random sample of documents for review to confirm that the determinations made regarding discoverability are appropriate. The system is capable of creating sample sets from a variety of sources, including the entire universe of documents, by particular OCA, or by particular reviewer. The system allows a third level reviewer to set a confidence level and an error rate, and then determines the number of documents required to meet those metrics.

Following the completion of first and second pass review of the majority of the material ingested, in November 2015 two attorneys assigned as permanent party attorneys conducted a quality control check with a confidence level set to 95 percent and an error rate of plus or minus 2.5 percent. No material was found to have been improperly marked as being non-discoverable and no improperly redacted material was discovered.

During the 13 February Article 39(a) session, the Defense raised the issue that while reviewing documents disclosed by the Government, they discovered that their electronic discovery software allowed them to read behind redactions the Government made to the documents and discovered material they believe should have been disclosed. Prior to the hearing, the Defense directed the Government to the document it believed was improperly redacted. The Government subsequently disclosed the document to the Defense again with the erroneous redactions removed. The Government also confirmed that the information had been disclosed in other documents.

The Government also conducted a quality assurance review of a statistical sampling of the work of the attorney who made the erroneous redaction and discovered no other material that was improperly redacted. Additionally, the Government told the Military Judge at the 13 February hearing that it would conduct a quality assurance review of all material reviewed since December 2015. During the week after the hearing, a statistical sample with a 95 percent confidence interval was compiled of all unclassified and secret documents reviewed since December 2015.

This sample comprised 678 documents totaling 7,269 pages. The review found three pages that contained material that was potentially discoverable, resulting in a potential error rate of approximately .041 percent. Again, the Government confirmed that the information had been disclosed in other documents.



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Trial Counsel

I certify that I have served or caused to be served a true copy of the above on the Defense Counsel on 9 March 2017.



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