

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

UNITED STATES)
)
v.) **Ruling and Order:**
) **Defense Access to Classified**
SGT Robert B. Bergdahl) **Information**
HHC, Special Troops Battalion)
U.S. Army Forces Command) **2 February 2016**
Fort Bragg, North Carolina 28310)

1. The defense has moved this court to order the government to provide access to the defense team to certain classified evidence in possession of the trial counsel in this case. D App 5. The government response is at G App 9.

FACTS:

2. The court finds the following facts by a preponderance of the evidence:¹

a. On 14 January 2016, after significant input from both parties and an Article 39(a) hearing on the matter, the court issued a protective order pursuant to MRE 505(g) (PO).

b. On 21 January 2016, trial counsel filed a motion requesting the court provide certain clarification of the protective order. G App 7.

c. On 22 January 2016, the court emailed the parties and stated that the court thought the PO was “pretty clear” but, nevertheless, asked the defense to articulate their understanding of their obligations under the PO and applicable law regarding four areas of potential classified information (CI) the defense may obtain or seek to obtain. Encl. 2 to D App 5.

d. On 22 January 2016, defense responded to the four questions referenced above and stated they would file a more full response to the general issue of access to classified discovery at a later time. Encl. 3 to D App 5.

¹ The court notes that there are some facts averred by the parties in their briefs which are in dispute. The court does not believe that these facts or the resolution of any dispute as to them, is necessary to the resolution of this motion. The basic dispute here is how and when the defense may access in CI in this case. Basically, the trial counsel believes that prior notice and OCA approval is required before the defense may access any CI related to this case. The defense disagrees.

e. Both parties agreed to the court resolving this matter on the written pleadings without oral argument.

LAW AND ANALYSIS:

3. MRE 505 does not contemplate “open discovery” -- the procedural norm for courts-martial not involving CI. MRE 505; Executive Order 12958 at § 4.2; *also, see generally U.S. v. Schmidt*, 60 MJ 1 (2004). MRE 505 (h) and (i) allow the government to assert its privilege to prevent discovery (h) or disclosure (i) of CI when the government determines that disclosure would be detrimental to national security. Still, this does not mean that the defense is totally under the government’s control when it comes to access to and disclosure of CI. While there are several provisions in MRE 505 that set forth when and how the defense may access or disclose CI, only two matters are pertinent to this ruling.

4. “Any information admitted into evidence pursuant to any rule, procedure, or order by the military judge must be provided to the accused.” MRE 505(c). This provision of the rule is clear and unambiguous. The issue seems to be one of timing. Waiting until CI evidence is offered or admitted to provide it to the accused makes no sense and is not in keeping with principals of judicial economy or fairness. Indeed, MRE 505(g) gives the court wide discretion, within the confines of the privilege, to determine the timing of the government’s compliance with MRE 505(c). Therefore, all CI which the government may offer into evidence at trial will be immediately provided to the defense within the constraints of the 14 January PO.² The duty to provide defense access to such CI is a continuing one. Thus, upon government determination that new CI may be offered into evidence at trial, trial counsel will notify defense counsel within 24 hours and allow defense to access said CI within the terms of the PO.

5. Regarding discovery by the defense of other CI which may be in possession of the government but which the government does not intend to offer into evidence at trial and may seek to delete, withhold or otherwise obtain relief from discovery of or access by the defense to, the trial counsel is required to submit a declaration to the court and the defense invoking the CI privilege and setting forth the damage to national security that the discovery of or access to such CI could be expected to cause. MRE 505 (h)(1)(A). Here again, timing seems to be the issue. The government averred at the 12 January 2016 39(a) session in this case that they had, to that date, reviewed approximately 25,000 CI documents totaling approximately 300,000 pages. There is no reason the government cannot immediately either disclose these documents in discovery to the defense or submit a declaration claiming the privilege or both – assuming there are documents that fit into both categories. The court set the case for trial in August 2016.³ Before the case can proceed to trial, the defense has to either have access to CI discovery or the court litigate the government’s invocation of the privilege or both. That

² As the discloser of this CI, the trial counsel is responsible to seek appropriate OCA approval if necessary. Presumably, if the trial counsel has made a determination to introduce such evidence at trial, they have already sought any necessary OCA approval. If not, they may seek a reasonable delay in this order to allow them to do so.

³ The government sought a May 2016 trial date in this case.

is unlikely to happen by August if the government does not begin the process soon and complete it expeditiously. Therefore, trial counsel will, upon receipt of this order, immediately provide defense counsel access to all CI in possession of trial counsel, for which the government does not intend to assert the privilege.⁴ MRE 505(h)(1)(A). Defense counsel access to this CI will only be made in compliance with the terms of the PO; and, the requirements for appropriate security clearances. The involvement of the defense security officer still apply. This is a continuing requirement.

6. No later than 29 February 2016, trial counsel will provide a MRE 505(h)(1)(A) declaration to the court and defense counsel (unless *in camera* review is requested in accordance with MRE 505 (h)(1)(B)) detailing all documents in possession of the trial counsel, for which trial counsel asserts the privilege. In compiling this declaration, the court reminds the government to consider and apply alternatives to full disclosure as outlined in MRE 505(h)(2)(A). This is a continuing requirement.

7. In spite of trial counsel's interpretation to the contrary, the court is not convinced that EO 13526, MRE 505 or any other law requires the defense to obtain OCA consent before seeking access to CI in possession of "any government agency, employee, information system or entity." The beauty of EO 13526 and MRE 505 is that the onus for deciding whether disclosure is proper, legal, and authorized is upon the possessor of that CI. Any other system for protection and accountability would be untenable and impracticable to enforce and would not best protect the CI. The possessor of CI is best positioned to know that the information is classified and whether they have disclosure authority for said information. Furthermore, case law supports this conclusion. In *U.S. v. Schmidt*, the issue was whether the government could forbid the accused from disclosing CI, which he was rightly in possession of, to his defense counsel as they prepared his defense, without first seeking approval from trial counsel.⁵ In *Schmidt* the CAAF held that the MRE 505(h)(1)⁶ notice requirement applies only when the defense seeks to disclose classified information during the course of the trial.⁷ Trial counsel's interpretation that MRE 505(h) requires the defense to seek OCA approval before seeking CI from "any government agency, employee, information system or entity" is not consistent with the holding in *Schmidt*. Though *Schmidt* applied specifically to disclosure, the same reasoning applies to case preparation/investigation by the accused and defense counsel. There simply is no need to or precedent for injecting the government into the middle of the defense trial preparation. Furthermore, EO 13526

⁴ If necessary, the trial counsel, as discloser, is responsible to seek OCA approval.

⁵ Though the facts in *Schmidt* do not indicate, it is safe to assume that these vigilant trial counsel, having thoroughly digested MRE 505, would have sought OCA approval before allowing the accused to discuss the CI he possessed with his defense counsel.

⁶ Now MRE 505(i)(1).

⁷ The government misinterprets the language in *Schmidt* indicating the lower court erred when it failed to recognize that the MRE 505(h)(1) (now (i)(1)) notice requirement applies only when "the defense seeks classified information from the government or when the defense has determined that it reasonably expects to disclose classified information . . ." *Schmidt*, at 2 (Emphasis added). The "seeks classified information from the government" language from *Schmidt* is dicta (the issue before the court concerned disclosure nor discovery) and not a correct statement of the provisions of MRE 505(h)(1) (now (i)(1)); there is no provision in (h)(1) (now (i)(1)) that controls the defense seeking classified information from the government – that provision concerns only disclosure by the accused.

para. 4.1 (i)(1) clearly states that CI originating in one agency which has been provided to another agency may be provided to yet a third agency or "U.S. Entity" by the second agency without seeking or obtaining consent from the originating agency. National security is well protected by EO 13526's scheme for placing the onus on the discloser to seek whatever approval is required prior to disclosure. The wording of MRE 505(i)(3) is also instructive on the point. In this continuing duty to provide notice provision, the accused is required to provide notice to the trial counsel and the court, when, in the course of the trial, they discover CI which they "reasonably expect to disclose or to cause the disclosure of . . ." This clearly contemplates that the defense may obtain CI during case preparation apart from anything the trial counsel may provide in the discovery process and, only if they intend to disclose it, are they required to notify trial counsel and the military judge. Additionally, MRE 505(g) provides that the military judge must issue a protective order to protect against the disclosure of CI disclosed to the defense by the government OR "that has otherwise been provided to or obtained by" the accused from other sources. This provision clearly contemplates that the defense may, through their own efforts to prepare for trial, come into possession of CI aside from that provided in discovery by the government. Furthermore, if the defense unwittingly comes into possession of information through some improper disclosure by others, they are responsible to take appropriate measures to truncate the improper disclosure and report the violation. They have a security officer to help them meet those responsibilities. As officers of the court, subject to the rules of court and the code of ethics (not to mention the UCMJ and 18 USC §§ 1-16) the court is confident the defense knows and will comply with the law in this area.

ORDER:

8. All CI which the government may offer into evidence at trial will be immediately provided to the defense within the constraints of the 14 January PO. This is a continuing duty. Thus, upon government determination that new CI may be offered into evidence at trial, trial counsel will notify defense counsel within 24 hours and allow defense to access said CI within the terms of the PO.

9. Trial counsel will, upon receipt of this order, immediately provide defense counsel access to all CI in possession of trial counsel, for which the government does not intend to assert the privilege. Defense counsel access to this CI will only be made in compliance with the terms of the PO. The requirements for appropriate security clearances and involvement of the defense security officer, still apply. This is a continuing requirement.

10. No later than 29 February 2016, trial counsel will provide a MRE 505(h)(1)(A) declaration to the court and defense counsel (unless *in camera* review is requested in accordance with MRE 505(h)(1)(B)) detailing all documents in possession of the trial counsel, for which trial counsel asserts the privilege. In compiling this declaration, the court reminds the government to consider and apply alternatives to full disclosure as outlined in MRE 505(h)(2)(A). This is a continuing requirement.

11. Trial counsel will take no action to prevent or interfere with defense counsel access to CI through their own efforts to investigate and prepare for trial. Defense counsel will ensure that they comply with all applicable POs, EOs, Regulations and Rules of Evidence as they come in contact with CI or potential CI.

So, ORDERED, this 2nd day of February 2016.



JEFFERY R. NANCE
COL, JA
Military Judge