

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

UNITED STATES)	
)	
v.)	Fourth Defense
)	Motion to Compel
)	
SGT Robert B. Bergdahl)	
HHC, Special Troops Battalion)	
U.S. Army Forces Command)	10 August 2016
Fort Bragg, North Carolina 28310)	

RELIEF SOUGHT

The Defense moves for an order directing the Government to provide copies of all requests for information and all prudential search terms that were used by the Department of Defense entities, intelligence community organizations, and other U.S. governmental organizations to generate documents for the trial counsel in the instant case. The Defense does request oral argument.

BURDEN OF PERSUASION AND BURDEN OF PROOF

Pursuant to Rule for Courts-Martial (RCM) 905(c)(2), the Defense, as the moving party, has the burden of proof. The standard of proof is a preponderance of the evidence. RCM 905(c)(1).

FACTS/ARGUMENT

Discovery in the military justice system is open, broad, liberal, and generous. See Article 46, Uniform Code of Military Justice (UCMJ); RCM 701 analysis, at A21-33; *United States v. Guthrie*, 53 M.J. 105, 107 (C.A.A.F. 2000). It is designed to eliminate pretrial gamesmanship, reduce the amount of pretrial motions practice, and reduce the potential for surprise and delay at trial. See *United States v. Stellato*, 74 M.J. 473, 481 (C.A.A.F. 2015). To that end, the Rules for Courts-Martial, the Rules of Professional Conduct, and the service courts impose important obligations upon a trial counsel. For example, a trial counsel must disclose favorable evidence as soon as practicable and disclose certain additional types of evidence upon request. See RCM 701(a)(2)(A); 701(a)(6).

Evidence that must be disclosed upon request includes items that are: (i) within the possession, custody, or control of military authorities; and (ii) which are material to the preparation of the defense. RCM 701(a)(2)(A). Evidence that is material includes that which would assist the defense in formulating strategy, tactics, or lines of investigation. See *United States v. Webb*, 66 M.J. 89, 91 (C.A.A.F. 2008); *United States v. Eshalomi*, 22 M.J. 12, 27 (C.M.A. 1986). It is not limited to evidence that is exculpatory or known to be admissible at trial. See *Webb, supra*, at 91; *United States v. Adens*, 56 M.J. 724, 733 (Army Ct. Crim. App. 2002).

In complying with the above requirements, a trial counsel may not intentionally remain ignorant. *United States v. Trigueros*, 69 M.J. 604, 611 (Army Ct. Crim. App. 2010). Rather, a trial counsel must exercise due diligence in discovering materials in the possession, control, or custody of other military authorities. *Id.* Furthermore, a trial counsel's obligation under Article 46 of the 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. *E.g. Stellato*, 74 M.J. at 481.

With the above principles in mind, the Defense has made numerous specific requests for Discovery:

I. Item 6 of the Fourth Defense Discovery Request was as follows:

All prudential search requests and requests for information sent to government or military organizations pertaining to this case, and copies of any correspondence between the prosecution and these organizations.

II. Item 7 of the Fourth Defense Discovery Request was as follows:

Search terms and the specific requests for information sent to government agencies or military organizations by trial counsel concerning the Bergdahl case.

III. Item 8 of the Fourth Defense Discovery Request was as follows:

For any government agencies or military organizations which turned over discovery materials in this case, the Defense request the names and contact information for all Information Review Officers assigned to the case.

IV. The Government's Response to each item above was as follows:

Denied. The request is not reasonably calculated to lead to the discovery of documents or information concerning any relevant issue or matter in the pending court-martial.

V. Item 25 of the Defense Request for Evidence, dtd. 4 May 2015 was as follows:

The defense requests copies of the 15 “prudential search requests” (PSRs) generated by government counsel at the defense’s earlier request in order to evaluate the evidence they are likely to affect and also to help guide defense efforts to seek and request evidence.

VI. The Government response, dtd. 13 May 2015 was as follows:

Denied. These documents are government work product/government documents.

In a nutshell, the Defense moves for an order directing the Government to provide copies of all requests for information and all prudential search terms that were used by the Department of Defense entities, intelligence community organizations, and other U.S. governmental organizations to generate documents for the trial counsel in the instant case. The purpose is to ensure that the Defense receives all of the 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.

According to the Government Motion for Partial Extension of MRE 505(h) Pretrial Order Deadline (G APP #30), 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.” From that material, the Government has identified approximately 35,000 disclosable documents totaling over 270,000 pages of content.

The Defense 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. Critically, although the Government indicated that they generated additional requests for information after the first Defense discovery request, the Defense does not know if additional requests for information or prudential search terms were generated incorporating additional Discovery requests.


A simple case might contain a CID file. The file would be maintained in a folder located in a file cabinet. Here, it is as if the file was spread out among thousands of file cabinets. No human being is searching every single file. The only way in which relevant information is uncovered is through the intelligent

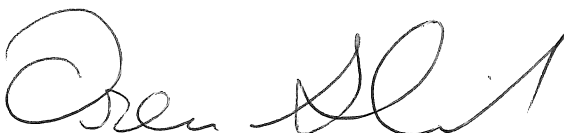
crafting of search terms to be used in various computer programs.¹ Whether intentional or unintentional, there is a significant danger that the Government has chosen search terms and requests for information that do not adequately gather the information requested by the Defense or required to be disclosed. Consequently, the Defense is concerned that the pool of documents created by the Government is deficient. The careful search of that pool for disclosable evidence is of no use if the relevant documents never made it to the pool in the first place.


As stated by Justice Louis D. Brandeis, "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." Only through an open and transparent process will we know whether the Government has gathered the appropriate documents from which to make their determinations as to what should and should not be disclosed.

CONCLUSION

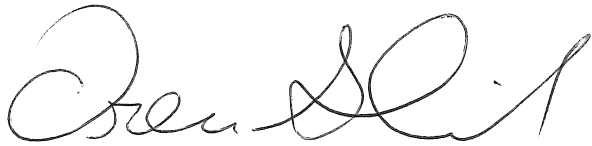
For the foregoing reasons, the Court should direct the Government to provide the requested information.


For EUGENE R. FIDELL
Civilian Defense Counsel

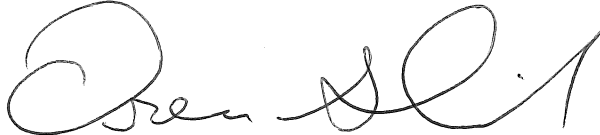

For FRANKLIN D. ROSENBLATT
LTC, JA
Individual Military Counsel


JASON THOMAS
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Defense Counsel

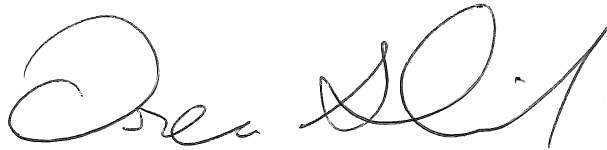
¹ The Defense has also requested an expert consultant to assist in crafting and reviewing prudential search terms. The Government has denied that request. The Defense is awaiting confirmation of that expert's availability before filing a motion compel his assistance.



For Will Helixon
Civilian Defense Counsel



For Jennifer Norvell
CPT, JA
Defense Counsel



OREN GLEICH
MAJ, JA
Defense Counsel

I certify that I have served or caused to be served a true copy of the above on the Trial Counsel on 10 August 2016.



OREN GLEICH
MAJ, JA
Defense Counsel