

UNCLASSIFIED//FOR PUBLIC RELEASE
MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ‘ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI</p>	<p>AE 425T (KSM, AAA)</p> <p>RULING</p> <p>Motion to Compel Discovery or in the Alternative to Abate and Dismiss</p> <p>(Government Invocation of Classified Information Privilege to Refuse Production of Discovery Regarding Circumstances of Destruction of Black Site)</p> <p>19 January 2017</p>
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1. Procedural History.

a. On 28 September 2016, Mr. Mohammad and Mr. Ali (a.k.a. al Baluchi) filed the subject motion to compel discovery, or, in the alternative, to abate the proceedings and dismiss all charges.¹ Specifically, the Movants seek discovery of information they argue is relevant to resolution of the issues raised in other motions before the Commission regarding the decommissioning of certain sites of evidentiary significance.²

b. Following denial of a 19 August 2016 discovery request submitted directly to the Government,³ Movants filed the subject motion to compel.⁴ The Government responded on

¹ AE 425L (KSM, AAA), Motion to Compel Discovery or in the Alternative to Abate and Dismiss (Government Invocation of Classified Information Privilege to Refuse Production of Discovery Regarding Circumstances of Destruction of Black Site), filed 28 September 2016.

² See AE 425 (KSM), Mr. Mohammed’s Motion to Recuse Military Judge and the Current Prosecution Team and for Further Appropriate Relief, filed 10 May 2016, and other filings in the AE 425 series generally.

³ AE 425L, Attachments B, C. The basis of the Government’s denial was recited as follows:

In accordance with M.C.R.E. 505, the Prosecution, in AE 051/AE 052, properly claimed a privilege over certain classified materials. In AE 051B/AE 052EE, this Commission properly ordered the protection of said classified information. As set forth in its filing, AE 051C(GOV)/AE 052FF (GOV), the Prosecution has complied with the order of this Commission. Therefore, the Prosecution respectfully declines to produce any further information regarding the matters set forth in AE 051/AE 052.

AE 425L (KSM, AAA), Attachment C.

⁴ AE 425L (KSM, AAA).

10 October 2016.⁵ The Movants replied on 17 October 2016,⁶ and Mr. Ali filed a supplement to the original motion on 27 December 2016.⁷

c. The Movants requested oral argument,⁸ while the Government opposed (requesting only an opportunity to respond should the Movants' request for argument be granted).⁹ The Commission heard oral argument regarding this matter on 7 December 2016.¹⁰

d. The Movants seek an order directing the discovery sought in their 19 August 2016 request be provided by the Government.¹¹ That requested discovery consisted of "all documents and information regarding the authorization for and execution of the destruction of the black site at issue," and "included but was not limited to:"

1. all actions taken by the government in response to the issuance of AE 052EE;
2. all communications between any persons or entities within or outside of the government regarding the authority purportedly contained within AE 052EE;
3. all communications between any persons or entities within or outside of the government regarding the requirements of AE 052EE, including the requirement that a redacted copy of AE 052EE be provided to the defense;
4. any effort of the government at any time to provide AE 052EE to the defense;
5. any effort of the government at any time to determine whether AE 052EE had been provided to the defense, including, but not limited to contacting Trial Judiciary for guidance;
6. the government's decision to allow destruction or failure to prevent destruction of the black site prior to verifying that AE 052EE had been provided to the defense;
7. the physical condition of the evidence at issue in AE 52EE at any point in time;
8. the destruction of the black site at issue in AE 52EE, including any progress or completion reports.¹²

⁵ AE 425M (GOV), Government Response to Defense Motion to Compel Discovery or in the Alternative to Abate and Dismiss, filed 10 October 2016.

⁶ AE 425P (KSM, AAA), Mr. Mohammad's Reply to AE 425M (GOV), Government Response To Defense Motion to Compel Discovery or in the Alternative to Abate and Dismiss, filed 17 October 2016.

⁷ AE 425L (AAA Sup), Mr. al Baluchi's Supplement to AE 425L Motion to Compel Discovery or in the Alternative to Abate and Dismiss, filed 27 December 2016.

⁸ AE 425L (KSM, AAA), para. 7; AE 425L (AAA Sup), para. 4.

⁹ AE 425M (GOV), para 6.

¹⁰ Unofficial/Unauthenticated Transcript of the *U.S. Khalid Shaikh Mohammad, et al.* Motions Hearing Dated 7 December 2016 from 9:02 A.M. to 10:32 A.M. at pp. 14365-14387.

¹¹ AE 425L (KSM, AAA), para. 2.

¹² AE 425L (KSM, AAA), paras. 2, 5.j.

In the alternative, Movants seek an order abating the proceedings and dismissing all charges and specifications.¹³

2. **Findings of Fact.** The Commission finds that material issues of fact have facially been raised with regard to certain processes related to the effectuation of its order regarding decommissioning of a certain “black site,”¹⁴ and that some discovery relevant thereto is appropriate.

3. **Law.**

a. **Jurisdiction.** This Commission has been established to try alien unprivileged enemy belligerents for violations of offenses triable by military commission. 10 U.S.C. § 948b. Its personal jurisdiction is limited to individuals subject to the Military Commissions Act of 2009 (M.C.A. 2009). 10 U.S.C. § 948d.

b. **Burden of Persuasion.** Ordinarily, unless otherwise provided in the Rules for Military Commissions (R.M.C.), the burden of persuasion on any factual issue which must be resolved to decide a motion lies with the movant. R.M.C. 905(c)(2).

c. **Applicable Discovery Standards.**

(1) The M.C.A. 2009 provides the Accused a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense. 10 U.S.C. § 949j. R.M.C. 701(1)(l), patterned after Rule for Courts-Martial (R.C.M.) 701(g)(1), gives the Military Judge authority to “specify the time, manner and place of taking discovery.” R.M.C. 701(c)(1) requires the Government to produce information that is “material to the preparation of the defense.” R.M.C. 703, patterned after R.C.M. 703, entitles each party to production of evidence that is “relevant, necessary and noncumulative.” R.M.C. 703(f)(1). The

¹³ AE 425L, para. 2.

¹⁴ See AE 425L, paras. 5.d, f, g.

right of the defense to discovery is not unlimited, however. The defense must establish an adequate theory of relevance to justify compelled discovery.¹⁵

(2) With regard to otherwise discoverable information disclosure of which would potentially damage national security, the Government may invoke its privilege regarding such information, after which the Commission may authorize appropriate prophylactic measures (e.g., redactions, substitutions, etc.) or other relief. *See generally* 10 U.S.C. §§ 949p1-7. The process by which the Government establishes the basis for its assertion of this privilege and seeks appropriate protective measures is generally *ex parte*. 10 U.S.C. § 949p-4(b)(2).

4. **Analysis.** The Commission recognizes that at least some of the information sought in the present motion is discoverable, in that it is relevant and necessary for resolution of issues raised in AE 425 and related motions. Other information the Movants seek, however, is not properly discoverable, either because the request is formulated too broadly to reasonably identify a theory of relevance, or because the information sought is subject to the *ex parte* procedures regarding classified evidence established in 10 USC § 949p-4. Accordingly, discovery will be directed with regard to some, but not all, of the information requested.

5. **Ruling.** Mr. Mohammad's and Mr. Ali's Motion to Compel Discovery or in the Alternative to Abate and Dismiss is **GRANTED IN PART**, as follows:

a. Not later than two weeks from the publication date of this Order, the Government will provide the Movants with the following:

(1) The information specified in subparagraphs 5.j.4 and 5.j.5 of AE 425L; and

(2) The information specified in subparagraph 5.j.7 of AE 452L, but only

regarding the following three times: 6 June 2014, 18 March 2016, and the present.¹⁶

¹⁵ *U.S. v. Graner*, 69 M.J. 104, 108 (C.A.A.F. 2010).

b. The Movants' request for an order compelling discovery is otherwise **DENIED**; and

c. The Movants' request for abatement of the proceedings and dismissal of the charges is **DENIED**.

So **Ordered** this 19 day of January, 2017.

//s//
JAMES L. POHL
COL, JA, USA
Military Judge

¹⁶ The two dates given are relevant because they are the dates of the Commission's protective orders regarding the evidence at issue. *See* AE 051B, AE 052EE, AE 051H.