UNITED STATES	)	
	)	**DEFENSE MOTION TO**
v.	)	**COMPEL DISCOVERY**
	)	
MANNING, Bradley E., PFC	)	
U.S. Army, xxx-xx-9504	)	
Headquarters and Headquarters Company, U.S.	)	
Army Garrison, Joint Base Myer-Henderson Hall,	)	DATED: 16 February 2012
Fort Myer, VA 22211	)	

RELIEF SOUGHT

1. In accordance with the Rules for Courts-Martial (R.C.M.) 701(a)(5), 701(a)(6), and 906(b)(6), Manual for Courts-Martial (M.C.M.), United States, 2008; Article 46, Uniform Code of Military Justice (UCMJ); and the Fifth and Sixth Amendments to the United States Constitution, the Defense respectfully requests that the Court compel the following discovery.

a. FOIA Requests Regarding Video in Specification 2 of Charge II: A copy of any Freedom of Information Act (FOIA) request and any response or internal discussions of any such FOIA request that is related to the video that is the subject of Specification 2 of Charge II. The Defense originally requested this information on 29 October 2010. The Government, on 12 April 2011, stated that "[redacted], the same day that WikiLeaks first released the video charged in Specification 2 of Charge II. [redacted] was a redacted version of the 15-6 investigation into the incident and not released in response to any FOIA request. Thus, the provided discovery was not responsive to the Defense's request. On 27 January 2012, the Government amended its response to the Defense's request by stating [redacted] The Government also indicated that it was [redacted]

b. Quantico Video: The video of PFC Manning being ordered to surrender his clothing at the direction of [redacted] and his subsequent interrogation by [redacted] on 18 January 2011. The Defense filed a preservation of evidence request over one year ago, on 19 January 2011 for this information. *See* Attachment A. The Government produced the video of PFC Manning being ordered to surrender his clothing, but not the video of the subsequent interrogation by [redacted]. The Defense alerted the Government to the need to locate the additional video in a telephone conversation on 12 December 2011. The Government indicated that it would attempt to locate the video, but has not done so.

c. EnCase Forensic Images: An Encase forensic image of each computer from the Tactical Sensitive Compartmented Information Facility (T-SCIF) and the Tactical Operations Center (TOC) of Headquarters and Headquarters Company (HHC), 2nd Brigade Combat Team (BCT),

10th Mountain Division, Forward Operating Base (FOB) Hammer, Iraq. The lead investigative unit for the government requested preservation of these items on 30 September 2010. *See* Attachment B. Additionally, the Defense submitted a preservation request for this evidence on 21 September 2011. *See* Attachment C. Given the government's own preservation request, the Defense believed it would be easy enough to obtain the requested forensic images. On 22 September 2011, the Government requested clarification of the Defense's preservation request. Ultimately, the Government acknowledged that it understood that it needed to preserve all SIPRNet hard-drives from the T-SCIF and the TOC and also provide a forensic image of all other computers seized by the United States. *Id.*

d. Damage Assessments and Closely Aligned Investigations: The following damage assessments and records from closely aligned investigations:

(1) Central Intelligence Agency: Any report completed by the WikiLeaks Task Force (WTF) and any report generated by the WTF under the direction of [redacted].

(2) Department of Defense: The damage assessment completed by the IRTF and any report generated by the IRTF under the guidance and direction of [redacted]. Additionally, the Defense requests all forensic results and investigative reports by any of the cooperating agencies in this investigation (DOS, FBI, DIA, the Office of the National Counterintelligence Executive and the CIA).

(3) Department of Justice: Any documentation related to the DOJ investigation into the disclosures by WikiLeaks concerning PFC Bradley Manning, including any grand jury testimony or any information relating to any 18 U.S.C. § 2703(d) order or any search warrant by the government of Twitter, Facebook, Google or any other social media site.

(4) Department of State: The damage assessment completed by the DOS, any report generated by the task force assigned to review each released diplomatic cable, and any report or assessment by the DOS concerning the released diplomatic cables.

BURDEN OF PERSUASION AND BURDEN OF PROOF

2. As the moving party, the Defense has the burden of persuasion. R.C.M. 905(c)(2). The burden of proof is by a preponderance of the evidence. R.C.M. 905(c)(1).

FACTS

3. PFC Manning is charged with five specifications of violating a lawful general regulation, one specification of aiding the enemy, one specification of disorders and neglects to the prejudice of good order and discipline and service discrediting, eight specifications of communicating classified information, five specifications of stealing or knowingly converting Government

property, and two specifications of knowingly exceeding authorized access to a Government computer, in violation of Articles 92, 104, and 134, UCMJ, 10 U.S.C. §§ 892, 904, 934 (2010).

4. The original charges were preferred on 5 July 2010. Those charges were dismissed by the convening authority on 18 March 2011. The current charges were preferred on 1 March 2011. On 16 December through 22 December 2011, these charges were investigated by an Article 32 Investigating Officer. The charges were subsequently referred without special instructions to a general court-martial on 3 February 2012.

5. It has been a long and arduous road for the Defense to obtain specifically requested items of discovery. The Defense submitted its first discovery request over 15 months ago, on 29 October 2010. *See* Attachment D. The Government did not immediately respond in writing to this request. Due to the lack of a written response, the Defense submitted additional discovery requests on 15 November 2010, 8 December 2010, 10 January 2011, 19 January 2011 and 16 February 2011. *Id.*

a. In the 15 November 2010 discovery request, the Defense requested that the Government provide, among other things, the classification determinations by the Original Classification Authorities (OCA) as well as the OCAs' damage assessments. This information was required to be completed by DOD Directive 5210.50, DOD Directive 5200.1, DOD Instruction 5240.4.

b. In the 8 December 2010 discovery request, the Defense requested a copy of any forensic result, investigative report, or damage assessment by the Department of State (DOS), Department of Defense (DOD), Department of Justice (DOJ), Federal Bureau of Investigation (FBI), and the Central Intelligence Agency (CIA). At the time of this request, the DOS had announced that it was conducting a thorough review of each released cable in an effort to identify any possible damage due to its release. The DOD was conducting a similar investigation regarding the Significant Activity Reports (SIGACTs) from Afghanistan and Iraq. The DOD had directed the Defense Intelligence Agency (DIA) to form a task force called the Information Review Task Force (IRTF) to review all items allegedly disclosed to WikiLeaks. Finally, [redacted] and [redacted] announced that there was an ongoing joint investigation by the DOD, DOS, DOJ, FBI and CIA.

c. In the 10 January 2011 discovery request, the Defense requested that the Government disclose items seized by the DOJ and other agencies pursuant to 18 U.S.C. § 2703(d).

d. In the 19 January 2011 discovery request, the Defense requested that the Government preserve the Quantico confinement facility video tape of [redacted]. This video documents the [redacted], ordering PFC Manning to be placed in suicide prevention. The decision to strip PFC Manning of his clothes and place him under suicide prevention was made over the recommendation of the [redacted].

e. In the 16 February 2011 discovery request, the Defense reiterated its request for any damage assessment or information review conducted by any governmental agency or at the direction of any governmental agency.

6. Instead of responding in writing, the Government periodically sent the Defense purported discovery on compact discs. The discovery provided by the Government was Bates numbered using a software program that provided for consecutive numbering of each page. The discs provided by the Government ranged in size from a few hundred pages of Bates numbered discovery to discs with well over twenty thousand pages of Bates numbered discovery. The Government did not organize the discovery in any manner that would indicate how it was responsive to the Defense's specific discovery requests. Additionally, the provided discovery often seem to unnecessarily include multiple copies of the same items – [redacted]. In addition to multiple copies of collateral investigations, the Government also provided entire copies of Army Regulations, Instructions and Training Manuals.[1]

7. It was not until 12 April 2011, six months after the Defense's initial discovery request, that the Government chose to respond in writing to the multiple discovery requests submitted by the Defense. *See* Attachment E. The Government's general response to each of the Defense's discovery requests was a variation of one of the following:

a) "[redacted]";

b) "[redacted]";

c) "[redacted]"; or

d) "[redacted]" *Id.*

8. Based upon the lack of information provided by the Government in its 12 April 2011 discovery responses, the Defense submitted additional discovery requests on 13 May 2011, 21 September 2011, 13 October 2011, 15 November 2011, and 16 November 2011. *See* Attachment F.

a. In the 13 May 2011 discovery request, the Defense again specifically requested any investigative summaries, damage assessments or OCA determinations conducted by the United States Army, DOD, DOJ, NSA, DIA, Department of Homeland Security Office of Intelligence and Analysis, FBI, and the Bureau of Diplomatic Security (DS). The Defense informed the Government of its affirmative obligation to seek out the requested discovery even if those items

[1] The Defense estimates at least 5,000 page of the unclassified discovery are duplicates of items previously provided by the Government.

were not already in its immediate possession. The Defense cited *United States v. Williams*, 50 M.J. 436, 441 (C.A.A.F. 1999), *United States v. Bryan*, 868 F.2d 1032, 1036 (9th Cir. 1989), and *United States v. Brooks*, 966 F.2d 1500, 1503 (1992) for the proposition that the above requested items were considered to be in the possession of the Government because they were in the control of agencies that were "closely aligned" with the Government's case. The Defense also requested any *Brady* or *Jenks* material.

b. In the 21 September 2011 discovery request, the Defense requested that the Government preserve all of the hard drives from the Tactical Sensitive Compartmented Information Facility (T-SCIF) and the Tactical Operations Center (TOC) of Headquarters and Headquarters Company, 2nd Brigade Combat Team, 10th Mountain Division, Forward Operating Base Hammer, Iraq.

c. In the 13 October 2011 discovery request, the Defense requested the ability to inspect the hard drives from computers in the Tactical Sensitive Compartmented Information Facility (T-SCIF) and the Tactical Operations Center (TOC) of Headquarters and Headquarters Company, 2nd Brigade Combat Team, 10th Mountain Division, Forward Operating Base Hammer, Iraq. The Defense also reiterated its request for any report or recommendation from the CIA (it had now formed a WikiLeaks Task Force (WTF)) DOJ, DOS, ODNI, and any other governmental intelligence agency that participated in the investigation.

d. In the 15 November 2011 discovery request, the Defense requested classification reviews and damage assessments for items charged in Specifications 8, 9, and 15 of Charge II.

e. In the 16 November 2011 discovery request, the Defense requested an EnCase forensic image of any computer seized by the Government and any information relied upon the Government to allege that PFC Manning gave information to any unauthorized individual in the 2009 timeframe. The Defense also renewed its request for any damage assessment or review completed in the case with the assistance of DIA, ODNI, or any other governmental agency.

9. The Government chose not to respond in a timely manner to the Defense discovery requests dated 13 May 2011, 21 September 2011, 13 October 2011, 15 November 2011, and 16 November 2011. Instead, the Government continued its practice of providing Bates numbered discovery on discs to the Defense without indicating how this discovery was responsive, if at all, to the Defense's requests.

10. On 16 November 2011, the Government notified the Defense and the Article 32 Investigating Officer (IO) that the Special Court-Martial Convening Authority (SPCMA) had ordered the restart of the Article 32. *See* Attachment G. The SPCMA ordered the Article 32 to start no earlier than thirty days from 16 November and to conclude no later than sixty days from 16 November. *Id.* Given the Government's failure to respond to the Defense's requests filed on 13 May 2011, 21 September 2011, 13 October 2011, 15 November 2011, and 16 November 2011, the Defense filed a Defense Request for Production of Evidence with the Article 32 IO. *See* Attachment H.

11. The request submitted to the Article 32 IO by the Defense requested several items that had not been provided by the Government. Among the items requested by the Defense were the following:

a. Quantico Video: The Defense requested a copy of the video of PFC Manning being ordered to surrender his clothing at the direction of [redacted] and the subsequent interrogation by [redacted]. The defense stated that the requested item was relevant to support PFC Manning's claim of unlawful pretrial punishment. The Defense cited the discussion section to R.C.M. 405(e) as authority for the right to obtain the requested information. The discussion to R.C.M. 405(e) supported the ability of the Article 32 IO to consider issues such as unlawful pretrial punishment.

b. EnCase Forensic Images: The Defense requested an EnCase forensic image of each computer from the T-SCIF and the TOC of Headquarters and Headquarter Company, 2nd Brigade Combat Team, 10th Mountain Division, Forward Operating Base Hammer, Iraq. An inspection of all seized governmental computers from the T-SCIF and TOC would have allowed the Defense to provide evidence that it was common for soldiers to add technically unauthorized computer programs to their computers. The practice of the unit was to tacitly authorize that addition of unauthorized programs including but not limited to: mIRC (a full featured Internet Relay Chat client for Windows that can be used to communicate, share, play or work with others on IRC networks); Wget (a web crawler program designed for robustness over slow or unstable network connections); GEOTRANS (an application program which allows a user to easily convert geographic coordinates among a wide variety of coordinate systems, map projections and datums); and Grid Extractor (a binary executable capable of extracting MGRS grids from multiple free text documents and importing them into a Microsoft Excel spreadsheet) to their computers. The Defense believed this information was relevant since the Government has charged PFC Manning with adding unauthorized software to his government computer in Specification 2 and 3 of Charge III.

c. Damage Assessments and Closely Aligned Investigations: The Defense requested the following damage assessments and records from closely aligned investigations:

(1) Central Intelligence Agency: Any report completed by the WTF and any report generated by the WTF under the direction of [redacted].

(2) Department of Defense: The DOD reached out for assistance from the DOS, FBI, DIA, the Office of the National Counterintelligence Executive and the CIA. The Defense argued that it was entitled to receive all forensic results and investigative reports by any of the cooperating agencies in this investigation. Additionally, the Defense noted that [redacted] on 29 July 2010 directed the DIA to lead a comprehensive review of the documents allegedly given to WikiLeaks and to coordinate under the IRTF, formerly TF 725, to conduct a complete damage review. The Defense believed, based upon public acknowledgements by representatives of the Government, that the results of this damage review would undercut the testimony of each the OCAs for the charged documents. Specifically, based upon public documents, it appeared that the IRTF concluded that no sources or methods were revealed by the alleged disclosures, and that all of the information allegedly disclosed was

either dated, represented low-level opinions, or was already commonly understood and known due to previous public disclosures.

(3) Department of Justice: The DOJ has conducted a very public investigation into the disclosures by WikiLeaks as referenced by [redacted]. The Defense requested any grand jury testimony and any information relating to any 18 U.S.C. § 2703(d) order or any search warrant by the government of Twitter, Facebook, Google or any other social media site that was relevant to PFC Bradley Manning.

(4) Department of State: The DOS formed a task force of over 120 individuals to review each released diplomatic cable. The task force conducted a damage assessment of the leaked cables and concluded that the information leaked either represented low-level opinions or was already commonly known due to previous public disclosures. According to published reports in multiple new agencies, including the Associated Press, The Huffington Post, and Reuters, internal U.S. government reviews by the Department of Defense and the Department of State determined that the leak of diplomatic cables caused only limited damage to U.S. interests abroad. According to the published account "[a] congressional official briefed on the reviews stated that the administration felt compelled to say publicly that the revelations had seriously damaged American interests in order to bolster legal efforts to shut down the WikiLeaks website and bring charges against the leakers." The official is quoted as saying "we were told (the impact of WikiLeaks revelations) was embarrassing but not damaging." *Id.* (source article is at appendix G). This determination was at odds with the classification review conducted by the OCA. As such, the Defense argued that [redacted] should not be permitted to espouse an opinion which is inconsistent with the damage assessments conducted by the government.

12. On 30 November 2011, the Government filed a response to the Defense request for production of evidence. *See* Attachment I. The Government indicated that it was seeking to preserve the requested Quantico video and the EnCase forensic images of the T-SCIF and TOC computers. With regards to the damage assessments and the closely aligned investigations, the Government stated the following: [redacted] *Id.*

13. On 1 December 2011 the Defense filed a motion to compel production of evidence at the Article 32 hearing. *See* Attachment J. In this motion, the Defense pointed out that the Government failed to respond to the Defense request as envisioned under R.C.M. 405(g)(1)(B). Instead, the Government simply treated the request as another request for discovery and consistent with its previous responses to discovery requests, the Government chose not to produce the requested discovery. The Defense renewed its request for the Article 32 IO to determine whether the information requested by the Defense was relevant and reasonably available. The Defense maintained that if the IO determined the information was relevant and reasonably available, one of the following should have occurred:

a. The IO should have ordered the custodian of the evidence to produce it at the Article 32 hearing and the custodian would then have been required to produce it. R.C.M. 405(g)(2)(C); or

b. The IO should have ordered the custodian of the evidence to produce it at the Article 32 hearing and once ordered, the custodian of the evidence should have determined if the information was reasonably available. If the custodian determined the information was not reasonably available, then this determination would have been binding on the IO and the Defense. The IO would have then been required to include a statement of the reasons for that determination in the record of the investigation. R.C.M. 405(g)(2)(D). Once the case was referred, the Defense would then have been permitted under R.C.M. 906(b)(3) to move the military judge to review the determination during a pretrial session; or

c. The IO should have ordered the custodian of the evidence to produce it at the Article 32 hearing and once ordered, the convening authority could have determined that the evidence should be withheld under Military Rule of Evidence (M.R.E.) 505(d)(5) since production of the evidence would not be done without causing identifiable damage to national security; or

d. The IO should have ordered the custodian of the evidence to produce it at the Article 32 hearing and once ordered, the government could have objected to the production of the evidence on grounds of privilege. If this had been done, the IO could then have conducted an in-camera review under M.R.E. 505(i). A M.R.E. 505(i) review would have been appropriate since the IO should have had the authority to perform those tasks that would clearly impact the conduct of the Article 32 hearing. *See* R.C.M. 405(i) (providing that rules of privilege in Section V of the M.C.M. apply to the Article 32).

14. On 15 December 2011, the Article 32 IO determined that he would not order the Government to produce any of the Defense requested information. *See* Attachment K. The IO ruled the following:

a. Quantico Video: The "evidence is not relevant to the form of the charges, the truth of the charges, or information as may be necessary to make an informed recommendation as to disposition; specifically, the circumstances surrounding PFC Manning's placement in suicide risk are not relevant to a determination as whether PFC Manning committed the charged offenses and if so, what the disposition of those charges should be." *Id.*

b. EnCase Forensic Images: The "evidence is relevant as it could help establish that it was common for soldiers in these locations to place unauthorized software to these computers; however, this evidence is not reasonably available because its significance is lessened by the fact it is cumulative to the testimony of at least [redacted] and [redacted], and as the government has indicated that it is still working to preserve this evidence, its limited significance is not outweighed by the delay of obtaining this evidence." *Id.*

c. Damage Assessments and Closely Aligned Investigations: The IO ruled as follows:

(1) Central Intelligence Agency: The "evidence is not reasonably available; as this was a joint investigation, this evidence is cumulative with evidence of the CID case file, and its limited significance is not outweighed by the delay in obtaining this evidence." *Id.*

(2) Department of Defense: The "evidence is not relevant to the form of the charges, the truth of the charges, or information as may be necessary to make an informed recommendation as to disposition; specifically, the extent of the harm caused by the charged offenses is not relevant to a determination as to whether PFC Manning committed the charged offenses and if so, what the disposition of those charges should be. Additionally, I understand from the 12 December 2011 telephone conference with [redacted] and Mr. Coombs that the government does not have the authority to disclose damage assessments and thus I conclude that any evidence of damage assessments is not reasonably available." *Id.*

(3) Department of Justice: The "evidence is not reasonably available; as this was a joint investigation, this evidence is cumulative with evidence of the CID case file, and also the government has said it has no knowledge of grand jury testimony or search warrants from the Department of Justice, which leads to a conclusion that the limited significance of this evidence is not outweighed by the delay in obtaining it." *Id.*

(4) Department of State: The "evidence is not relevant to the form of the charges, the truth of the charges, or information as may be necessary to make an informed recommendation as to disposition; specifically, the extent of the harm caused by the charged offenses is not relevant to a determination as to whether PFC Manning committed the charged offenses and if so, what the disposition of those charges should be. Additionally, I understand from the 12 December 2011 telephone conference with [redacted] and Mr. Coombs that the government does not have the authority to disclose damage assessments and thus I conclude that any evidence of damage assessments is not reasonably available." *Id.*

15. On 20 January 2012, the Defense submitted an additional discovery request to the Government. *See* Attachment L. The Defense requested contact information for the non-military OCAs. The Defense also requested that the Government respond to specific questions regarding whether the Government had obtained any damage assessment, report, or recommendation from WTF, IRTF, FBI, CIA, DOJ, DOS, ODNI, DIA or the Office of the National Counterintelligence Executive.

16. On 27 January 2012, the Government finally submitted discovery responses to all of the outstanding Defense discovery requests. *See* Attachment M. In addition to these discovery responses, the Government also included amended responses to the Defense discovery requests submitted before 13 May 2011. The Government's 27 January 2011 discovery responses fell generally into one of the following categories:

a. "[redacted]";

b. "[redacted]";

c. "[redacted]";

d. "[redacted]";

e. "[redacted]";

f. "[redacted]"; or

g. "[redacted]."

Id.

17. On 31 January 2012, the Government submitted a general discovery response to the Defense. *See* Attachment N. The Government's discovery response was intended to act as a blanket response to the Defense's multiple requests for damage assessments and investigative files by the various OCAs and government agencies. Instead of providing any of the requested information by the Defense, the Government defaulted to one of the following responses:

a. "[redacted]"; or

b. "[redacted]" *Id.*

18. In total, the Government has so far provided approximately 78,148 pages of unclassified discovery to the Defense and approximately 333,194 pages of what the Government considers classified discovery. The vast majority of this discovery, however, is not responsive to the specific items repeatedly requested by the Defense and that is the subject of this motion to compel.

WITNESSES/EVIDENCE

19. The Defense does not request any witnesses be produced for this motion. The Defense respectfully requests this court to consider the referenced documents listed as attachments to the motion.

LEGAL AUTHORITY AND ARGUMENT

20. Military courts recognize "a much more direct and generally broader means of discovery by an accused than is normally available to him in civilian courts." *United States v. Reece*, 25 M.J. 93, 94 (C.M.A. 1987). Regarding discovery, "military law has been preeminent, jealously guaranteeing to the accused the right to be effectively represented by counsel through affording every opportunity to prepare his case by openly disclosing the Government's evidence." *United States v. Enloe*, 35 C.M.R. 228, 230 (C.M.A. 1965). The only restrictions placed upon liberal defense discovery are that the information requested must be relevant and necessary to the subject of the inquiry, and the request must be reasonable. *Reece*, 25 M.J. at 95. *See also United States v. Luke*, 69 M.J. 309, 319 (C.A.A.F. 2011) ("The military rules pertaining to discovery focus on equal access to evidence to aid the preparation of the defense and enhance the orderly administration of military justice. To this end, the discovery practice is not focused solely upon evidence known to be admissible at trial. The parties to a court-martial should evaluate pretrial discovery and disclosure issues in light of this liberal mandate.")(citations omitted).

21. Relevant evidence is "any 'evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *Id.* at 95, *quoting* M.R.E. 401. In addition, the Court of Military Appeals stated in *United States v. Hart*, 29 M.J. 407, 410 (C.M.A. 1990):

> In his opinion at the court below, Judge Gilley adopted the premise that, under Article 46, discovery available to the accused in courts-martial is broader than the discovery rights granted to most civilian defendants. From this, he correctly reasoned that, where prosecutorial misconduct is present or where the Government fails to disclose information pursuant to a specific request, the evidence will be considered "material unless failure to disclose" can be demonstrated to "be harmless beyond a reasonable doubt."

22. Under R.C.M. 701, the trial counsel is required to automatically disclose evidence known to the trial counsel that reasonably tends to:

(A) Negate the guilt of the accused of an offense charged;

(B) Reduce the degree of guilt of the accused of an offense charged; or

(C) Reduce the punishment.

R.C.M. 701(a)(6). *See generally United States v. Simmons*, 38 M.J. 376 (C.M.A. 1993) (accused prejudiced by nondisclosure of information by the government that tended to negate the guilt of the accused); *United States v. Sebring*, 44 M.J. 805 (N-M.C.C.A. 1997) (Government had obligation to search for favorable evidence in drug lab's files which showed some mistakes in handling drug samples); *United States v. Kinzer*, 39 M.J. 559 (A.C.M.R. 1994) (error for Government to fail to disclose exculpatory evidence).

23. In addition to the requirement of the Government to disclose any and all evidence that is favorable to the accused, upon request by the Defense, the Government is also required to disclose materials that are within its possession, custody, or control. R.C.M. 701(a)(2)(A); *United States v. Meadows*, 42 M.J. 132 (C.A.A.F. 1995). The Government is obligated by law to turn over evidence in its possession, as well as to retrieve from other government agencies and entities outside of its immediate office relevant evidence upon a Defense request. *United States v. Williams*, 50 M.J. 436 (C.A.A.F. 1999). The Court of Appeals indicated that the scope of the Government's duty to discover and disclose information extends to items that are within the "government's control." *Id.* at 441.

24. The requirement under *Williams* means that the trial counsel has an affirmative obligation to seek out requested evidence that is in the possession of the Government even if that evidence is not already in its immediate possession. *Id.* Not only must the trial counsel search its core files within the case, the trial counsel must also search the files of law enforcement officials that have taken part in the investigation of the subject matter of the case. *Id.*; *United States v. Bryan*, 868 F.2d 1032, 1036 (9th Cir. 1989) (prosecutor will be deemed to have knowledge of and access to anything in the possession, custody, or control of any federal agency participating in the same investigation of the defendant). Additionally, the trial counsel must search investigative files in related cases maintained by "an entity 'closely aligned with' the prosecution." *Williams*, 50 M.J. at 441. Finally, the trial counsel must search other files designated in a Defense discovery request that identify a specified type of information in a specified file. *Id.* Here, the Government has been burying its head in the sand, claiming that it either has no knowledge of the existence of the damage assessments sought by the Defense, claiming that it has already disclosed the information, or claiming that the Defense is not entitled to receive this information. The significance of the damage assessments is self-evident and it is incredible that the Government could, in all seriousness, claim otherwise. The Government's repeated denial of discovery requests, using one of a variety of themes, is simply an attempt to avoid disclosing evidence that is favorable to the Defense. Such gamesmanship should not be countenanced. *United States v. Clark*, 37 M.J. 1098, 1103 (N.M.C.M.R. 1993)("Courts-martial discovery practice has been quite liberal. It strives to eliminate 'gamesmanship.'").

25. The Defense unsuccessfully attempted to secure the below-requested information at the Article 32 hearing. Despite providing a specific request for this information and stating its relevancy for the Article 32, the IO failed to hold the Government to its discovery obligations. *See* R.C.M. 701(e) (stating that each party is entitled to obtain needed evidence); *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Kern*, 22 M.J. 49, 51 (C.M.A. 1986). Instead, the IO simply adopted the assertions of the Government that the information was either not available or was not relevant to the form, truth, or disposition of the charges. It is important to note that the Defense requested a report prepared by the Department of Justice, the IO's civilian employer. Not surprisingly, the IO found that that Government was not required to produce this evidence, nor any of the other evidence that it been withholding from the Defense for well over a year.[2] The IO's ruling was simply a "cut and paste" job, repeating the Government's position on the Defense requested evidence. The IO's ruling did not take into account the right of the

[2] The position is even more indefensible if one considers that representatives of the various government agencies that were investigating the case and/or preparing damage reports were seated in the audience *every day* at PFC Manning's Article 32 hearing. And yet, the evidence was not required to be disclosed.

Defense to obtain evidence that is favorable to the accused. *See generally,* Army Regulation 27-26, paragraph 3.8(d); *United States v. Kinzer*, 39 M.J. 559, 562 (A.C.M.R. 1994); *United States v. Adens*, 56 M.J. 724 (A.C.C.A. 2002). Due to the IO's ruling, the Government was allowed to remain consciously ignorant of the presence of evidence favorable to the accused that was reasonably within its possession. *United States v. Williams*, 50 M.J. 436 (C.A.A.F. 1999); *United States v. Bryan*, 868 F.2d 1032, 1036 (9th Cir. 1989). This ruling frustrated the discovery purposes of the Article 32, and resulted in relevant information not be considered by either the IO or the Convening Authority.

26. The Government cannot have its cake and eat it too. It cannot charge a defendant with 22 specifications, comprising numerous legal elements, and then refuse to provide the Defense with the evidence it needs to mount a robust Defense. To date, the Government has had unfettered discretion in deciding what to make available to the Defense, when to make it available, and in what form. The Government should not be allowed to continue to act as the sole gatekeeper for what evidence is and is not relevant and what evidence will and will not be disclosed. *See* Article 46 of the UCMJ ("[t]he trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence"). The conduct of the Government in preventing the Defense from obtain needed discovery over the last 15 months discloses why judicial intervention is needed. The Defense requests that the Government be compelled to produce the above-mentioned discovery that is either in the Government's immediate possession or in a location which it has a duty to search.

CONCLUSION

27. Based on the above, and the *ex parte* submission by the Defense, the Defense requests that the Court order the Government to obtain the requested information and provide this information to the Defense.

Respectfully submitted,

DAVID EDWARD COOMBS
Civilian Defense Counsel