IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES	)	
	)	**DEFENSE RESPONSE**
v.	)	**TO PROSECUTION NOTICE**
	)	**TO COURT OF ONCIX DAMAGE**
MANNING, Bradley E., PFC	)	**ASSESSMENT**
U.S. Army, xxx-xx-9504	)	
Headquarters and Headquarters Company, U.S.	)	
Army Garrison, Joint Base Myer-Henderson Hall,	)	2 June 2012
Fort Myer, VA 22211	)	

RELIEF SOUGHT

1. The Defense requests that this Court order the immediate production of the Office of the National Counterintelligence Executive (ONCIX) damage assessment and all supporting documentation for an *in camera* review by the Court.[1]

BURDEN OF PERSUASION AND BURDEN OF PROOF

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

EVIDENCE

3. The Defense does not request any witnesses be produced for this motion. The Defense requests that this Court consider its own 23 March 2012 Discovery Ruling. Appellate Exhibit XXXVI.

FACTS

4. On 31 May 2012, the Government provided notice to the Court and the Defense that ONCIX had a draft damage assessment. Along with the Government's notice, it provided a copy of its 24 May 2012 letter to ONCIX and the reply by ONCIX on 30 May 2012.

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[1] The Defense requested relief is not a waiver of other possible remedies based upon Government discovery violations. The Defense reserves the right to request additional relief from the Court.

[2] The Defense assumes that the Government is moving the Court to allow it until 3 August 2012 to produce the ONCIX damage assessment for *in camera* review.

ARGUMENT

5. In its Notice, the Government remarkably makes its misrepresentations and lack of diligence look like altruism. *See* Prosecution Notice to Court of Identification of NCIX Damage Assessment [hereinafter "Government Notice Re: ONCIX Damage Assessment"] at p. 1 ("in the interests of justice, the prosecution believes the Court's ruling regarding the DoS draft damage assessment should also apply to the ONCIX draft."). When this Court looks at the timeline of events, it is clear that the "discovery" of the ONCIX damage assessment is just another example – and a particularly egregious one at that – of the Government's manipulation of the discovery process.

6. The Defense submitted multiple discovery requests for forensic results, investigations and damage assessments from closely aligned agencies, including ONCIX. In the Government Response to the Defense Motion to Compel #1, the Government stated that "ONCIX has not completed a damage assessment." p. 11. Notably, the Government also said the exact same thing about the Department of State. However, given the information that was available publicly, the Defense was able to show that the Department of State was working on *something*, regardless of whether it was "completed." Having no knowledge of anything to the contrary with respect to ONCIX, the Defense was forced to accept the Government's representation that ONCIX did not have anything by way of a damage assessment.

7. On 21 March 2012, the Court required the Government to respond to several factual questions regarding each of the Defense requested damage assessments. The Government responded to the Court's question regarding the ONCIX damage assessment by stating "ONCIX has not produced any interim or final damage assessment in this matter." Appellate Exhibit XXXVI at p. 6. The Defense does not believe this was an accurate statement at the time – given that ONCIX is currently in the process of *finalizing* the damage assessment, it stands to reason that ONCIX had some form of interim/draft/working damage assessment as of 21 March 2012. However, having no knowledge at the time of anything to the contrary, the Defense, and now the Court, was forced to accept the Government's representation.

8. In the Court's 23 March 2012 ruling, the Court ordered the Government, *inter alia*, to: a) begin the process of producing the Department of State's damage assessment to the Court for *in camera* review; and b) search ONCIX for forensic results and investigative files.

9. On 23 March 2012, the Government had an obligation to correct its misrepresentation about ONCIX's damage assessment. Clearly, the Court found that the Department of State damage assessment – even if in interim or draft form – was "relevant and necessary for the Court to conduct an *in camera* review." Appellate Exhibit XXXVI, p. 11. The Court also ordered the Government to produce the other two damage assessments (the IRTF and WTF damage assessment) at issue. In short, the Court found that damage assessments of closely aligned agencies must be produced to the Court for *in camera* review. This Ruling triggered a duty on the part of the Government to correct the misimpression it had created by its disingenuous use of the expression, "ONCIX has not completed a damage assessment"[3] and what the Defense

[3] By using the expression "ONCIX has not completed a damage assessment" (when it should have said, "ONCIX has not finished completing its damage assessment") this implies that such a damage assessment was never even performed.

submits was an outright misrepresentation that ONCIX does not have "any interim or final damage assessment in this matter." Clearly, as of the 23 March 2012 Ruling, the Court and the Defense believed that ONCIX did not have any sort of damage assessment, final or interim. Since the Government had knowledge to the contrary, there was a duty to disclose that to the Court – not sit on that information for over two months.[4]

10. The Government's misrepresentations regarding ONCIX continued when it notified the Court on 20 April 2012 that "ONCIX does not have any forensic results or investigative files." Appellate Exhibit LVI, p. 2. This statement was wholly inconsistent with the few pages of *Brady* discovery the Government had provided a week earlier. In the *Brady* discovery, it was clear that ONCIX was collecting information from various agencies in late 2010 to assess what damage, if any, was occasioned by the leaks. So how could it be that ONCIX neither had an investigation nor a damage assessment?

11. The Defense sent an email on 21 April 2012 to the Court expressing concern about the inconsistency between the Government's representation that ONCIX did not have a "damage assessment" or "investigative results" and what the Defense was receiving in discovery. The Defense wrote:

> Ma'am,
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> In the Government's Notification to the Court yesterday, it indicated that the Defense Intelligence Agency (DIA) and the Office of National Counterintelligence Executive (ONCIX) did not have any forensic results or investigative files related to this case.
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> Approximately a week ago, the Government produced to the Defense approximately 12 pages of Brady materials from interim damage assessments from November, 2010 by the Federal Communications Commission, the Federal Trade Commission, the U.S. Department of Urban Development, the Millennium Challenge Corporation, the National Archives, and the United States Marshals Service. [See Attached]. Some of these interim damage assessments reference investigations by ONCIX and DIA. For instance, the 26 November 2010 "Memorandum for the Office of the National Counterintelligence Executive (ONCIX)", the Federal Communications Commission states, "As requested, this Memorandum provides the response of the Federal Communications Commission (FCC), as requested by the NCIX memo dated 26 October 2010." (p. 1). Similarly, the 19 November 2010 letter from the U.S. Department of Housing and Urban Development is addressed to the DIA. Moreover, the DIA is overseeing the Information Review Task Force, an investigation into the alleged disclosures. Further, the interim damage assessments also reveal the Office of the Director of

[4] The duty to disclose does not change simply because the Government was planning on filing a motion for reconsideration of the Court's ruling. As of 23 March 2012, the Court's ruling stood – and the Government had an ethical obligation to correct the misimpression it had created. It could not sit on its laurels, then make a feeble attempt at reconsideration, then await a ruling, then reach out to ONCIX and make arrangements, and finally reach out to the Court to inform the Court of the fact that ONCIX did, in fact, have a damage assessment. *See* AR 27-26, Rule 3.3.

> National Intelligence (ODNI) has relevant investigative files. See letter from United States Marshals ("On October 13, 2010, the Office of the Director of National Intelligence (ODNI) … provided a checklist of questions that it recommended each agency impacted by [WL] dissemination use to assess the impact on its operations.") The Court's ruling did not specifically address ODNI; however, previous Defense requests for discovery asked the Government to provide all ODNI investigative files. The Defense will renew its discovery request for ODNI investigative files and forensic results based upon the interim damage assessments.
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> It is readily apparent that there are investigative files in the hands of the DIA, ONCIX and ODNI. The interim damage assessments clearly show this. Accordingly, the Defense does not understand how the Government can maintain that "DIA does not have any forensic results or investigative files" and "ONCIX does not have any forensic results or investigative files." The Defense requests that in light of the interim damage assessments, the Government provide a full explanation of its statement that neither of these agencies has investigative files and provide a witness from each of the relevant agencies to appear at a motions hearing.

See Attachment.

12. The Government waited until an 802 session to "explain away" the inconsistency. This was when the Government conveniently and out of whole cloth fabricated definitions of "damage assessments" and "investigations." *See* Appellate Exhibit LXXI. It continued to maintain that ONCIX did not have a damage assessment (even though the Court had already concluded that the Department of State draft/interim assessment was discoverable). And it maintained that the data collected by ONCIX, and presumably accumulated into some report, did not fall within the purview of the word "investigations." The Defense was stunned by the continued obfuscation. It was abundantly clear that ONCIX had some form of inquiry into the harm from the leaks – but the Government switched definitions around arbitrarily so as to avoid disclosing this discovery to the Defense. The Defense then indicated to the Government that it would submit another discovery request for, *inter alia*, documents from ONCIX. Once again, at this point, the Government should have thought to itself: "We know that ONCIX has responsive documentation, albeit in draft form. Maybe we should tell the Court?" But it didn't.

13. On 24 April 2012, the Government produced the Department of State damage assessment for *in camera* review and resurrected an issue that the Court had already decided – whether the Department of State damage assessment was discoverable. The Government's attempt to re-litigate this issue and the authority provided in support of the motion for reconsideration was so weak that the Court did not even want to hear from the Defense in this respect. The Government hung its hat on one sentence of *dicta* from a concurring opinion in a case from 1963. On 11 May 2012, the Court denied the Government's motion.

14. One would think that at the very least, the Government would choose to inform the Court of the ONCIX damage assessment after the Court's Ruling. It didn't. Instead, the Government waited another three weeks to bring this issue to the Court's attention. In the interim, it arrogantly assumed – without asking the Court – that it would have *over two months* to produce

the damage assessment to the Court for *in camera* review. The Government already notified ONCIX that ONCIX would have until 3 August 2012 to produce the damage assessment.

15. MAJ Fein's letter to ONCIX is telling. In his letter to the General Counsel at ONCIX, MAJ Fein states, "[redacted]." Government Notice Re: ONCIX Damage Assessment, attached letter from MAJ Fein to [redacted], May 24, 2012 (emphasis added). The reason that the Court "did not rule on NCIX's draft" was because the Government represented to the Court that ONCIX did not possess a draft damage assessment. MAJ Fein makes it look like this is simply an error on the *Court's* part, stating "[redacted]" To the extent that there is an "inconsistency" it is one which the Government created when it misrepresented to the Court on 21 March 2012 that ONCIX not have "any interim or final damage assessment in this matter."

16. As an ancillary note, MAJ Fein's letter to the General Counsel at ONCIX reveals that the Government has not yet started its *Brady* search with respect to the interim damage assessment. The General Counsel states that "[redacted]" Government Notice Re: ONCIX Damage Assessment, letter from [redacted] to MAJ Fein, 30 May 2012. Thus, it appears that the Defense will not get *Brady* material from the ONCIX damage assessment, at the earliest, until early August.

17. The Defense predicts that the Government will try to define itself out of this self-created mess by arguing one of the following:

> a) That the Government said "ONCIX has not *produced* any interim or final damage assessments in this matter." (emphasis added). In other words, what it was saying was that there might have been an interim report, but that report had not yet been *produced* to the Government; or
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> b) That the report that existed on 21 March 2012 was pre-interim (or, in the Government's words, it was a "working paper"), so it technically didn't fit the definition of "interim." The Government will then define "interim" to be distinct from "working paper" (which, of course, is distinct from "damage assessment" and which may or may not be distinct from a "draft"). It was abundantly clear what the Court was asking: did ONCIX have some document in existence that assessed the damage from the leaks? *See* Appellate Exhibit LXXII.

The Court should not permit the Government to wiggle its way out of what is clearly a misrepresentation to the Court and one of a long list of discovery violations.

CONCLUSION

18. The Defense requests that this Court order the immediate production of the entire ONCIX

damage assessment and all supporting documentation for an *in camera* review by the Court.

Respectfully submitted,

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Civilian Defense Counsel