IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

U N I T E D S T A T E S	)	
	)	**DEFENSE MOTION TO**
v.	)	**COMPEL DISCOVERY #3**
	)	
MANNING, Bradley E., PFC	)	
U.S. Army, xxx-xx-9504	)	
Headquarters and Headquarters Company, U.S.	)	
Army Garrison, Joint Base Myer-Henderson Hall,	)	17 August 2012
Fort Myer, VA 22211	)	

RELIEF SOUGHT

1. In accordance with the Rules for Courts Martial (RCM) 701(a)(2) and 905(b)(4), Manual for Courts-Martial (MCM), United States, 2008; Article 46, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 846; and the Fifth and Sixth Amendments to the United States Constitution, the Defense respectfully requests that the Court compel the requested discovery. Specifically, the Defense requests that the Court order the Government to produce the remaining 1,290 emails that it obtained from Marine Corps Base Quantico (MCBQ) regarding the confinement conditions of PFC Manning.

BURDEN OF PERSUASION AND BURDEN OF PROOF

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

EVIDENCE

3. The Defense does not request any witnesses be produced for this motion. The Defense requests that this Court consider the following evidence in support of this motion:

a) Attachment A (Government's Preservation Request, dated 28 April 2011);
b) Attachment B (Response by Quantico indicating all electronic correspondence has been provided to the trial counsel, dated 20 December 2011);
c) Attachment C (Government Discovery Response, dated 14 August 2012);
d) Attachment D (Email from MAJ Ashden Fein, dated 26 July 2012);
e) Attachment E (Email from MAJ Ashden Fein, dated 27 July 2012); and
f) Attachment F (Email from MAJ Ashden Fein, dated 14 August 2012).

FACTS

4. On 28 April 2011, the Government submitted a "request for prudential search and preservation of information" to [REDACTED], [REDACTED]. *See* Attachment A. The document submitted by MAJ Fein requested [REDACTED] to "take any and all reasonable

and necessary steps to preserve any information held by your command which concerns or references PFC Manning" and secondly "that your command conduct a thorough and comprehensive search of its records for information which relates to PFC Manning's confinement at the Quantico Brig." *Id*. In August of 2011, the Government began receiving documentation responsive to its preservation request. *See* Attachment C.

5. On 20 December 2011, [redacted], the [redacted] for [redacted], confirmed that "all relevant electronic correspondence, electronic files and hard copy documentary evidence regarding the confinement of PFC Manning in the possession of Marine Corp [B]ase Quantico official[s] have been provided. Trial counsel were (sic) permitted to view and copy all relevant files maintained by the Quantico Pretrial Confinement Facility." *See* Attachment B.

6. The Government began providing documentation related to PFC Manning's confinement at Quantico in October of 2011. Based upon the volume of the information provided, the Defense believed that this was the full extent of the information the Government had from Quantico.

7. On 25 July 2012, almost a year after the Government first began receiving documentation from Quantico, and almost seven months after receiving the last of the Quantico documentation, the Government started reviewing the emails that it had received from Quantico. *See* Attachment C. According to the Government, it started reviewing these emails "in preparation for the defense Article 13 motion." *Id*. 4. The Article 13 motion, however, had been on the case calendar since this case was referred. The established deadline for the Defense to file the Article 13 motion was 27 July 2012. Additionally, the Defense had already advised the Government that the Article 13 motion would be a very lengthy and involved motion, totaling over 100 pages. In fact, the case calendar had accommodated the Government's request for an additional week to respond to the motion due to the anticipated length of the motion.

8. Once the Government elected to review the Quantico documentation, it reviewed a total of 1,374 emails on 25 and 26 July 2012. *Id*., *see also*, Attachment F. On 26 July 2012, the Government selected 84 emails that it believed were "obviously material to the preparation of the defense" and produced them to the Defense. *See* Attachment D.

9. On 27 July 2012, the Defense notified the Court that MAJ Fein had sent, at 2115 on 26 July 2012, 84 separate emails which depicted high level discussions at Quantico concerning PFC Manning's custody status. The Court held an RCM 802 conference on 27 July 2012 to discuss the need for a continuance in the consideration of the Article 13 motion.

10. As a result of the Government's late discovery, the Defense requested a continuance of the proceedings in order to review and incorporate information from the 84 emails into its Article 13 submissions; to interview (and re-interview) witnesses based on information contained therein; and to file a supplemental Article 13 witness list. On 1 August 2012, the Court granted the Defense's request.

ARGUMENT

11. The emails from Quantico are in the possession, custody, and control of the military and fall within RCM 701(a)(2). While the Government has turned over a small fraction of this material, 84 emails, it has failed to turn over any of the remaining 1,290 emails which are "regarding the confinement of PFC Manning" and were turned over by Quantico in response to MAJ Fein's "prudential search and preservation" request. *See* Attachments A and B.

12. RCM 701(a)(2)(A) provides that, after service of charges, upon request of the Defense, the Government shall permit the Defense to inspect:

> Any books, papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, *which are within the possession, custody, or control of military authorities*, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial, or were obtained from or belong to the accused.

(emphasis supplied).

13. The Government has previously maintained that if an organization is subject to a military command, then this factor controls the determination of whether materials are within the possession, custody, or control of military authorities. *See* Appellate Exhibit XLIX. The Court has held that "the defense is entitled to disclosure of matters known to the trial counsel or in the possession of military authorities." *See* Appellate Exhibit CXLVII, p. 4. Quantico is subject to a military command. Accordingly, the Government has an obligation to turn over documents that are material to the preparation of the defense.

14. As the Defense has argued before, the case law reaffirms that "material" under RCM 701(a)(2)(A) is not a difficult standard to satisfy. In *United States v. Cano*, 2004 WL 5863050 at *3 (A. Crim. Ct. App. 2004), our superior court discussed the content of the "materiality" standard under R.C.M. 701(a)(2)(A):

> In reviewing AE V in camera, the military judge said that he examined the records and AE III contained "everything . . . [he] thought was even remotely potentially helpful to the defense." That would be a fair trial standard, but our examination finds a great deal more that should have been disclosed as "material to the preparation of the defense." We caution trial judges who review such bodies of evidence in camera to do so with an eye and mind-set of a defense counsel at the beginning of case preparation. That is, not solely with a view to the presentation of evidence at trial, but to actually preparing to defend a client, so that the mandate of Article 46, UCMJ, is satisfied.

See also United States v. Roberts, 59 M.J. 323, 326 (C.A.A.F. 2004) ("The defense had a right to this information because it was relevant to SA M's credibility and was therefore material to the preparation of the defense for purposes of the Government's obligation to disclose under R.C.M.

701(a)(2)(A).")(emphasis added); *United States v. Webb,* 66 M.J. 89, 92 (C.A.A.F. 2008) ("[U]pon request of the defense, the trial counsel must permit the defense to inspect any documents within the custody, or control of military authorities that are 'material to the preparation of the defense.' R.C.M. 701(a)(2)(A). Thus, an accused's right to discovery is not limited to evidence that would be known to be admissible at trial. It includes materials that would assist the defense in formulating a defense strategy.").

15. On 8 December 2010, the Defense requested "[a]ny and all documents or observation notes by employees of the Quantico confinement facility relating to PFC Bradley Manning." *See* Attachment E. In response to the Defense's request, "the prosecution requested Quantico preserve all documentation and their emails." *Id.*

16. In spite of receiving the 1,374 emails in response to its preservation request, the Government elected to permit these emails to collect dust in one of its file cabinets until two days before the Defense's Article 13 motion was due. In defending its conduct, the Government will likely try to assert that it did not believe that an emails involving the [redacted] and Brig personnel, or emails concerning PFC Manning's confinement status were "documents or observations notes by employees of the Quantico confinement facility" within the meaning of the Defense's discovery request. The Government will likely try to convince the Court that when it was reviewing the emails for *Giglio* and *Jencks* under RCM 914, it came across information that was obviously material to the preparation of the Defense and then turned the information over as soon as it was aware of its existence. Such a position is untenable. These emails are clearly "documents … by employees of Quantico confinement facility relating to PFC Manning" and should have been produced a long time ago pursuant to the Defense's discovery request. Indeed, the Government itself recognizes that these documents are discoverable under RCM 701(a)(2) as it indicates that these emails are "obviously material to the preparation of the defense."

17. The Government was clearly aware of the fact that the Defense believed PFC Manning's confinement conditions were unnecessarily onerous. PFC Manning had repeatedly requested to be removed from MAX and POI. Additionally, the Defense made numerous requests of the United States Army Staff Judge Advocate's Office for the Military District of Washington to assist in removing PFC Manning from MAX and POI. In the fall of 2010, Mr. Coombs and MAJ Fein had several telephone conversations about the onerous conditions of PFC Manning's confinement. MAJ Fein assured Mr. Coombs that he was looking into the issue and would view it as one of his highest priorities. *See* Defense Article 13 Motion, p. 47. PFC Manning was never taken off of MAX or POI status. And it is clear that MAJ Fein and the Government did not advocate for the rights of PFC Manning during this period despite repeated protestations from the Defense that PFC Manning was being subjected to illegal pretrial punishment.

18. Despite being aware of the impending Article 13 motion, the Government inexplicably chose to wait until two days before the filing of the Defense's Article 13 motion before reviewing documents that it had been holding for close to a year. This conduct is either yet another example of that lack of due diligence on the Government's part, or a conscious decision by the Government to gain a tactical advantage in the Article 13 motion.

19. The requested emails are clearly material to the preparation of the Defense. Their volume alone proves the extent of involvement by individuals outside of the Quantico Brig in the custody status and classification of PFC Manning. This undeniable fact clearly supports the Defense's argument that the decision to keep PFC Manning in MAX and POI for over nine months was not based upon a legitimate non-punitive basis. As such, all 1,374 emails are material to the preparation of the defense.

20. Moreover, it defies logic to believe that there are nearly 1,300 emails out there dealing with PFC Manning's confinement that are not somehow relevant and helpful to the preparation of the defense. With the exception (perhaps) of purely logistical issues,[1] it would seem that any email referencing PFC Manning's confinement is *per se* material to the preparation of the defense.[2]

21. One additional note: the Government has indicated that it has produced emails that are "obviously" material to the preparation of the Defense. This is *not* the appropriate standard. The Government must turn over all documents which are material to the preparation of the Defense – as in relevant and helpful. The Defense believes, based on the sheer volume of emails not produced, that the Government has not done so.

22. The Government has had anywhere from 7 months to over a year to review the 1,374 emails it received from Quantico. The Defense has not had equal access to this same information, or the ability to adequately factor this information into the Defense's Article 13 motion. The requested information is material to the preparation of the defense, and should be turned over immediately. To permit the Government to hold onto the remaining 1,290 emails will only reward its lack of due diligence, and result in the Defense being unable to demonstrate the full extent of the Article 13 violation.

CONCLUSION

23. Under R.C.M. 701(a)(2), the Court should conclude that the remaining 1,290 emails being held by the Government from Quantico are within the "possession, custody, or control" of the Government and are material to the preparation of the Defense. The Court should compel the Government to produce these emails immediately to the Defense in order to avoid any additional requirement for a continuance of the Article 13 motion.

Respectfully submitted,

DAVID EDWARD COOMBS
Civilian Defense Counsel

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[1] For instance, emails concerning PFC Manning's movement.

[2] The Government has proved that it is not adept at determining what is relevant or material to the preparation of the Defense. The Court should recall that the Government did not believe damage assessments were relevant. Further, the Government did not believe that the FBI investigation pertaining to PFC Manning was relevant. These examples show that the Government's incredibly narrow view of what is relevant is not in accord with what is *actually* relevant.