UNITED STATES	)	
	)	**DEFENSE REQUEST TO COMPEL PRODUCTION OF EVIDENCE**
v.	)	
	)	
MANNING, Bradley E., PFC U.S. Army, [redacted] Headquarters and Headquarters Company, U.S. Army Garrison, Joint Base Myer-Henderson Hall, Fort Myer, VA 22211	)	DATED: 1 December 2011

I. INTRODUCTION

1. In accordance with the Rules for Courts-Martial (R.C.M.) 405(f)(10) and (g)(1)(B); Manual for Courts-Martial (M.C.M.), United States, 2008; Article 46, Uniform Code of Military Justice; and the Fifth and Sixth Amendments to the United States Constitution, defense counsel in the above entitled case respectfully request that the Investigating Officer compel production of evidence.

II. BACKGROUND

2. PFC Bradley Manning is charged with various offenses under Article 92 and Article 134 of the UCMJ. The offenses deal with the incorporation, under Article 134, of the Espionage Statute 18 U.S.C. § 793(e), Public Money or Property Statute 18 U.S.C. § 641, and Computer Fraud Statute 18 U.S.C. § 1030(a)(1). 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.

3. On 22 November 2011, the defense submitted a request for production of evidence at the Article 32 hearing under R.C.M. 405(g)(1)(B). The government responded to the defense request for production of evidence on 30 November 2011.

III. DISCUSSION

4. Under R.C.M. 405 and 701, the defense may request materials that are within the possession, custody, or control of military authorities. 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 their immediate office relevant evidence upon a defense request. *United States v. Williams*, 50 M.J. 436 (C.A.A.F. 1999). This motion renews the defense's request for the previously mentioned items in the Defense Request For Production Of Evidence.

5. The standard set out in R.C.M. 405 and R.C.M. 701 requires the government to turn over items that are within the "government's control." This requirement means that the trial counsel,

upon defense request, 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.* at 441. The "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." *United States v. Bryan*, 868 F.2d 1032, 1036 (9th Cir. 1989); *Williams*, 50 M.J. at 441. Furthermore, R.C.M. 405(g)(1)(B) and 703(a) establishes the standard for discovery in military courts: the prosecution and defense "shall have equal opportunity to obtain witnesses and evidence." *See* Article 46, UCMJ.

6. In the instant case, the defense requested the production of evidence at the Article 32 hearing. Instead of responding to the defense request as envisioned under R.C.M. 405(g)(1)(B), the government simply treated the request as another request for discovery. Consistent with its previous responses to discovery requests, the government provided one of the following responses: (a) a general denial; (b) a statement that it had already provided all information in its possession; or (c) a statement that it was either unaware of any information or did not presently have the authority to disclose the requested information.

7. To ensure that R.C.M. 405 and 703 will have meaning at trial, "[e]ach party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence." R.C.M. 701(e). The accused is entitled to inspect both exculpatory and inculpatory evidence. *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Kern*, 22 M.J. 49, 51 (C.M.A. 1986). Construing the due process clause, the Supreme Court in *Brady v. Maryland* established a duty to disclose evidence favorable to the defense: "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material, either to guilt or punishment, irrespective of the good faith or bad faith of the prosecutor." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). As the numerous cases deciding *Brady v. Maryland* claims indicate, "favorable" is not the same as evidence that proves the defendant to be totally innocent or establishes an unshakable alibi. Anything that tends to assist the defense, cast doubt on the government's case, or impact on a potential punishment is "evidence favorable to an 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). The defense has requested the following information be produced at the Article 32 hearing:

a. The video of PFC Manning being ordered to surrender his clothing at the direction of [redacted] and his subsequent interrogation on 18 January 2011. Given the fact the defense filed a preservation of evidence request on 19 January 2011 – nearly one year ago – the government has no excuse for not providing the video. *See* Appendix A. The video is clearly within the possession of the government and should have already been produced. *The government has responded that it "will provide all matters requested that are it is possession no later than 2 December 2011."*

b. A copy of all adverse administrative or UCMJ actions, all supporting documentation and any rebuttal materials to such action based upon the 15-6 investigation conducted by [redacted]. The matters requested can easily be found by going to the specifically listed servicemembers' official records. *Williams*, 50 M.J. at 441 (government, upon defense request,

has an affirmative obligation to seek out requested evidence). It is without dispute that several officers and enlisted members received adverse administrative actions as a result of their failure to take appropriate action in this case. *See* Appendix B. Thus far, the defense believes it has only received information on one of the fifteen individuals recommended for adverse administrative action. *The government has responded that it "has provided all matters requested that are in its possession."*

c. 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* Appendix C. Given the government's own preservation request, it should easily be able to determine the location of these items. *The government responded to the defense request by stating that "it is still actively working to preserve related computer hard drives based on defense's preservation request dated 21 September 2011."*

d. The defense requested any *Brady* or *Jencks* material in the government's possession. *Brady v. Maryland*, 373 U.S. 83 (1963) (holding that due process requires the government to turn over exculpatory evidence in its possession); *Jencks v. United States*, 353 U.S. 657 (1957) (holding that in a criminal prosecution, the government may not withhold documents relied upon by government witnesses, even where disclosure of those documents might damage national security matters). Under military law, the trial counsel has an affirmative obligation to seek out requested evidence by the defense that is in the possession of the government even if that evidence is not already in the immediate possession of the trial counsel. *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); *United States v. Brooks*, 966 F.2d 1500, 1503 (1992) (the government is considered to have possession of information that is in the control of agencies that are "closely aligned with the prosecution"). The defense specifically requested the below listed information from the government that is in control of agencies that are closely aligned with this prosecution. As is apparent from the government's responses, it has either purposefully chosen to not search for the specifically requested information, or is shirking its responsibility to do so by saying it has "no knowledge":

i) [redacted], National Security Staff's Senior Advisor for Information Access and Security Policy was tasked to lead a comprehensive effort to review the alleged leaks in this case. *See* Appendix D. *The government responded to the defense request by stating that it "has no knowledge of any Brady or Jencks material ... [and] will make a determination whether to provide the information if and when it becomes aware of such records."*

ii) A copy of any e-mail, report, assessment, directive, or discussion by [redacted] to the Department of Defense concerning this case in order to determine the presence of unlawful command influence. *See* R.C.M. 405(e). Additionally, defense requests any e-mail, report, assessment, directive, or discussion by [redacted] to the Department of State or Department of Justice concerning this case. *The government responded to the defense request by stating that it "has no knowledge of any Brady or Jencks material ... [and] will make a*

determination whether to provide the information if and when it becomes aware of such records."

iii) The damage assessment conducted by the Information Review Task Force and by [redacted]. *See* Appendix E and F. *The government responded that it "has no knowledge of any Brady or Jencks material ... [and] does not presently have the authority to disclose damage assessments, if any, cited by the defense and will make a determination whether to provide the information if and when it becomes available."*

iv) The collateral investigations by the Department of State, the Federal Bureau of Investigation, the Defense Intelligence Agency, the Office of the National Counterintelligence Executive and [redacted]. The defense is entitled to receive any forensic results and investigative reports by any of the cooperating agencies in this investigation. *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); *United States v. Brooks*, 966 F.2d 1500, 1503 (1992); Article 46, Uniform Code of Military Justice (UCMJ). *The government responded that it "has no knowledge of any Brady or Jencks material ... [and] has provided all forensic results and investigative reports requested that are in its possession and that the United States has authority to disclose."*

v) The Department of Justice investigation into the alleged leaks by WikiLeaks as referenced by [redacted], to include 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. *Brady v. Maryland*, 373 U.S. 83 (1963); *Jencks v. United States*, 353 U.S. 657 (1957). *The government responded that it "presently has no knowledge of any Brady or Jencks material ... and will furnish said records to the defense should it become aware of such records."*

vi) The Department of State damage assessment review conducted by its task force of over 120 individuals. This task force reviewed each released diplomatic cable. *See* Appendix G. *The government responded that it "has no knowledge of any Brady or Jencks material ... [and] does not presently have the authority to disclose damage assessments, if any, cited by the defense and will make a determination whether to provide the information if and when it becomes available."*

e. The Damage Assessment of Compromised Information that is required to be submitted to the Special Security Officer (SSO) under DoD 5105.21-M-1 once an SCI Security Official determines that a security violation has occurred. The defense also requested a copy of the final security violation investigation report submitted to the SSO DoD/ Defense Intelligence Agency under DoD 5105.21-M-1. The government had not previously responded to the defense discovery requests for this information. The government's response confirms that the alleged disclosures in this case did not involve any sensitive compartmented information. While this fact alone is not dispositive of whether the alleged disclosures caused harm, it is an additional factor supporting the defense request for production of the above damage assessments. *In response to the defense request for production of evidence, the government responded that it "there is currently no evidence supporting a compromise of sensitive compartmented information (SCI)."*

8. Under R.C.M. 405(g)(1)(B), upon receiving a defense request for production of evidence, the investigating officer should make an initial determination whether the information requested is "reasonably available." R.C.M. 405(g)(2)(C). "Evidence is reasonably available if its significance outweighs the difficulty, expense, delay, and effect on operations of obtaining the evidence." R.C.M. 405(g)(1)(B). 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. "[D]etermination of the relevance and necessity of defense requested evidence should be made by the court, not ex parte by the prosecutor." *Id.* at 94 n. 4. According to the Court of Military Appeals, the Military Rules of Evidence establish "a low threshold of relevance." *Id.* at 95. 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 Military Rule of Evidence (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."

9. In accordance with these rules and law, the defense has requested the opportunity to inspect or receive copies of the items listed above in multiple defense discovery requests and has also requested that this information be produced at the Article 32 hearing. Thus far, the government has consistently failed to adequately respond.

10. The government's latest response is yet another example of its failure to exercise due diligence in obtaining requested information. The government has failed to provide a detailed account of its efforts to comply with its discovery obligations. Additionally, the government's response that it "*does not presently have the authority to disclose damage assessments, if any, cited by the defense and will make a determination whether to provide the information if and when it becomes available*" is either intentionally obstructionist or yet another example of its failure to exercise due diligence.

11. Under the rules, the government is not allowed to remain ignorant of the presence of evidence favorable to the accused that is 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). Instead, if the Investigating Officer determines that the information requested by the defense is reasonable available, one of the following must occur:

a. The Investigating Officer orders the custodian of the evidence to produce it at the Article 32 hearing and the custodian produces it. R.C.M. 405(g)(2)(C); or

b. The Investigating Officer orders the custodian of the evidence to produce it at the Article 32 hearing and once ordered, the custodian of the evidence determines the information is not reasonably available. If this happens the Investigating Officer and the accused are bound by the determination. *Id.* However, the Investigating Officer must 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 is referred, the accused is permitted under R.C.M. 906(b)(3) to move the military judge to review the determination during a pretrial session; or

c. The Investigating Officer orders the custodian of the evidence to produce it at the Article 32 hearing and once ordered, the convening authority determines the evidence should be withheld under Military Rule of Evidence (M.R.E.) 505(d)(5) since production of the evidence cannot be done without causing identifiable damage to national security; or

d. The Investigating Officer orders the custodian of the evidence to produce it at the Article 32 hearing and once ordered, the government objects to the production of the evidence on grounds of privilege and an in-camera review is conducted by the Investigating Officer under M.R.E. 505(i). A M.R.E. 505(i) review is appropriate since the Investigating Officer has the authority to perform those tasks that 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).

12. The government should not be permitted to determine what evidence will and will not be produced at the Article 32 hearing. The requested information is necessary for the defense to adequately prepare its case. Without the requested discovery, any Article 32 Investigation will be deficient. *See* R.C.M. 905(b)(1) and 906(b)(3) (concerning motions for appropriate relief relating to the pretrial investigation).

IV. RELIEF REQUESTED

13. Pursuant to the Fifth and Sixth Amendments to the United States Constitution, Article 46 UCMJ, R.C.M. 405, 701, and 906(b)(7), the defense requests the Investigating Officer to issue an order requiring the government to obtain the requested information. Failing to obtain the information, the government should be required to provide a detailed account of its efforts for review by the Investigating Officer.

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