

**UNITED STATES ARMY TRIAL JUDICIARY
FOURTH JUDICIAL CIRCUIT**

UNITED STATES OF AMERICA)	
)	
v.)	GOVERNMENT RESPONSE TO
)	DEFENSE MOTION TO
SMITH, Eric B.)	COMPEL DISCLOSURE
Major (O-4), U.S. Army)	
Headquarters and Headquarters Company,)	
Troop Command,)	14 September 2012
Madigan Army Healthcare System,)	
Tacoma, WA 98431)	

I. RELIEF REQUESTED

The Government respectfully requests that the court deny the defense's motion to compel discovery as overbroad and as requesting evidence that is not relevant, and production of which will cause undue delay.

II. FACTS

On 18 November 2011, the charge was preferred against the accused. The Article 32 investigation occurred on 19 March 2012. This charge was referred to the Court on 5 April 2012. On 13 August 2012, the Defense requested, in part, that the Government provide evidence as identified by the following subparagraphs to paragraph 2:

(c)(17): "Records of internal and external communication related to the this case, including copies of faxes, telephone record logs, internal correspondence, or any other records."

(d)(7): "Source, preparation and usage records demonstrating traceability and shelf life for standard materials and solutions used for calibration and quality control (including unique identifications, origins, dates and details of preparation and use, composition and concentration of prepared materials, supplier certifications, shelf lives of parent and stock solutions)."

(d)(8): "Documentation of the laboratory's storage conditions for the standards and controls used in the subject casework, for the period from the initial date of receipt through the date of the subject analysis; include a procedure describing practices for storing standards and controls; include a description of the materials that are collocated with standards and with unknown samples."

(d)(9): "Contemporaneous records documenting preparation of all solutions, standards, and controls used in the batch in which the subject case sample was tested."

(d)(10): "Records documenting the verification of the standards and controls used in the batch in which the subject case sample was tested; for both purchased and prepared solutions, provide verification data for testing performed prior to use."

(d)(15): "As prepared and as determined values for all blanks, replicates and controls included in batches with case sample."

On 16 August 2012, the Government responded to the Defense Supplementary Discovery Request. The following responses were given to the above-named subparagraphs:

(c)(17): "This request is overbroad and seeks to elicit information that may be privileged; to the extent this material eluded to is discoverable to Defense, it has either already been provided, or the Defense has been privy to such material."

(d)(7-10): "These materials are available for Defense to inspect at Tripler Medical Center."

(d)(15): "This request is voluminous in nature, and is available for Defense to Inspect at Tripler Medical Center."

On 20 August 2012, MAJ Daniel Nichols, Commander of the Tripler Army Medical Center Forensic Toxicology Drug Testing Center, sent approximately 1,503 pages of documents to the Defense via the Trial Counsel. Included in that submission were the following responses to the above-named subparagraphs of the Defense Supplementary Discovery Request:

(c)(17): "JAG can produce all such records in the form of email communication with FTDTL."

(d)(7-10, 12): "Reagent and control material records are voluminous and are available for review at the FTDTL after prior co-ordination of the visit. Procedures are found in the QC SOP."

(d)(15): "Reports for the batches containing the specimen of interest can be found in the previously provided laboratory document packet."

III. EVIDENCE

Defense Request for Supplemental Discovery (13 August 2012)

Government Response to Defense Request for Supplemental Discovery (16 August 2012)

Laboratory Information Regarding Supplemental Request for Discovery, excerpt (dated 20 August 2012; received 31 August 2012)

United States v. Andrews, 36 M.J. 922 (A.F.C.M.R. 1993)

IV. LAW

The Government offers the following authorities in support of this response.

Rules for Court-Martial 701
Rules for Court-Martial 703
Rules for Court-Martial 906
Military Rule of Evidence 403
Military Rule of Evidence 502
United States v. Andrews, 36 M.J. 922 (A.F.C.M.R. 1993)

V. DISCUSSION

The request for "internal and external communication related to the this case" in subparagraph 2(c)(17) is overbroad, as it requests both evidence which would not be relevant under M.R.E. 401, and communications which would be privileged under M.R.E. 502. Any Defense request for discovery of evidence must establish the relevance of the requested evidence, and enough detail to identify the evidence sought. R.C.M. 703(f)(3). In the request at issue, the request gave only a sweeping and general description, broad enough to include countless communications, including privileged communications. The overbreadth of the request is highlighted by the response submitted by the Commander of the laboratory, indicating that "JAG" would be able to produce the requested evidence. This response indicates that the laboratory understood the request to be a asking for attorney communications. Even for attorney communications that might not be privileged communications, the Defense request is still required to establish the relevance of the requested evidence, and give sufficient specificity to allow the Government to respond with an appropriately tailored disclosure. Where the request is broad enough to be understood to be asking for privileged information, the requesting party should exercise strict compliance with the rules for disclosure.

The evidence requested in subparagraphs (d)(7) through (d)(10) and (d)(15) is not relevant. Nothing in the Defense Motion to Compel Discovery addresses why the evidence would have any tendency to make the existence any fact of consequence to the determination of this action more or less probable. M.R.E. 401.

Although the evidence requested is not relevant evidence, and therefore the Government does not have a duty to produce these documents, the Government does not object to the Defense inspecting the evidence requested in these paragraphs. However, the Government strongly objects to any delay to accommodate this inspection. The judge may preclude inspection or production of evidence if the probative value of such production is outweighed by the danger of confusion of the issues, or by considerations of undue delay or waste of time. M.R.E. 403.

The court may grant a continuance when a party would be substantively prejudiced without the delay. Here, however, Defense has had ample opportunity to conduct research into the case. The inconvenience of coordinating counsel and expert schedules to perform


extraordinary research is not a substantive prejudice that merits a continuance. “[Just] as administrative inconvenience is not a good basis for the government to oppose a delay, administrative inconvenience is not, without more, good cause to justify a defense delay.” United States v. Andrews, 36 M.J. 922, 926 (A.F.C.M.R. 1993). The charges were preferred more than nine months ago. The defense was afforded an opportunity to gain discovery at the Article 32 in March of 2012. The charge was referred to court-martial on 5 April 2012, which gave the Defense further avenues to obtain evidence. Since referral, the trial has been continuously delayed at the Defense’s request. While the Defense determines its own strategy, the court is not obliged to grant unlimited delay until the Defense exhausts every imaginable avenue of exploration. R.C.M. 906(b).

VI. CONCLUSION

The Motion to Compel Discovery does not cure the issues of overbreadth and lack of relevance which prevented the Government from responding effectively to the previous request for discovery. The evidence requested is not described in sufficient detail to allow a compliant response, is not relevant, and its production will cause undue delay to a case already delayed excessively.


VII. RELIEF REQUESTED

For all of the reasons discussed in this response, the Government respectfully requests this court deny the defense’s motion.



AARON G. JOHNSON
CPT, JA
Trial Counsel

I certify that I served or caused to be served a true copy of the above on the Defense Counsel on 14 September 2012.



AARON G. JOHNSON
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