

IN THE UNITED STATES ARMY  
FIRST JUDICIAL CIRCUIT

UNITED STATES )

v. )

MANNING, Bradley E., PFC )

U.S. Army, xxx-xx-9504 )

Headquarters and Headquarters Company, U.S. )

Army Garrison, Joint Base Myer-Henderson Hall, )

Fort Myer, VA 22211 )

**ADDENDUM #2 TO DEFENSE  
MOTION TO COMPEL  
DISCOVERY #2: REQUEST  
FOR WITNESSES**

18 June 2012

RELIEF SOUGHT

1. The Defense reiterates its request for relief in Appellate Exhibit CI. Specifically, the Defense requests the Court to suspend these proceedings and order the Government to state with specificity the steps it has taken to comply with its discovery obligations under R.C.M. 701(a)(2); 701(a)(6), and 905(b)(4), Manual for Courts-Martial (M.C.M.). The Defense also requests that this Court order the Government to produce a witness from the Office of the National Counterintelligence Executive (ONCIX), the Federal Bureau of Investigation (FBI), and the Department of Homeland Security (DHS) who can testify regarding the representations made to the trial counsel concerning any damage assessment/impact statement being produced by ONCIX, FBI and DHS.

EVIDENCE

2. The Defense requests that this Court order the Government to produce the following witnesses:

a) A witness from the Office of the National Counterintelligence Executive (ONCIX) who can testify to:

- i) the representation made to trial counsel in February 2012;
- ii) the representation made to trial counsel in March 2012;
- iii) what ONCIX had by way of a damage assessment in February and March 2012;  
and
- iv) the contents of the 18 May meeting with ODNI.

b) A witness from the Federal Bureau of Investigation (FBI) who can testify as to when the FBI had something by way of a damage assessment/impact statement, and when trial counsel had knowledge of this fact.

c) A witness from the Department of Homeland Security (DHS) who can testify as to when the DHS had something by way of a damage assessment, and when trial counsel had knowledge of this fact.

### FACTS

3. 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. Appellate Exhibit CXIX. On that same day, the Government notified the Court and Defense that the FBI had conducted an impact statement. Appellate Exhibit C.

4. On 2 June 2012, the Defense filed its Response to the Government's notice of the ONCIX damage assessment in Appellate Exhibit 120, and also addressed Government's statement that it had "discovered" an FBI impact statement in Appellate Exhibit CI.

5. On 6 June 2012, the Court orally required the Government to account for its efforts regarding each of the identified agencies within the Defense's Motion to Compel Discovery #2 during an Article 39(a) session. The Court discussed FBI and ONCIX with the Government.

6. With regards to the FBI, the Government did not indicate when it learned of the FBI impact statement. When the Court asked the Government if it was prepared to discuss when it first learned of the FBI impact statement, the Government balked. Instead, of responding to the Court's question, the Government only told the Court of the date that it first obtained approval to provide the FBI impact statement to the Defense under M.R.E. 505(g)(2). The Government believed the date it received approval from the FBI to turn over the impact statement was on 18 May 2012. Instead of immediately alerting the Court and the Defense, the Government buried the existence of the FBI impact statement in its 31 May 2012 filing which was intended to respond to the Defense's Supplement to the Motion to Compel Discovery #2. Appellate Exhibit C, p. 4.

7. With regards to the ONCIX damage assessment, the Court and the Government engaged in the following colloquy:

COURT: Why did you tell me back on the 21<sup>st</sup> of March that NCIX or ONCIX had no damage assessment? Those were not the exact words you used but go ahead and tell me-

MAJ Fein: Correct your Honor. Your Honor, frankly. Because we do not have access. Or even knowledge, absent us asking a question and receiving it to these files because of the nature of this type of assessment. We ask the questions based off of the Defense's discovery requests. Specifically your Honor, if it may please the Court to kind of lay out a time line. This is, this is somewhat reflected in the Defense's motion from Saturday. But, 16 February 2012 was the Defense's motion to compel discovery, their first motion. On 28 February 2012 was the first 802 conference. After the 16 February 2012 motion to compel, we approached at some point, I don't have that date, NCIX through ODNI and said "we are required to produce the following, here is an example of what it is. What do

you have?” And then their response of course given was the department of, “ONCIX has not completed a damage assessment – to date they have not produced any interim or final damage assessment in this matter.” That is what they gave us and told us.

COURT: Did they do that orally or in writing?

MAJ Fein: Orally your Honor. And so, by us writing that down, and inquiring “is this all you have, is this what it is?” And this is the response we received. That is ultimately what we – fast forward, at the motions hearing, on the record, both at the 802 conference after the motions hearing, and on the email inquiry on 21 March, when asked. As you will notice from the Court’s motion to compel discovery dated 23 March 2012, the Court documented the email questions and those email questions were “does the damage assessment essentially exist with ODNI, or excuse me with ONCIX.” And we responded in an email “ONCIX has not produce any interim or final damage assessments in this matter.” We asked them the questions. We don’t have any other access to their files. They answered it. So, at that point we relayed that to the Court, we relayed it to the Defense and the Court ruled. Then –

COURT: At that time, is it the Government’s belief that they didn’t have anything?

MAJ Fein: Correct your Honor. It is our belief, at that point, that they were compiling these other assessments we knew about because we started reaching out once they told us about it – to go get those. But, that they had no other documentation that would be subject to discovery – based off this response. So, yes we did know that their individual organizations were submitting theirs, and that is why we went out to those independent organizations to get them approval and disclose them.

COURT: MAJ Fein, you understand that the purpose of the questions from the Court was to discover what’s out there?

MAJ Fein: Yes, your Honor. And the prosecution did exactly that, your Honor. Even after the email from the Court, the prosecution reached out to ODNI and NCIX to ask the question again and this was the response we received. And it goes back to the military authorities line of, line of inquiry. That a military prosecutor, even a Department of Justice prosecutor, doesn’t necessarily have access to walk into any government building and search the files. We asked questions, we give them the relevant cases, the case law, we show them the discovery requests and any other orders. And then they give us the answer. Or give us access and we go search them for the answer. And in this case, they gave us the answer. We relayed that to the Court.

*-Later after the Defense indicated that the Government had to have known that ONCIX was creating a damage assessment-*

COURT: So the Government’s position if I am understanding it then, is that you saw a distinction between the Department of State – which you told me the Department of State has not completed a damage assessment; and – I guess what is the difference between

what the Department of State's position was at that time and what ONCIX's was at that time?

MAJ Fein: Your Honor, to be honest, the Government does not necessarily know. We asked the questions and this is what we are given and what we relayed to the Court...

8. On 8 June 2012, the Government provided Defense with oral notification of the existence of the DHS damage assessment. The Government has not yet provided notice to the Court. The Government did not indicate when it first learned of the damage assessment or why it had not provided notice to the Court or the Defense of its existence prior to this date. The Government simply stated that 8 June 2012 was the first time that it was authorized to provide notice of the damage assessment to the Defense.

9. On 15 June 2012, the Defense requested the Government to indicate when it intended to file its submission regarding the due diligence accounting for which it requested a two week extension. Within minutes, the Government responded that it did not intend to file until 21 June 2012. The Defense immediately replied, and informed the Government that a filing on 21 June 2012 would not provide the Defense with an opportunity to respond or the Court with an adequate amount of time to consider the filings prior to the Article 39(a). *See Attachment.* The Government did not respond.

#### ARGUMENT

10. The Government has represented that it has simply relayed to the Court what it was told from ONCIX. Unfortunately, the timeline provided by the Government and the representations by the Government during oral argument and in Court filings regarding what it knew and when concerning ONCIX do not mesh. The Government would have us believe that, while it knew that ONCIX was compiling a damage assessment starting in October 2010, it blindly relied on an oral assertion from some person at ONCIX in February 2012 that "ONCIX has not produced any interim or final damage assessments in this matter." Just to double check, apparently, the Government called up ONCIX a few weeks later in March 2012 and said something to the effect, "Are you sure you don't have anything?" And again, some person at ONCIX once again said "ONCIX has not produced any interim or final damage assessments in this matter." And the Government once again blindly took that person's word for it. And apparently, a mere two months later, ONCIX went from not having anything worth disclosing to the Court to having a discoverable draft. So, the Government would have us believe that from October 2010 until March 2012 (almost a year and a half), ONCIX did not have anything that would be considered a draft or an interim report; but then a mere two months later, it would have a draft that was nearing a final report. And, of course, regardless of what ONCIX told the Government about the status of its draft (or non-draft), none of this excuses the fact that the Government did not tell the Court or the Defense that ONCIX had something "in the works." Something is not right with the Government's account of the ONCIX story – and a witness from ONCIX should testify so as to set the record straight.

11. The Government has also represented to the Court that it recently “discovered that the FBI conducted an impact statement, *outside of the FBI law enforcement file*, for which the prosecution intends to file an ex parte motion under MRE 505(g)(2).” Appellate Exhibit C at p. 4. Yet, in its 22 March 2012 statement to the Court, the Government stated “the United States is concurrently working with other Federal Organizations which we have a good faith basis to believe may possess damage assessments or *impact statements...*” See Prosecution’s Response to Court’s Email Questions (22 March 2012). The term “impact statements” within this document is clearly referencing the FBI impact statement.<sup>1</sup> The Government undoubtedly knew of the FBI impact statement prior to its 22 March 2012 disclosure to the Court. The Government, however, failed to notify the Court on that date of the FBI impact statement. The Government also failed to notify the Court of the FBI impact statement on 20 April 2012 when it represented what the FBI had in its possession and that “the United States anticipates that the FBI is the only government entity that is a custodian of classified forensic results or investigative files relevant to this case that will seek limited disclosure IAW MRE 505(g)(2).” Appellate Exhibit LVI.

12. Based upon the Governments responses, either the respective agencies are being less than truthful with the Government, or the Government is being less than truthful with the Court. This Court should require the Government to produce a witness from ONCIX, FBI, and DHS who can testify regarding the representations by the respective agencies to the trial counsel. The Court should not permit the misrepresentations by either various agencies or the trial counsel to frustrate discovery in this case.

### CONCLUSION

13. The Defense requests that this Court order the Government to produce a witness from ONCIX, FBI, and DHS who can testify regarding the representations made to the trial counsel concerning any damage assessment/impact statement.

Respectfully submitted,

DAVID EDWARD COOMBS  
Civilian Defense Counsel

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<sup>1</sup> Though, of course, the Court and the Defense did not know this at the time due to our belief that the FBI did not have any damage assessment.