IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES	)	
	)	**DEFENSE REPLY TO**
v.	)	**GOVERNMENT**
	)	**SUPPLEMENTAL RESPONSE**
	)	**TO DEFENSE MOTION TO**
MANNING, Bradley E., PFC	)	**COMPEL DISCOVERY #2**
U.S. Army, xxx-xx-9504	)	
Headquarters and Headquarters Company, U.S.	)	
Army Garrison, Joint Base Myer-Henderson Hall,	)	
Fort Myer, VA 22211	)	DATED: 11 July 2012

RELIEF SOUGHT

1. The Defense requests that this Court order the Government to disclose discovery from the State Department in accordance with R.C.M. 701(a)(2), 701(a)(6) and 703, as discussed herein. Further, the Defense requests that this Court deny the Government's request for 45-60 days to produce relevant records or claim a privilege or move for substitutions. Instead, the Defense requests that this Court order that for all remaining discovery, the Government should consult with equity holders to coordinate the claiming of a privilege (or other course of action) *simultaneous* with its review of the documentation such that the Government is prepared to proceed immediately upon a discovery ruling.

ARGUMENT

A. The Government Fails To Indicate Whether Any of the State Department Records Contained *Brady* Material

2. The Government's submission overlooks a critical issue: Do any of the State Department records contain *Brady* material? Now that it has reviewed all these records, it is in a position to state whether the records contained *Brady*. Nowhere in its submission does it say whether it found *Brady* material. Instead, it says "[redacted]." Prosecution Supplemental Response to Defense Motion to Compel Discovery #2, at p. 4 [hereinafter "Government Response"]. First thing's first. Do any of the records reveal *Brady* material? If so, these records need to be immediately disclosed to the Defense. Moreover, based on the tenor of the Government's submissions, the Defense would like to be clear: information can be discoverable *Brady* material even if it is cumulative.

3. The Defense is not clear why the Government failed to overlook this critical issue in its submission. However, it would venture to guess that some material which it describes as

"predating" the State Department damage assessment actually constitutes *Brady* material. Thus, the Defense believes that the Government is hoping that if the Court rules that anything predating the damage assessment does not need to be produced, it will get out of its *Brady* obligations that way.

B. The Court Should Deny the Government's Request to Not Produce Records that Predate the State Department Damage Assessment

4. The Government wants this Court to rule that *anything* that predated the State Department damage assessment should not be produced because it is cumulative and not relevant and necessary. It states in this respect:

[redacted]

The Government is asking for permission to simply exclude from discovery anything with a date that preceded the State Department damage assessment – which would, in effect, be *practically everything at the State Department*. It would have the Court do so on the sheer conjecture that this information "[redacted]." Government Response, at p. 5.

5. The Government's request is breathtaking. It would have the Court deny discovery of facially relevant information because this information was "likely" considered by the State Department in compiling the damage assessment. The Government does not even bother to try to make the argument that the discovery is *actually* cumulative (i.e. it is duplicative of information in the damage assessment). That argument would not be true. Instead, it makes the argument that based on the fact that this material predates the damage assessment, it *must be* cumulative (i.e. it is *de facto* cumulative). The Government's lack of logic continues to dumbfound the Defense.

6. Consider the implications of this request. All an agency would need to do to avoid discovery is to compile some type of ultimate assessment and then claim that anything that predated that

assessment was "off limits" because it was somehow "considered" in developing the assessment. The contention is ludicrous.

7. Further, the volume of information that the Government would seek to have the court exclude from its discovery obligations is in the ballpark of 5000 pages. The Government believes that these 5000 pages must have "likely contributed to" the 150 page State Department damage assessment.[1] It is hard to believe that the damage assessment is cumulative when, page-wise, there are thirty-three times more pages in the disputed discovery than in the damage assessment itself.

8. The State Department's "interim" damage assessment is not the be-all-and-end-all of discovery from the State Department in this case. If there are other documents dealing with mitigation efforts, the damage from the charged cables, etc., this is all evidence that is material to the preparation of the defense under R.C.M. 701(a)(2), and thus, relevant and necessary under R.C.M. 703. It does not matter whether it predated the damage assessment or was considered by those drafting the damage assessment.

9. Let's look at a couple of the categories of information that the Government would have the Court rule "off-limits" because they temporally predate the State Department damage assessment. The Government would seek to preclude the Defense from having access in discovery to the "[redacted]." Because this predated the damage assessment, according to the Government, it is overcome by events. However, the formal guidance provides insight into the degree of remediation that was necessary and the true seriousness of the alleged leaks. If the guidance, for instance, indicated that major remediation measures needed to be taken, this is something that would clearly be material to the preparation of the defense (i.e. the Defense would then know not to argue that this did not cause much disruption at the State Department). It would also be information that would not be discoverable under *Brady*. Thus, if this Court accepts the Government's request, this evidence would never see the light of day simply because it predated the damage assessment.

10. The Government would also seek to prevent the Defense from having access to the written assessments by the Chiefs of Mission review. Assume, for instance, that the Ambassador from Country A indicated that the leaks did little to no damage in his country. Assume further that the State Department damage assessment downplays this fact and does not accurately portray the actual assessment by the Ambassador from Country A. How is this information not material to the preparation of the defense (or relevant and necessary) simply because it predated the damage assessment? The Defense would clearly want to know if the State Department damage assessment overstated the damage, or potential for damage, from the alleged leaks.

11. Much like the testimony of the Original Classification Authorities (OCAs), the Government would have the Defense and Court treat the "interim" State Department damage assessment as absolute gospel that cannot be questioned. It would have everyone pretend that nothing that happened before the creation of the damage assessment was important or relevant.

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[1] This is the Defense's estimate based on only reviewing the damage assessment on one occasion. The Defense does not have its own copy of the damage assessment.

12. The Government's request to have this Court order outright exclusion of all discovery that predates the State Department damage assessment is particularly egregious in light of the Government listing *twenty-two* witnesses from the State Department. How can the Government in good faith plan on calling twenty-two witnesses from the State Department and refuse to turn over documentation on the sole basis that because it predates the damage assessment, it is "likely" cumulative? *See* Government Response, p. 5 ("[redacted]"). This would certainly make it easier for the Government to prepare their witnesses. After all, the Defense would be limited in its cross examination to basically one document – the damage assessment – which the Defense does not have the ability to even view absent coordination with the Government.

13. And the Defense need not remind the Court that, to the extent that the Defense does use the damage assessment against the Government and its State Department witnesses, we already know that the Government is planning on arguing that the assessment is only "interim" – or, in the words of the Government, it represents "a snapshot in time." Thus, the Government plans on downplaying the significance of the document that now contends is the *only* document that the Defense should have from the State Department. How can the Government be permitted to talk out of both sides of its mouth – say that the damage assessment is only "interim" and therefore not particularly significant, but that it is significant enough that all other information that predates it should not be produced to the Defense?

14. What is funny is if the Government was planning on going this ridiculous route, why did it even need to review the documentation? It knew on 7 June (over one month ago) that virtually all the information specifically listed by the Defense predated the damage assessment. The only information that did not predate the damage assessment is the information collected by the Director of the Office of Counter Intelligence and Consular Support. So why wait a month to make this argument? Nothing in this argument actually relies on the content of the documents the Government has reviewed. Instead, it simply relies on the dates at the top of the document. Given this, the argument could have been presented (and disposed of) much earlier.

15. The Government's argument that anything that predates the draft damage assessment is not discoverable is so weak that it is reminiscent of the *Giles* argument. This Court will recall that the Government insisted that the State Department damage assessment was not discoverable based on dicta in a second concurring opinion from a 50-year old case. The Government acknowledged that its argument was made at the behest of the State Department; when the Defense questioned the Government on this, it adopted the position as its own. Here, the Government has once again adopted a litigation position that is so untenable that it should be embarrassing. One is left to wonder the obvious question: Is the Government actually making these arguments of its own accord, or is the State Department the puppet master in this case? The Defense would venture to guess that it is the latter. If so, this is clearly a conflict of interest; a third party government agency cannot be permitted to dictate the litigation positions of the prosecutor in a criminal proceeding. The agency's role is limited to claiming a privilege if discovery is ordered by a Court. An agency cannot be "in cahoots" with the Government to formulate trial strategy that would be best for that agency. As the Defense has said before, the Government's litigation positions are always borne of convenience and not of principle. This is yet another example of the Government taking a preposterous litigation position in order to

champion the interests of the State Department – the organization that will provide, incidentally, nearly a quarter of the witnesses in this case.

C. The Court Should Deny the Government's Request to Not Produce "Purely Administrative" Records

16. The Government requests that the Court relieve it from the obligation to provide "[redacted]." Government Response, at p. 5. The Defense does not understand the second part of the sentence ("[redacted]"), and how that sentence is intended to modify the scope of "[redacted]." Normally, the Defense would trust that the Government could distinguish between a pure administrative record and something else. Unfortunately, that is not so in this case. Given the liberties that the Government has taken with all definitions in this case, the Defense does not understand what the Government means by "[redacted]" – much less what it means by "[redacted]" *Id.*

17. Moreover, even purely administrative records might be material to the preparation of the defense. If there is, for instance, a log book that chronicles how many times a group met and for how long, that can be used to show the extent of the concern that the disclosure of the cables caused at the State Department. While this is just one example, the Defense simply does not believe that the Government will distinguish between administrative and non-administrative records in good faith.

D. The Court Should Deny the Government's Request to Not Produce Information About Persons at Risk

18. The Government makes a beyond-feeble attempt to resist production of information related to persons at risk:

[redacted]

Government Response, at p. 6. While the Government does a good job of parroting back discovery rules, it fails to explain *why* the information is not material to the preparation of the defense or relevant and necessary. It seems somewhat obvious to the Defense that if the Government is going to show, either in the merits or sentencing, that the disclosures put certain people at risk, then the Defense is entitled to information pertaining to those people apparently put at risk. If the Government wishes to claim a privilege over this information, it is entitled to

do so. However, it appears highly disingenuous to claim that this information is not material to the preparation of the defense.

19. If the Government refuses to produce this information to the Defense, the Defense will move to preclude the Government from making any reference in this case to the release of the diplomatic cables putting people at risk. The Government wants to have its cake and eat it too. It wants to call twenty-two witnesses from the State Department who will opinion on how catastrophic the leaks were and how they put innocent lives at risk – all while refusing to provide underlying documentation regarding those individuals apparently put at risk. The Defense submits that this is the equivalent of entering a boxing ring with your hands tied behind your back. How can the Defense attempt to rebut any allegation that these individuals were not put at risk without any underlying documentation?

E. The Government's Contention that a Written Statement of [redacted] Testimony Does Not Exist is Not Believable

20. The Government states:

[redacted]

Government Response, at p. 4. The Defense submits that it is likely that neither the Government nor the State Department tried hard enough.

21. Notably, the Government does not state definitively that no written statement exists. Rather it states, "[redacted]." *Id.* So it appears to be sheer conjecture that no such statement exists. Indeed, it defies logic that [redacted] would appear before Congress and simply "wing it." Moreover, why would [redacted] have a written statement on 10 March 2011 for the Senate Committee on Homeland and Governmental Affairs, but not for his reporting to Congress?

22. Neither the Government nor the State Department has an incentive to look very hard for any written statement that [redacted] made to Congress. In the end, we are left with the million dollar question is: *Did anybody ask* [redacted]*?*

F. The Defense Requests That the Court Order the Government to Be Prepared to Claim (or Not Claim) a Privilege Immediately Upon a Discovery Ruling

23. Perhaps the most troubling aspect of the Government's motion is its request on p. 6:

[redacted]

[redacted].

This is the Government's not-so-subtle attempt to hold the Court and the Defense hostage to its timeline. This simply cannot continue.

24. This case has been ongoing for 26 months (approximately 800 days). The Government would seek to add on time to the case calendar as if it were nothing. Lest it forget, PFC Manning is still in pretrial confinement. And the only reason why the parties are currently still in the "discovery phase" of litigation (as stated by MAJ Fein in his letter to the General Counsel of ONCIX) is because the Government has been grossly negligent in fulfilling its discovery obligations.

25. Consider for a moment what the Government's request means in practical terms. The Government filed this motion on 9 July 2012. The Defense's Response will be filed on 11 July 2012. The issue will likely be litigated at the next motions argument on 16-20 July -- assuming the Government does not file a motion opposing the Defense's request to have the Court deny the Government an additional 45-60 days. If the Court rules on, say, 20 July 2012 that the evidence is discoverable, the Government would then have until 20 September to "seek limited disclosure under MRE 505(g)(2) or claim a privilege under MRE 505(c) and to produce the documents under RCM 701(g), MRE 505(g)(2), or MRE 505(c), if necessary." Litigation would then ensue over the limited disclosure or privilege, which would bring the parties to November or December.

26. The Defense cannot fathom why the Government cannot multi-task – i.e. why can't the Government review the documents and simultaneously consult with the equity holder about what documents would be subject to a claim of privilege or limited disclosure? If the Government would simply apply some common sense, it would be in a position (even under its timeline) to proceed within the next few weeks.

27. The Government will undoubtedly say that the Defense simply does not understand how complicated this process is, etc. We have heard this all before. At some point, the Government cannot continue to hide behind the complexity of this case as an excuse for everything. It has the entire resources of the United States government behind it – including the ability to contract out work to lawyers who are not even detailed to this case (which the Defense is aware that the Government is currently doing). The Government cannot continue to requests months upon months to produce discovery that should have, in fact, been produced *well over a year ago*.

28. The Defense would also like this Court to take note of the difficult position that the Government has put the Court in – a position that the Defense submits was designed to manipulate the Court into ruling in the Government's favor. If the Court rules in the Defense's favor and orders the Government to produce some or all of the records, it will not be until likely November or December that this issue is settled. It might be that, after reviewing these records, the Defense becomes aware of other discovery that should have been produced. After all, the purpose of discovery is to "discover" information. Thus, we may be well into the New Year and still mired in discovery battles regarding the State Department. The one sure-fire way to avoid all this would be to rule in the Government's favor – a quick and easy fix. The Defense is

clearly not saying that the Court will be persuaded by the Government's tactics; it is simply saying that it was the deliberate intention of the Government to lord discovery delays over the Court and the Defense in hopes of avoiding its discovery obligations.

29. The Defense incorporated dates for disclosure of State Department documents into its case calendar because it knew that the Government would seek to drag out the process as long a conceivably possible. The Government resisted putting any such dates on its calendar, saying instead, "[redacted]." 30 June 2012 Email from MAJ Fein to the Court. The Government's position is typical in that it adopts the most protracted, nonsensical way of doing things. Rather than planning ahead in order to expedite the discovery process, the Government proceeds as if things simply cannot, or should not, be done simultaneously. Given how long has elapsed since PFC Manning has been placed in pretrial confinement, the Government's cavalier attitude in constantly requesting "at a minimum, an additional 45-60 days" is disquieting.

G. The Defense Requests That The Government Be Required to Provide All Documentation it has Received from the State Department

30. The Government simply cannot be trusted to make decisions regarding discovery in this case. This latest motion shows that the Government believes that anything that predates an interim damage assessment is *de facto* cumulative and therefore not discoverable. If the Government is prepared to make such an inane argument, it is clear that the Government simply cannot be trusted to sift through what is *Brady* and what is material to the preparation to the defense and/or relevant and necessary.

31. At a certain point, the Government should have to "own" its litigation positions. It cannot continue to make arguments that are so far out in left field that they raise questions about the basic ability of the Government to recognize what is material to the preparation of the defense and/or what is relevant and necessary. A blanket exclusion of all discovery based on an arbitrary date (the date of the State Department damage assessment) is not an intelligent, reasonable litigation position. And when prosecutors continue to take widely unreasonable litigation positions, at a certain point, they can no longer be trusted.

32. As a reminder, here are but a few of the highly untenable legal positions the Government has taken in this case, just with respect to discovery:

a) Maintaining that *Brady* did not apply to punishment;
b) Maintaining that R.C.M. 701 did not apply to classified discovery;
c) Disputing the relevance of facially relevant items (such as damage assessments);
d) Maintaining that R.C.M. 703 applied to discovery, instead of the appropriate R.C.M. 701 standard;
e) Resisting production of the Department of State damage assessment under the "authority" of *Giles* (which provided no legal support for its position);
f) Debating with the Court on whether the Government needed to provide documents that were obviously material to the preparation of the defense absent a specific request;

g) Maintaining that the FBI investigative file was not material to the preparation of the defense, to which the Court quizzically asked, "How could the investigative file *not* be material to the preparation of the defense?"
h) Maintaining that the Defense did not provide the requisite level of specificity (e.g. for files that could not conceivably have been described any more specifically)

33. The Defense understands that whether certain things are discoverable may be the subject of litigation. However, the Government has taken such extreme and unsupported positions over the course of this litigation that the Defense and the Court are left to wonder whether: a) the Government has any idea what it is doing; and b) in light of past events, the Government can be trusted to do what the Court orders.

34. Accordingly, the Defense submits that the only way to ensure that the Defense gets the discovery it is entitled to is for the Court to order that all documentation from the State Department be produced to the Defense. Alternatively, the Government should be required to segregate all discovery that it does *not* believe needs to be produced and order that the Government be required to produce it to the Court for *in camera* review.

CONCLUSION

35. For the reasons outlined herein, the Defense requests that this Court deny the Government's request to not be required to produce the following information:

(1) Information that predated the State Department draft damage assessment dated August 2011;

(2) Purely administrative records; and

(3) Personally Identifiable Information (PII) of persons negatively affected by the unauthorized disclosures, to include those persons identified by the WikiLeaks Persons at Risk Group (WPAR) as being put at risk.

36. The Defense renews its motion for production of information from the State Department in accordance with R.C.M. 701(a)(2), 701(a)(6) and 703, as discussed herein. Further, the Defense requests that this Court deny the Government's request for 45-60 days to produce relevant records or claim a privilege or move for substitutions. Instead, the Defense moves for this Court to order that for all remaining discovery, the Government should consult with equity holders to coordinate the claiming of a privilege (or other course of action) *simultaneous* with its review of the documentation such that the Government is prepared to proceed immediately upon a discovery ruling.

Respectfully submitted,

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