IN A GENERAL COURT-MARTIAL
IN THE SECOND JUDICIAL CIRCUIT, U.S. ARMY TRIAL JUDICIARY
FORT BRAGG, NORTH CAROLINA

UNITED STATES	)	
	)	
v.	)	Government Response to Defense
	)	Motion to Vacate Pre-Referral Protective
BERGDAHL, ROBERT BOWDRIE	)	Order and for Other Appropriate Relief
(BOWE)	)	(Public Trial)
SGT, U.S. Army	)	
HHC, Special Troops Battalion	)	
U.S. Army Forces Command	)	28 April 2016
Fort Bragg, North Carolina 28310	)	

RELIEF SOUGHT

The Government opposes the Court vacating LTC Peter Burke's Unclassified Protective Order, dated 25 March 2015. In the event the Court vacates LTC Burke's protective order, the Government requests the Court issue a protective order, or other ruling as it deems necessary to protect personally identifiable information [hereinafter "PII"].

The Government has, along with the Court, already taken the steps required to ensure the protection of the Accused's Sixth Amendment rights.

BURDEN OF PERSUASION AND BURDEN OF PROOF

The Defense as the moving party bears the burden of persuasion on any factual issue of which resolution is necessary to decide this motion. The burden of proof is a preponderance of the evidence. Rule for Courts-Martial [hereinafter "R.C.M."] 905(c).

FACTS

For the limited purpose of this motion, the Government adopts the Defense facts except to the following objections, clarifications and additions:

Defense Fact 1: On 15 June 2015, the Trial Counsel, in responding to a query from Defense counsel, emailed the Defense concerning the protective order and the public release of documents, emphasizing that the protective order reiterates the parties' obligations to prevent unauthorized disclosure of PII under applicable law and regulation. The email also reminded the Defense team that in order to release Government documents, they needed to go to the appropriate official and request release in accordance with applicable regulations. Encl 1.

Defense Fact 3: LTC Burke does not have the authority to publicly release the Army Regulation [hereinafter "AR"] 15-6 investigation.

Defense Fact 4: The Government does not adopt this fact.

Defense Fact 7: The Defense provided no new information in their 14 September 2015 request, therefore, no action was warranted by LTC Burke.

Defense Fact 11: The 2014 AR 15-6 executive summary includes PII.

Defense Fact 12: The transcript of the Accused's statement includes PII.

Defense Fact 13: The Government was under no obligation to proffer any such evidence. The Government's decision not to proffer such evidence is in no way a comment on whether such evidence exists.

Defense Fact 14: This fact is irrelevant to the pending motion as LTG Dahl is not the release authority under the applicable regulations.

Defense Fact 16: The Government does not adopt this fact.

Additional Government Facts are as follows:

Fact 1: The Government has made arrangements for, and will continue to support, public and media access to proceedings in this case as required.

Fact 2: No stenographers have registered for or requested access to either Article 39(a) session held in this case.

Fact 3: R.C.M. 802 regulates conferences between the parties. The Government, Defense, and Court have complied with R.C.M. 802.

WITNESSES/EVIDENCE

The Government encloses the following additional documents as evidence:

1. E-mail of Trial Counsel to Defense Counsel dated 15 June 2015.

LEGAL AUTHORITY AND ARGUMENT

I. Protective Order

A. The protective order issued by LTC Burke was a valid protective order

Prior to referral, R.C.M. 405(g)(6)[1] specifically allows the convening authority to issue a protective order "to guard against the compromise of information disclosed to the accused." *See United States v. Wiechmann*, 67 M.J. 456, 461 (C.A.A.F. 2009) ("The convening authority exercises responsibility for pretrial matters...including issues involving the...issuance of protective orders."); *Doe v. Commander, Naval Special Warfare Command San Diego*, 2004 CCA Lexis 276, at *11 (N-M Ct. Crim. App. 2004) (unpublished) (denying relief citing to R.C.M. 405(g) where Defense sought a writ of mandamus ordering the convening authority to modify his protective order issued prior to the Article 32 hearing arguing it was "unconstitutionally vague and overbroad, exceeds the scope of his authority and improperly invades the attorney-client relationship"). Here, the protective order was validly issued by LTC Burke to protect against the compromise of PII, the release of which would be detrimental to the public interest.

B. The protective order issued by LTC Burke is still valid

The Government is aware of no authority that renders a convening authority's order void automatically upon referral. Defense argues that R.C.M. 806(d) renders LTC Burke's protective order "a legal nullity." D APP 8, page 5. The Government acknowledges the Court's authority to enter orders as it determines necessary under a variety of provisions, including R.C.M. 806(d). However, R.C.M. 806(d) does not address orders issued prior to referral.

It is clear the convening authority has significant powers to regulate UCMJ proceedings prior to referral, and that the convening authority's orders and actions in these cases remain in effect after referral. "Because a military judge is not appointed to conduct proceedings until charges are referred to a court-martial, the military justice system does not have standing courts at the trial level to address legal issues at the pre-referral stage. The convening authority exercises responsibility for pretrial matters that would otherwise be litigated before a judge in civilian proceedings." *Wiechmann*, 67 M.J. at 461 (internal citations omitted). In addition to issuance of protective orders, examples where a convening authority can take action with regard to pre-referral issues include: appointing Government-funded experts, ordering depositions, and ordering an inquiry into the mental capacity or mental responsibility of the accused. *Id. (citing* R.C.M. 405(g)(6), 702(b), 703(d), and 706).

The actions taken under the above Rules for Courts-Martial do not become "legal nullit[ies]" simply because the case gets referred.[2] However, once a military judge is detailed to conduct proceedings in the case, the parties may seek to have the military

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[1] This references the Rules for Courts-Martial in effect at the time of the order. This authority has since been incorporated in R.C.M. 404A.

[2] In *Doe*, 2004 CCA Lexis 276, at *2, *cited above,* the United States Navy-Marine Corps Court of Criminal Appeals discussed, without concern, that the protective order "was designed to protect classified information during the Article 32 investigation **and** possible follow-on court-martial proceedings." (Emphasis added).

judge re-visit issues previously decided by a convening authority or commander. *See, e.g.,* R.C.M. 305(j) (pre-trial confinement reviews); R.C.M. 703 (renewal of an expert request denied by the convening authority); and R.C.M. 706 (request for an inquiry into the mental capacity or responsibility of the accused). *See also* R.C.M 908 (allowing the Government to appeal "a refusal by the military judge…to enforce [a classified protective order] that has previously been issued by the appropriate authority" (demonstrating that protective orders remain in effect past referral)). The protective order issued by LTC Burke is therefore still in effect.

C. If the Court decides to vacate LTC Burke's order, the Government requests the Court issue a protective order, or other ruling, as it deems necessary to protect PII

The Government acknowledges the Court's authority to enter orders as it determines necessary under a variety of provisions, including R.C.M. 806(d), R.C.M. 701, and R.C.M. 506. There are a number of authorities addressing proper procedures for the release of unclassified information including, but not limited to, AR 380-5, *Department of the Army Information Security Program;* AR 340-21, *The Army Privacy Program;* AR 360-1, *The Army Public Affairs Program;* AR 27-10, *Military Justice;* and AR 25-55, *The Department of the Army Freedom of Information Act Program.*[3] If the Court vacates LTC Burke's protective order, the Government requests the Court issue a protective order, or other ruling, as it deems necessary to protect PII.

In its filing, Defense claims the 2014 AR 15-6 investigation executive summary and the Accused's statement to then MG (now LTG) Dahl do not include PII. D APP 8, Facts 11 and 12, page 3. Department of Defense Regulation 5400.11-R, *Department of Defense Privacy Program*, dated 14 May 2007, defines personal information as:

> Information about an individual that identifies, links, relates, or is unique to, or describes him or her, e.g., a social security number; age; **military rank**; civilian grade; marital status; race; salary; home phone numbers; other demographic, biometric, personnel, medical, and financial information, etc. Such information is also known as personally identifiable information (i.e., information which can be used to distinguish or trace an individual's identity, such as their **name**, social security number, date and place of birth, mother's maiden name, biometric records, including any other personal information which is linked or linkable to a specified individual)(emphasis added).

A review of the executive summary of the AR 15-6 investigation and transcript of the Accused's statement reveal, for example, names of individuals other than the Accused.

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[3] Department of Defense Memo, *Safeguarding Against and Responding to the Breach of Personally Identifiable Information,* dated 21 September 2007, specifically states "The Department of Defense has a continuing affirmative responsibility to safeguard Personally Identifiable Information (PII) in its possession and to prevent its theft, loss, or compromise.

Under the appropriate regulations, therefore, these individuals' PII would be compromised if Defense released these documents. In addition, AR 15-6, paragraph 3-18, states "no one will disclose, release, or cause to be published any part of the report, except as required in the normal course of forwarding and staffing the report or as otherwise authorized by law or regulation, without the approval of the appointing authority." The appointing authority for the 2014 15-6 investigation is the Director of the Army Staff. Although the Government has already provided this guidance to the Defense on 15 June 2015 (*see* ENCL 1), they have not submitted a request to the appointing authority.

Given Defense counsel's repeated assertions that it intends to release Government documents to the public and given Defense counsel's misunderstanding regarding what qualifies as PII, the Government requests the Court issue a protective order or other ruling as it deems necessary to protect against unauthorized release of PII[4].

II. Public Trial

A. The Government is not aware of any authority requiring the Military Judge to take any action in addition to what is already being done to ensure the public and media have access to the proceedings

The Defense has adopted seven requests as outlined in the 4 January 2016 letter from the Hearst Corporation to the Court. The Government's responses to the individual requests are below.

1. The Government has made arrangements for, and will continue to support, public and media access to proceedings in this case as required.

2. The Government is not aware of any authority requiring any court to provide daily sound recordings and/or transcripts of proceedings in this case prior to their creation and authentication as part of the record of trial. *United States v. McDougall,* 103 F.3d 651, 657 (8th Cir. 1996) (First Amendment does not extend to tapes of deposition testimony offered into evidence in a criminal trial because the public was able to attend the trial and has thus "received all information in the public domain"); *Ctr for Constitutional Rights v. Lind*, 954 F. Supp. 2d 389 (D. Md. 2013) ("plaintiffs have not convinced me…that they have a right under the First Amendment to the availability of expedited preparation services for transcripts, and certainly not at government expense. Nor am I persuaded…that the military must give them access to audio recordings of a court-martial while it is still ongoing.") The Government does not oppose the Court allowing a privately retained stenographer in the court room (or as necessary, an over flow room).

[4] After filing D APP #8, the Defense publicly released almost all documents related to the instant case. The Defense made the documents available on a public website accessible at https://bergdahldocket.wordpress.com/.

3. The Government believes the Court and the parties have complied with, and will continue to comply with, R.C.M. 802. No additional action is required.

4. The docket is already publicly available. The Government is not aware of any affirmative requirement or authority for the Court to release judicial documents filed as part of an on-going court-martial. While federal courts have identified a First Amendment right to some judicial documents "the Supreme Court has not ruled on 'whether there is a constitutional right of access to court documents and if so, the scope of that right.' " *United States v. Gonzales,* 150 F.3d 1246, 1256 (10th Cir. 1998). Further, the Government is not aware of any case that extends a common law right of access to judicial documents filed as part of an on-going court-martial. *But see,* discussion of relevant case law below. Should the Court order the Government to release "party filings and court decisions" as requested, the Government will arrange for an electronic reading room where documents can be posted once classification reviews have been conducted and appropriate Court directed redactions have been applied.

5. No case in the Military Courts has addressed whether there is a public right to access court-martial materials admitted into evidence or otherwise "submitted to the court" under the First Amendment or common law. Numerous federal courts have found the First Amendment right to public access of court proceedings extends to evidence actually admitted at trial. Without deciding whether a First Amendment right of access extends to such materials, the Army Court of Criminal Appeals indicated that the "qualified right of access to materials entered into evidence may apply with equal validity to exhibits that were presented in public at a trial by court-martial." *United States v. Scott,* 48 M.J. 663, 666 (Army Ct. Crim. App. 1998) (vacating a military judge's order to seal an entire stipulation of fact, after it was admitted in open court. Under a closure of proceedings analysis, the Court found that the military judge failed to make required findings on the record.)

6. The Government believes the Court will take all steps necessary under R.C.M. 806 if either party seeks closure of a proceeding.

7. The Government knows of no affirmative authority requiring or authorizing the Court to release documents (see discussion in paragraphs 4 and 5 above), and in turn, knows of no authority requiring specific findings if the Court withholds release for classified or unclassified documents. *But see* discussion below regarding specific findings required prior to withholding judicial documents in federal courts; *Scott*, 48 M.J. 663, 666 (cited above) (discussing requirements prior to sealing a document that becomes part of the record of trial); and R.C.M. 806(b)(4).

B. If the Court determines that there is either an affirmative requirement to release judicial documents (under the First Amendment or common law), or that it possesses the authority to do so under a different analysis, the Government asks the Court to consider the following prior to release

The Court must decide, document by document, what documents to release as not every document filed with the Court should be considered a judicial document subject to release. *Nixon v. Warner Communications, Inc.,* identified the media's common law right to access judicial records and documents in civilian court, but the case failed to provide analysis for what, exactly, qualifies as a judicial record. 435 U.S. 589, 599 (1978) ("We need not undertake to delineate precisely the contours of the common-law right"). Various federal courts have recognized that not everything filed in a case will qualify as a judicial document.[5] Certainly, "judicially authored or created documents are judicial records." *United States v. Appelbaum*, 707 F.3d 283, 290 (4th Cir. 2013). "Documents filed with the court are judicial records if they play a role in the adjudicative process, or adjudicate substantive rights." *Id.* Likewise, documents "filed with the objective of obtaining judicial action or relief" are judicial documents. *Id.* Judicial records are also "materials which properly come before the court in the course of an adjudicatory proceeding and which are relevant to that adjudication." *United States v. El-Sayegh*, 131 F.3d 158, 163 (D.C. Cir. 1997) (citation omitted). In order to be considered a judicial document, "the item filed must be relevant to the performance of the judicial function and useful in the judicial process." *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995). Documents that are "relevant to the performance of the judicial function and useful in the judicial process" are judicial documents. *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006) (internal quotation marks omitted).

Even if a document is a judicial document, "access has been denied where the court files might have become a vehicle for improper purposes" like those documents that are merely "reservoirs of libelous statements for press consumption." *Nixon v. Warner Communications, Inc.,* 435 U.S. 589, 602 (1978). Of note for the instant case, classified and other protected information should not be subject to disclosure. *See generally* M.R.E. 505 and 506; *United States v. Nixon*, 418 U.S. 683, 714-716 (1974) (discussing special handling and redactions of Presidential communications).

As discussed above, no court with precedential authority over this Court has determined that a First Amendment right of access extends to judicial documents in any court. Nor have they affirmatively held that a common law right extends to court-martial documents. However, where a common law right exists, the Supreme Court has been

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[5] *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995) ("The mere filing of a paper or document with the court is insufficient to render that paper a judicial document subject to the right of public access."); *See also Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006)(discussing *Amodeo* and analyzing judicial documents in civil proceedings); *United States v. Connolly*, 321 F.3d 174, 180 (1st Cir. 2003) (*citing United States v. Gonzales*, 150 F.3d 1246, 1255 (10th Cir. 1998) ("Not all documents filed with the court are considered judicial documents.")); *But see Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 782 (3rd Cir. 1994) (The "filing of a document gives rise to a presumptive right of public access") (citations omitted).

clear that this common law right of access to judicial records and documents is "not absolute". *Nixon,* 435 U.S. at 598. "Every court has supervisory power over its own records and files" *Id.* Further, the "decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." *Id. a*t 599 (citations omitted).

Under the common law presumption of access, prior to withholding judicial documents from disclosure to the public, the trial court need only to find that "the public's right of access is outweighed by competing interests." *In re Knight Publ'g Co.*, 743 F.2d 231, 235 (4th Cir. 1984).

Under the First Amendment presumption of access, prior to withholding judicial documents from disclosure to the public, the trial court must identify a compelling governmental interest, and find the denial is "narrowly tailored to serve that interest." *In re Washington Post Company*, 807 F.2d 383, 390 (4th Cir. 1986).

The Government recognizes that a potential release of judicial documents and release under the Freedom of Information Act ("FOIA"), 5 U.S.C. §552 are distinct processes with distinct decision makers. For example, unlike FOIA, release under the common law or First Amendment is at the direction of the trial court. However, Military Courts are not created or maintained in the same ways that are standing civilian criminal courts. *See Article 26(a) UCMJ; Wiechmann*, 67 M.J. at 461 (C.A.A.F. 2009) (discussed above). Although Army courts have clerks of court, that clerk is not traditionally responsible for responding to requests by the public or media for judicial documents. Similarly, the Army is still currently operating on paper records, complicating access to documents under a judicial documents theory.

While not necessarily identical, analysis and redaction under the common law right of access is likely to yield similar results as analysis and redaction under FOIA exemptions as FOIA has a presumption of disclosure but also seeks to balance competing interests. *See generally, Dayton Newspapers, Inc. v. United States Dep't of the Navy*, 109 F. Supp. 2d 768 (S.D. Ohio 1999) (holding that panel member questionnaires could properly be withheld under various FOIA exemptions as the court could identify no legitimate public interest in disclosure and significant privacy interests of withholding the personal information); *See also Ctr for Constitutional Rights v. Lind*, 954 F. Supp. 2d 389 (D. Md. 2013) (Court discussed the Government's redaction under FOIA while noting a witness list would likely not be considered a judicial document and even if it was, redaction of identities would likely be permissible under either the common law or First Amendment analysis). In the event either party takes issue with the Court's redactions or withholding of particular documents, the issue can be resolved during an Article 39(a) session.

CONCLUSION

The protective order issued by LTC Burke is valid and still in effect. If the Court decides to vacate the order, the Government requests the Court issue an order, or other appropriate ruling, as it deems necessary to protect PII. The Government has, along with the Court, already taken the steps required to ensure the protection of the Accused's Sixth Amendment rights.

E. Whipple
EILEEN C. WHIPPLE
CPT, JA
Trial Counsel

Certificate of Service

I certify that I have served or caused to be served a true copy of the above Government Response to Defense Motion to Vacate Pre-Referral Protective Order and for Other Appropriate Relief (Public Trial) to Defense via email on 28 April 2016.

E. Whipple
EILEEN C. WHIPPLE
CPT, JA
Trial Counsel

Kurz, Margaret V MAJ USARMY FORSCOM (US)

From: Kurz, Margaret V MAJ USARMY FORSCOM (US)
Sent: Monday, June 15, 2015 4:20 PM
To: Rosenblatt, Franklin D LTC USARMY (US)
Cc: eugene.fidell@yale.edu; Beese, Christian E MAJ USARMY HQDA TJAGLCS (US); Foster, Alfredo N Jr CPT USARMY IMCOM HQ (US)
Subject: Government position concerning Protective Order and public release of documents

Sir,

The 25 March 2015 protective order issued by LTC Burke in his capacity as the convening authority was intended to highlight to the parties their responsibility to protect the privacy interests of the individuals mentioned in the documents, and to protect the due process of the current proceedings. Paramount within that due process concern was the accused's right to a fair trial.

The protective order does not affect the preliminary hearing proceedings since the disclosure of information during those proceedings would not be considered an unauthorized disclosure as contemplated within the order. Accordingly, the defense should present evidence, conduct direct and cross examination, and present their arguments at those proceedings as they would if there was not a protective order in place.

Due to the national interest in the case, the protective order focused on the importance of protecting individuals' privacy rights—personally identifiable information (PII)—that will be implicated if PII is released in violation of the Privacy Act. Further, sensitive information as contemplated by the protective order is again defined as information that contains PII in accordance with AR 380-5, paragraph 5-19.

Independent of, and unrelated to the protective order, the Defense has been provided government owned documents and information for the limited purpose of preparing for the Article 32 preliminary hearing—not for release to the media or other third parties unrelated to Defense's preparation of their case. If the Defense desires to make such releases they must go to the appropriate official—in the case of the AR 15-6 Investigation, it is the Director of the Army Staff—and request the appropriate release of the relevant documents. Trial counsel do not have the authority to authorize release of the documents to third parties, or assist or approve redactions within documents.

The Government's release of information is bound by the Freedom of Information Act and the Privacy Act, and the Government cannot authorize or condone the release of information outside of those official procedures. Further, the attorneys representing the Government must comply with Army Regulation 27-26, Rule 3.6 Tribunal Publicity. The rule recognizes the potential risk that the release of information to a public forum could have a substantial likelihood of materially prejudicing an adjudicative proceeding. Defense counsel should ensure that any contemplated release of information complies with their similar local bar rules governing the release of information.

The Prosecution will continue to abide by the rules protecting privacy interests of individuals, the right of the accused to have a fair trial, and the public's right to attend public proceedings, e.g., the preliminary hearing. The release of documents by the Defense to the public that either does not have PII or has the PII redacted only risks impacting the rights of the accused.

V/R
MAJ Margaret V. Kurz
Chief, Complex Litigation
Office of the Staff Judge Advocate