

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

<p>MAHMOAD ABDAAH, et al.,</p> <p>Petitioners,</p> <p>v.</p> <p>BARACK H. OBAMA, et al.,</p> <p>Respondents.</p>

Civil Action 04-01254 (HHK)

ORDER

Before the court are petitioners' motions for additional discovery [## 339, 391] and petitioners' motion "to compel compliance with sections I.D.1 and I.E.1 of the Case Management Order" [#446]. Upon consideration of the motions, the oppositions thereto, and the record of this case, the court concludes that the motions should be granted in part and denied in part.

I.

Through these motions, petitioners seek discovery in several areas as follows:

- (1) All statements, in whatever form (including audio tapes, video tapes, transcripts, or translations), made by a petitioner on which the government relies to justify that petitioner's detention, as well as contemporaneous notes of such statements and all other records and reports of such statements (without regard to who prepared them or their form).
- (2) Information about the circumstances in which any statement by a petitioner, which is relied on by the government to justify that petitioner's detention, was made, including, without limitation, information about the time and duration of the interrogation, the physical conditions during the interrogation, physically or psychologically coercive measures used against a petitioner before or during the interrogation, records showing a petitioner's medical condition at the time of the interrogation, copies of interrogation logs and interrogation plans, and a sworn declaration from the interviewing agent concerning such circumstances.
- (3) All statements, in whatever form (including audio tapes, video tapes,

transcripts or translations), made by other current or former Guantánamo Bay detainees on which the government relies to justify a petitioner's detention, and information and documents relating to the circumstances in which such statements were made or adopted.

(4) All documents containing information relating to any fees, bounties, or other monetary or non-monetary remuneration or consideration given to third parties for the apprehension, transfer of into the government's custody, or investigation of a petitioner, including any payments, gifts, promises of leniency, any form of preferential treatment, or any improvements in conditions of detention provided to third parties who have made statements on which the government relies to justify a petitioner's detention.

(5) All photographs shown to third parties to make identifications of petitioners to the extent that the government relies on such identifications to justify a petitioner's detention.

See Pets.' Mots. Add'l Discovery [##339, 391], Pets.' Mot. Compel [#446].

II.

This case is governed by the case management order entered by Judge Hogan in *In re Guantánamo Bay Detainees Litigation*, 1:08-mc-00442, on November 6, 2008 [#940], as amended on December 16, 2008 [#1315] ("Consolidated CMO"). This court analyzes petitioners' requests under sections I.D.1 and I.E.1 of the Consolidated CMO.¹

A. Exculpatory Evidence Under Section I.D.1 of the Consolidated CMO

Section I.D.1 of the Consolidated CMO states, in part:

The government shall disclose to the petitioner all reasonably available evidence in its possession that tends materially to undermine the information presented to support the government's justification for detaining the petitioner. . . . In this context, the term "reasonably available evidence" means evidence contained in any information reviewed by attorneys preparing factual returns for all detainees; it is not limited to evidence discovered by the attorneys preparing the factual return for the petitioner. The term also includes any other evidence the

¹ Petitioners' requests are denied insofar as they are made under section I.E.2 of the Consolidated CMO because they do not meet the four-part test laid out in that section.

government discovers while litigating habeas corpus petitions filed by detainees at Guantanamo Bay.

Consolidated CMO § I.D.1 (internal citation omitted). Under this provision, petitioners seek information about any bounties, fees or other consideration given to third parties for the apprehension, transfer and investigation of petitioners, as well as information about the circumstances under which third party statements upon which the government relies to justify its detention of a petitioner were made.

Petitioners argue that “if it turns out that a Petitioner was ‘sold’ to the United States by persons who had taken custody of him in order to recover a bounty, this would undermine the claim that Petitioner was in fact an enemy combatant” and therefore evidence of bounties paid for the apprehension of a petitioner falls within the scope of section I.D.1 of the Consolidated CMO. Pets.’ Mot. Compel at 2. Petitioners further argue that information that tends materially to undermine the credibility of third parties upon whose statements the government relies to justify detention falls within the scope of this provision. The government responds that it has complied in full with Section I.D.1 of the Consolidated CMO. It asserts that while the information petitioners seek *may* meet the test for production, it does not necessarily meet that test and therefore the court should not designate certain categories of evidence that are *per se* required to be produced. Resp.’s Opp. to Pets.’ Mot. Compel at 12-13 (“it is simply not the case that all or even most evidence of inducements offered to witnesses or of bounties paid to captors must be automatically produced under this section”). The government argues that evidence of bounties or fees paid for a petitioner’s apprehension is not exculpatory unless the government relies on the fact of that apprehension or information gained from those who were paid the

bounty to justify a petitioner's detention, and that evidence of inducements to cooperate are only exculpatory if they took place in sufficient proximity to the statement relied upon to still be deemed to have influenced that statement.

Petitioners' arguments are generally well-taken. The court orders the government to disclose any reasonably available information relating to any fees, bounties, or other monetary or non-monetary remuneration or consideration (including any payments, gifts, loans, promises of leniency, preferential treatment, release, reduction in charges, or improvements in conditions of detention) given to third parties for the apprehension, transfer into the government's custody, or investigation of petitioners. The government may comply with this order to disclose reasonably available information relating to fees, bounties, remuneration or consideration through the affidavits or declarations of government officials describing any such fees, bounties, remuneration or consideration in lieu of the original documents. Such description must include the amount of any fee, bounty or monetary remuneration or the nature of any non-monetary remuneration or consideration and what the government obtained in exchange for it to the extent that information is reasonably available.

Further, the court orders the government to disclose all reasonably available forms (i.e., audio and video recordings, transcripts and translations) of any third party statements that the government relies on to justify a petitioner's detention, and any information about the circumstances under which those statements were made, if those forms or circumstances would tend to materially undermine the credibility or reliability of such statements. This includes any evidence of any physically or psychologically coercive measures used against or inducements offered to a third party before or during the interrogation in which the statement was made, and

any medical records of a third party to the extent that such records undermine the credibility or reliability of that third party's statements.

The court further notes that on January 22, 2009, the President issued an Executive Order directing the Attorney General, to the extent reasonably practicable, to

[A]ssemble all information in the possession of the Federal Government that pertains to any individual currently detained at Guantanamo and that is relevant to determining the proper disposition of any such individual. All executive branch departments and agencies shall promptly comply with any request of the Attorney General to provide information in their possession or control pertaining to any such individual.

Exec. Order No. 13492 § 4(c)(1), 74 Fed. Reg. 4897, 4898 (January 22, 2009). In addition to the information that is "reasonably available" as defined by the Consolidated CMO, the court considers any information that the government reviews or obtains while implementing the Executive Order to be reasonably available under the Consolidated CMO.

B. Discovery Under Section I.E.1 of the Consolidated CMO

Section I.E.1 of the Consolidated CMO states, in part:

If requested by the petitioner, the government shall disclose to the petitioner (1) any documents and objects in the government's possession that the government relies on to justify detention; (2) all statements, in whatever form, made or adopted by the petitioner that the government relies on to justify detention; and (3) information about the circumstances in which such statements of the petitioner were made or adopted.

Consolidated CMO § I.E.1. Under this provision, petitioners seek additional forms of their own statements upon which the government relies to justify their detention, additional information about the circumstances under which those statements were made, and photographs of petitioners to the extent the government relies upon an identification of a petitioner made using a photograph.

Petitioners argue first that under this provision the government must produce all forms of any statement made or adopted by the petitioner upon which the government relies to justify that petitioner's detention including audio or video tapes, contemporaneous transcripts, notes, or translations. The government responds that "the correct reading requires the government to produce only those versions of a statement upon which it intends to rely, in whatever form it intends to do so." Resp.'s Opp. to Pets.' Mot. Compel at 16. The court concludes that the government's reading is at odds with the plain language of the Consolidated CMO and notes that it has been repeatedly rejected. *See, e.g., Zaid v. Obama*, No. 1:05-cv-01646 (Jan. 22, 2009), *Hatim v. Obama*, No. 1:05-cv-01429 (February 17, 2009). The phrase "in whatever form" plainly includes all forms of a petitioner's statement, not just that form that the government relies on to justify his detention. Therefore, the court orders the government to produce all forms in its possession of any statement made by a petitioner that the government relies on to justify detention of that petitioner, including audio or video recordings, transcripts, notes, or translations.²

Second, petitioners argue that the requirement of section I.E.1(3) of the Consolidated CMO that the government produce information about the circumstances in which petitioners made or adopted statements on which the government relies includes information concerning any physically or psychologically coercive techniques that were used, "or whether the Petitioner had been 'softened up' in the weeks or months preceding the interrogation." Pets.' Mot. Compel at 6.

² The court declines the government's request to limit any additional searches for forms of a petitioner's statement to the consolidated files (i.e., the consolidated assemblage of information compiled by JTF-GTMO and OARDECC) that were reviewed by attorneys preparing the amended factual return for a petitioner.

Petitioners further argue that this requirement includes information in the heads of those who were involved in the interrogation and therefore seek declarations from these individuals. The government responds that it has already produced evidence of the circumstances of petitioners' statements pursuant to section I.E.1(3). Further, it asserts that evidence of coercion or duress is wholly within the knowledge of each petitioner and therefore need not be produced under section I.E.1(3). The government also explains the burden entailed in gathering all of the evidence that petitioners seek.

The court concludes that the government's interpretation is overly narrow. The requirement that the government disclose "information about the circumstances in which such statements of the petitioner were made or adopted," Consolidated CMO § I.E.1(3), surely includes evidence of coercion or duress before or during the time that the statement was made. The court orders the government to disclose any information in its possession about the circumstances under which a petitioner's statements that the government relies on to justify detention of that petitioner were made, which shall include information about the time, duration, and physical conditions of the interrogation, any physically or psychologically coercive techniques used before or during the interrogation, any inducements or promises made before or during the interrogation, and copies of any interrogation logs.

The court does not require production of records showing a petitioner's medical condition at the time of the interrogation, but to the extent a petitioner's medical condition would materially undermine the information presented to support the government's justification for detaining the petitioner and is reasonably available, the government must produce it under section I.D.1 of the Consolidated CMO. The court also does not require the government to

provide sworn declarations from the interviewing agents concerning the circumstances under which petitioners' statements were made because of the burden this would place on the government. If petitioners believe that such declarations are likely to produce evidence that demonstrates that a petitioner's detention is unlawful and will enable the petitioner to rebut the factual basis for his detention without unfairly disrupting or unduly burdening the government, they may seek such declarations under section I.E.2 of the Consolidated CMO.

Third, petitioners argue that section I.E.1(1) of the Consolidated CMO, which requires the government to disclose documents and objects that the government relies on to justify detention, includes a requirement that the government produce the photographs from which the government asserts that a third party identified a petitioner. They state, "[i]n these cases, the photograph is itself an essential part of the identification and thus the Government is necessarily relying on it to justify detention." Pets.' Mot. Compel at 5. The government responds that the Consolidated CMO does not require such a production because the government did not rely on the photographs in its factual returns. It argues that photographs "can be extremely difficult to find and produce, if they can be found at all." Resp.'s Opp. to Pets.' Mot. Compel at 20. The court concludes that the government's argument has merit and that this request falls outside of the required production under section I.E.1(1) of the Consolidated CMO. If petitioners believe that such photographs are likely to produce evidence that demonstrates that a petitioner's detention is unlawful and will enable the petitioner to rebut the factual basis for his detention without unfairly disrupting or unduly burdening the government, they may seek such photographs under section I.E.2 of the Consolidated CMO.

III.

For the foregoing reasons, the court concludes that petitioners' motions should be granted in part and denied in part. Accordingly, it is this 6th day of April 2009, hereby

ORDERED that petitioners' motions [## 339, 391, 446] are **GRANTED** in part and **DENIED** in part as explained in this order. Under sections I.D.1 and I.E.1 of the Consolidated CMO, respondents must disclose, if they have not already done so:

- (1) any reasonably available evidence relating to any fees, bounties, or other monetary or non-monetary remuneration or consideration (including any payments, gifts, loans, promises of leniency, preferential treatment, release, reduction in charges, or improvements in conditions of detention) given to third parties for the apprehension, transfer into the government's custody, or investigation of petitioners as described in this order;
- (2) all reasonably available forms (i.e. audio and video recordings, transcripts and translations) of any third party statements that the government relies on to justify petitioners' detention and any evidence about the circumstances in which those statements were made or adopted, if those forms or circumstances would tend to materially undermine the credibility or reliability of such statements as described in this order;
- (3) all forms (i.e. audio and video recordings, transcripts, notes and translations) in the government's possession of any statement made by a petitioner that the government relies on to justify its detention of that petitioner; and
- (4) any information in the government's possession about the circumstances in which a petitioner's statements that the government relies on to justify its detention of that petitioner were made or adopted, which shall include information concerning the time, duration and physical conditions of the interrogation, any physically or psychologically coercive techniques used before or during the interrogation, any inducements or promises made before or during the interrogation, and copies of any interrogation logs; and it is further

ORDERED that respondents shall produce the items and information that are the subject of this order, and file a declaration that they have done so, by no later than April 27, 2009.

Henry H. Kennedy, Jr.
United States District Judge