

UNITED STATES

v.

U.S. Army, (b) (6)

Army Garrison, Joint Base Myer-Henderson Hall,

Fort Myer, VA 22211

**DEFENSE MOTION FOR
JUDICIAL NOTICE OF
FOIA REQUEST BY REUTERS**

DATED: 15 JUNE 2013

1. PFC Bradley E. Manning, by and through counsel, moves this court, pursuant to Military Rules of Evidence (MRE) 201 to take judicial notice that Reuters America, Inc. made a FOIA request to United States Central Command (CENTCOM), to which it received a response twenty-one (21) months later.

2. As the moving party, the Defense has the burden of persuasion. RCM 905(c)(2). The burden of proof is by a preponderance of the evidence. RCM 905(c)(1).

3. PFC Manning is charged with five specifications of violating a lawful general regulation, one specification of aiding the enemy, one specification of disorders and neglects to the prejudice of good order and discipline and service discrediting, eight specifications of communicating classified information, five specifications of stealing or knowingly converting Government property, and two specifications of knowingly exceeding authorized access to a Government computer, in violation of Articles 92, 104, and 134, Uniform Code of Military Justice (UCMJ) 10 U.S.C. §§ 892, 904, 934 (2010).

4. The original charges were preferred on 5 July 2010. Those charges were dismissed by the convening authority on 18 March 2011. The current charges were preferred on 1 March 2011. On 16 December through 22 December 2011, these charges were investigated by an Article 32 Investigating Officer. The charges were referred to a general court-martial on 3 February 2012.

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WITNESSES/EVIDENCE

5. The Defense does not request any witnesses be produced for this motion.

LEGAL AUTHORITY AND ARGUMENT

6. In the interest of judicial economy, MRE 201 relieves a proponent from formally proving certain facts that reasonable persons would not dispute. There are two categories of adjudicative facts that may be noticed under the rule. First, the military judge may take judicial notice of adjudicative facts that are “generally known universally, locally, or in the area pertinent to the event.” MRE 201(b)(1). Under this category of adjudicative facts, it is not the military judge’s knowledge or experience that is controlling. Instead, the test is whether the fact is generally known by those that would have a reason to know the adjudicative fact. *U.S. v. Brown*, 33 M.J. 706, 709 (N.M.C.A 1992). The second category of adjudicative facts is those “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” MRE 201(b)(2). This category of adjudicative facts includes government records, business records, information in almanacs, scientific facts, and well documented reports. *Id.* See also, *U.S. v. Spann*, 24 M.J. 508 (A.F.C.M.R. 1987). Moreover, judicial notice may be taken of a periodical. *U.S. v. Needham*, 23 M.J. 383, 385 (C.M.A. 1983)(taking judicial notice of Drug Enforcement Agency publication). The key requirement for judicial notice under this category is that the source relied upon must be reliable. Salzburg, Lee D. Schinasi & David A. Schlueter, *Military Rules of Evidence*, §201.02[3] at p. 2-7 (7th Ed., Matthew Bender & Co. 2011)

7. Under MRE 201(d), a military judge must take judicial notice if the proponent presents the necessary supporting information. In making the determination whether a fact is capable of being judicially noticed, the military judge is not bound by the rules of evidence. *Id.* Additionally, the information relied upon by the party requesting judicial notice need not be otherwise admissible. *Id.* The determination of whether a fact is capable of being judicially noticed is a preliminary question for the military judge. *See* MRE 104(a).

8. The fact that Reuters received a response to its FOIA request 21 months after its request is a fact capable of accurate and ready determination from reliable sources. MRE 201(b)(2). Here, Reuters FOIA request was submitted to the Pentagon on 25 July 2007. *See* Enclosure 1 (BATES # 412534). On 7 August 2007, the Reuters request was forwarded to CENTCOM for processing. *See* Enclosure 2 (BATES# 412533). On 24 April 2009, CENTCOM formally responded to the Reuters request. *See* Enclosure 3 (BATES# 412536-412537). Each of these correspondences is on the sender’s official letterhead and was provided to the Defense by the Government during discovery. Their reliability cannot reasonably be questioned.

9. The requested fact is relevant. This Court previously ruled that evidence of PFC Manning’s motive is relevant with respect to the knowledge element of the Specification of Charge I. *See* Appellate Exhibit 470 at 3. In its draft instructions the Court established:

“Knowingly requires actual knowledge by the accused that by giving intelligence to the 3rd party or intermediary or in some other indirect way, that he was actually giving intelligence to the enemy through indirect means. This offense requires that the accused had a general evil

intent in that the accused had to know he was dealing, directly or indirectly, with an enemy of the United States. “Knowingly” means to act voluntarily or deliberately. A person cannot violate Article 104 by committing an act inadvertently, accidentally, or negligently that has the effect of aiding the enemy. *See* Appellate Exhibit 410.

10. The requested fact is relevant to PFC Manning’s motive. During his providence inquiry PFC Manning noted that he read about the lengthy delay Reuters experienced with respect to its FOIA request for information related to the killing of two of their employees in Iraq. PFC Manning, citing the lengthy FOIA process and the fact that Reuters was denied access to video of the incident, went on to say that he believed release of the video would help Reuters prevent such events in the future. PFC Manning testified that he originally intended to release the video directly to Reuters upon redeployment, but chose to release the video to WikiLeaks so Reuters could get the information prior to his redeployment. The fact for which judicial notice is requested substantiates the difficulty PFC Manning believed Reuters had obtaining a copy of the video. PFC Manning’s belief that releasing the video could help prevent similar incidents in the future is directly related to the knowledge element of Charge I. It is clear from PFC Manning’s testimony that he believed he was dealing with WikiLeaks and Reuters, and not an enemy of the United States. The documentation of the Reuters FOIA request makes it more likely that circumstances surrounding that request were as PFC Manning believed them to be.

11. The requested fact is also relevant to rebut any motive or state of mind evidence presented by the Government. This Court held, “[i]f the Government offers statements made by the accused to SPC Jihrla Showman to prove his state of mind, the accused’s motive or state of mind during the period of the charged offenses is relevant to rebut that evidence.” *See* Appellate Exhibit 470 at 3. As discussed, PFC Manning released the video depicting two Reuters employees being killed because he believed Reuters would be able to help prevent similar incidents in the future if they saw the video. PFC Manning also cited the delays in processing the Reuters FOIA request in his decision making process. The instant fact makes it more likely that PFC Manning’s motive was as he described it, and is, thus, relevant.

CONCLUSION

12. Based on the above, the Defense requests that the Court to take judicial notice of the requested adjudicative fact.

Respectfully Submitted



JOSHUA J. TOOMAN
CPT, JA
Defense Counsel

I certify that I served or caused to be served a true copy of the above on MAJ Ashden
Fein, via electronic mail, on 15 June 2013.

A handwritten signature in black ink, appearing to read 'J. Tooman', with a long horizontal stroke extending to the right.

JOSHUA J. TOOMAN
CPT, JA
Defense Counsel