

UNITED STATES OF AMERICA

v.

Manning, Bradley E.  
PFC, U.S. Army,  
HHC, U.S. Army Garrison,  
Joint Base Myer-Henderson Hall  
Fort Myer, Virginia 22211

DEFENSE TARGETED BRIEF  
ON OBJECTIONS TO PROSECUTION  
EXHIBITS 31, 32, 33, 34, & 109 FOR ID

15 JUNE 2013

**RELIEF SOUGHT**

The Defense requests this Court find that the above captioned Exhibits are inadmissible. The cited Prosecution Exhibits for Identification are properly excluded because they are hearsay, have not been properly authenticated, and are not relevant.

**THE LAW**

Military Rule of Evidence (MRE) 401 defines relevant evidence as any having "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Pursuant to MRE 402, relevant evidence is admissible, while irrelevant evidence is inadmissible. MRE 403 allows for the exclusion of admissible evidence where probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues.

Hearsay is an out of court statement offered to prove the truth of the matter asserted. MRE 801(c). Hearsay is not admissible pursuant to MRE 802.

MRE 901(a) requires that evidence be authenticated as a condition precedent to admission. Authentication requires "evidence sufficient to support a finding that the matter in question is what its proponent claims." *Id.* Such evidence may be provided through testimony from a witness with knowledge that a matter is what it claims to be. MRE 901(b)(1).

**ANALYSIS**

Prosecution Exhibits for Identification 31, 32, 33, 34, and 109 should be excluded because they have not been properly authenticated, are hearsay, and are not relevant.

**I. THE EXHIBITS IN QUESTION HAVE NOT BEEN PROPERLY AUTHENTICATED**

In order for the Government to authenticate the Exhibits in question they must offer testimony from a person with knowledge about the *actual* site. MRE 901. Specifically, the Government should be required to produce testimony from a person with knowledge about how the Wikileaks and Twitter websites appeared at a given time. Printouts from websites are not self-authenticating. *In re Homestore.com, Inc. v. Securities Litigation*, 347 F.Supp.2d 769 (C.D.

Cal. 2004). As such, printouts from a website must be accompanied by an individual with personal knowledge of what a site looked like at a particular time. *Id.* at 782-783. The court in *St. Luke's Cataract & Laser Inst., P.A. v. Sanderson*, 2006 WL 1320242, at \*2 (M.D.Fla. 2006) held that screen shots from archive.org (A.K.A. the "Wayback Machine") were properly authenticated when accompanied by affidavits from an employee of archive.org. This view is supported by the holding in *Sam's Riverside, Inc. v. Intercon Solutions, Inc.*, 790 F.Supp.2d 965 (S.D. Iowa 2011), which held that an affidavit from an archive.org employee was sufficient to authenticate a screen shot from archive.org. *Id.* at 981. However, an affidavit from archive.org only serves to authenticate the records of archive.org. It *does not* authenticate that a particular webpage looked a particular way on a particular day. See Enclosure 9, Archive.org FAQ.<sup>1</sup>

Web sites are "live," whereas caches reflect what something looked like at a single moment in time. Web sites can change frequently and may look different from one second or minute to the next. See Enclosure 1, Declaration of Trent Struttman. Take, for example, CNN.com, which reports on the news. One could go to the site at 1200 and see a story about Congress, only to go back at 1201 and find that the death of a former President has taken over the page. A site like archive.org or Google cache only capture what a website looked like at a *single moment* in time. Again, consider a hypothetical scenario involving CNN.com. A story about a Supreme Court decision headlines the site at 1130, and Google cache or a third party contributor to archive.org saves the site at 1145. The headline then changes at 1146 when Congress passes a budget, and again at 1200 when a former President passes away. Because the Supreme Court decision headlined when the site was archived, that is how the page would appear on archive.org or Google cache. Now suppose Bob visited the site at 1147. Despite what appears on archive.org or Google cache, Bob would not have seen the article on the Supreme Court decision. This scenario illustrates the inherent unreliability of online caches. Its reliability is only established if the Government can show that PFC Manning saw the *exact* site they wish this court to consider.

Here, what the Government should be required to authenticate is not what appeared on a web cache, but rather what actually appeared on wikileaks.org, the website they allege PFC Manning visited. Absent testimony from an individual who viewed versions the Wikileaks Most Wanted lists in 2009, only an individual from wikileaks.org has the personal knowledge required to authenticate how the list looked at a particular time in 2009. The court in *Novak v. Tucow's, Inc.*, 2007 U.S. Dist. LEXIS 21269 (E.D.N.Y. Mar. 26, 2007), supports this position. At issue in *Novak* was the admissibility of a number of printouts from the Wayback machine. The court held:

While plaintiff's declaration purports to cure his inability to authenticate the documents printed from the internet, he in fact lacks the personal knowledge required to set forth with any certainty that the documents obtained via third-party websites are, in fact, what he proclaims them to be. This problem is even more acute in the case of documents procured through the Wayback Machine. Plaintiff states that the web pages archived within the Wayback Machine are based upon "data from third parties who compile the data by using software programs known as crawlers," who then "donate" such data to the Internet Archive, which "preserves and provides access to it ." (Novak Decl. ¶ 4.) Based

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<sup>1</sup> <http://archive.org/legal/faq.php#wayback>

upon Novak's assertions, it is clear that the information posted on the Wayback Machine is only as valid as the third-party donating the page decides to make it—the authorized owners and managers of the archived websites play no role in ensuring that the material posted in the Wayback Machine accurately represents what was posted on their official websites at the relevant time. As Novak proffers neither testimony nor sworn statements attesting to the authenticity of the contested web page exhibits by any employee of the companies hosting the sites from which plaintiff printed the pages, such exhibits cannot be authenticated as required under the Rules of Evidence.

Id. at \*5. It is clear from the *Novak* opinion that authentication must be done by an individual with personal knowledge of the actual site that posted the Wikileaks Most Wanted list or Tweet. That is, Wikileaks and Twitter. *See also, Dollman v. Mast Indus.*, 2011 U.S. Dist. LEXIS 99802, Footnote 1 (S.D.N.Y. Sept. 6, 2011); *Burchette v. Abercrombie & Fitch Stores, Inc.*, 2010 U.S. Dist. LEXIS 47043, Footnote 6 (S.D.N.Y. May 10, 2010); *Audi AG v. Shokan Coachworks, Inc.*, 592 F. Supp. 2d 246, 278 (N.D.N.Y. 2008); *Chamilia, LLC v. Pandora Jewelry, LLC*, 2007 U.S. Dist. LEXIS 71246, Footnote 4 (S.D.N.Y. Sept. 24, 2007); *Market-Alerts Pty., Ltd. v. Bloomberg Fin. L.P.*, 2013 U.S. Dist. LEXIS 15300, Footnote 12 (D. Del. Feb. 5, 2013); *Crochet v. Wal-Mart Stores, Inc.*, 2012 U.S. Dist. LEXIS 18258, \*12 (W.D. La. Feb. 13, 2012).

The reliability of archive.org records can reasonably be questioned. Unlike the Government's affidavit, which, interestingly, is not on the standard archive.org affidavit form, the affidavit secured by the Defense establishes for the Court a thorough understanding of the Wayback Machine. The documents held by archive.org are documents obtained from third-party individuals donating the pages that they decide to make for archive.org. Archive.org plays no role in ensuring that the material posted and made available through archive.org accurately represents what was posted on a particular website at any particular time. As such, archive.org cannot state that documents are what they claim to be as they are not a person with knowledge of the events recorded within the documents on archive.org or that the documents are from the purported website. *See* Enclosure 10, Affidavit from archive.org.

The Government has not suggested that PFC Manning saw the archive.org website; the Government's theory is that PFC Manning viewed the Wikileaks Most Wanted list directly from the Wikileaks webpage sometime in 2009. The affidavit from archive.org makes clear they have no personal knowledge as to what the Wikileaks website *actually* looked like at any given point in time. Rather, archive.org has personal knowledge of what a *third party* told them it looked like at a particular time. This cannot suffice for authentication in a criminal proceeding. While an individual's business or financial matters are important, they pale in comparison to an accused's right to due process. Because websites are so easily and routinely hacked (*See* Enclosures 4-8), the best evidence in this case is the testimony of someone from Wikileaks or Twitter who *could* testify about how a website looked at a given time.

## II. THE EXHIBITS IN QUESTION ARE HEARSAY

Should the Court find that the Exhibits in question can be properly authenticated, they would be properly excluded as hearsay. Each of the proffered exhibits contains triple hearsay. First, there is the statement by the webpage itself, Wikileaks or Twitter. Second, is the statement

of the individual who allegedly captured the site and relayed the information to archive.org or Google cache. Finally, there is the statement of archive.org or Google cache.<sup>2</sup>

The Government has proffered that they intend to offer the exhibits for a non-hearsay purpose. Specifically, they indicated an intention to use the exhibits to show the effect on the listener, PFC Manning. In order for these exhibits to be admitted as non-hearsay the Government must be required to show that PFC Manning *actually saw them*. For there to be an effect on a listener *there must actually be a listener*. The Government has offered no evidence that PFC Manning actually viewed Prosecution Exhibits for Identification 31-34 and 109.

Predictably, there is little case law on this obvious matter. The Northern District of Illinois considered the issue in *Brandon v. Village of Maywood*, 179 F.Supp.2d 847 (N.D. Ill. 2001). *Brandon* involved a plaintiff in a §1983 claim, an alleged drug dealer, being asked by two women whether he was working that day. The key question was whether police officers had reasonable suspicion that the accused was engaged in drug activity. The court found that unless the officers heard the question asked by the women it was not relevant and constituted hearsay. *Id.* at 856. The Supreme Court of New Mexico in *New Mexico v. Rosales*, 136 N.M. 25, 30 (2004) followed suit, finding that evidence was properly excluded as hearsay when it could not be shown that one actually heard the out of court statement.

The Government has failed to show that PFC Manning ever saw the websites in question. To date the only evidence offered by the Government to suggest PFC Manning saw a Most Wanted List were a trio of searches on Intelink and a passing reference in the Press Association chat about OpenSource.gov. Testimony from Special Agent Mark Mander showed that while PFC Manning did Intelink searches for three items on Prosecution Exhibit 110, there were 78 items total on the list. Thus, PFC Manning *didn't* search for 75 of the items on Prosecution Exhibit 110. The Government also points to a handful of lines in the Press Association chat in which OpenSource.gov is referenced as proof that PFC Manning saw a list indicating Wikileaks wanted information from that site. In relying on these few lines the Government ignores critical facts. First, PFC Manning, was an all-source analyst whose job included scouring the web for information. Second, PFC Manning created an OpenSource.gov account *prior* to his first Intelink search for "Wikileaks" on 1 DEC 2009. *See* Enclosure X, stipulation of X. Obviously, he was aware OpenSource.gov prior to developing knowledge of Wikileaks. Finally, the chat itself involves Press Association telling PFC Manning they are interested in OpenSource.gov. Clearly, Press Association did not believe PFC Manning had seen the Most Wanted list or such a comment would have been unnecessary. Conspicuous in its absence in the chat conversation is any reference to the 2009 list by PFC Manning or Wikileaks. PFC Manning gives no indication to Press Association that he has seen such a list or is operating off of it, and Press Association gives no indication that they are directing PFC Manning to obtain an item of any 2009 list.

Despite mountains of forensic evidence chronicling PFC Manning's computer activities in 2009 and 2010 there is no forensic evidence connecting PFC Manning with a Wikileaks Most Wanted List. To date we have heard extensive testimony from Special Agent David Shaver and Mr. Mark Johnson, who conducted forensics on PFC Manning's personal computer (Mac Book

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<sup>2</sup> It is possible that the Exhibits involving Google cache are double hearsay. It is unclear whether Google relies on third parties to acquire the data used in their cache.

Pro), primary SIPR computer (.22), secondary SIPR computer (.40), tertiary SIPR computer (.185), and various other pieces of digital media. Both SA Shaver and Mr. Johnson have testified that, despite finding other connections to Wikileaks, there is no forensic connection between PFC Manning and a Wikileaks Most Wanted list. Furthermore, the Court has heard testimony about a number chats and emails involving PFC Manning. At no point during any of those conversations does PFC Manning or the individuals with whom he is conversing mention a Wikileaks Most Wanted list.

Even assuming, *arguendo*, that the Court is persuaded by the Government's circumstantial evidence, the Government cannot demonstrate that PFC Manning saw the particular list the Government offers. A number of versions of the 2009 list have undoubtedly been available in some form or another on the WikiLeaks webpage based upon the versions that the Court has already been presented by the Government and the Defense. Based on the Government's scant evidence, it is no more likely that PFC Manning saw any one version of the list rather than another. Absent a showing that PFC Manning saw the *particular* Exhibit being offered, the Government has failed to establish PFC Manning as the "listener" required to establish non-hearsay admissibility of an Exhibit.

### III. THE EXHIBITS IN QUESTION ARE NOT RELEVANT

Should the Court find that the proffered Exhibits are properly authenticated and qualify as non-hearsay, the Exhibits would be properly excluded as irrelevant. Nothing in any of the proffered exhibits would have given PFC Manning notice that Wikileaks was used by the enemy, nor do they make it more or less likely that he would have reason to believe release of the charged documents could cause harm to the United States or be used to the benefit of a foreign nation. To the contrary, assuming PFC Manning saw a version of the Wikileaks Most Wanted List, he would have seen that the documents were sought for the purpose of *positive* change. Moreover, the proffered Exhibits will not assist the Court in assessing the value of the charged documents for purposes of Specifications 4, 6, 8, 12, and 16 of Charge II.

Even if the Court finds that the documents offered by the Government are marginally relevant, the documents would be properly excluded under MRE 403. The probative value of these documents is limited. The Government cannot establish that PFC Manning saw any *particular* version of this list, nor can they establish the list was guiding PFC Manning's actions. As such, the proffered Exhibits are of minimal probative value. Consideration of the proffered Exhibits would unfairly prejudice PFC Manning by allowing the Government to argue a theory (PFC Manning was working for Wikileaks) that finds little, if any, support in the actual facts of this case, mischaracterizes the evidence and, looks to makes connections where not even reasonable inferences exist. Moreover, admission of the Exhibits would offend judicial economy and confuse the issues. The Defense will be required to explore in even greater detail with both Government and Defense computer experts whether PFC Manning saw the lists or Tweets in question. Whether or not PFC Manning saw any of the websites included in the Exhibits confuses the actual remaining issues; what did PFC Manning know at the time he provided documents to Wikileaks and what should he have reasonably known? Because the risk of unfair prejudice and confusion of the issues outweigh the probative value of the Exhibits they should be properly excluded under MRE 403.

## CONCLUSION

The Defense respectfully requests the Court exclude the Exhibits in question. Prosecution Exhibits for Identification 31 and 32 have not been properly authenticated because they come from cached websites. Moreover, both Exhibits constitute at least double hearsay for which no exception is applicable. Because the Government cannot prove that PFC Manning saw either Tweet, there could have been no effect on PFC Manning and the Exhibits do not qualify as non-hearsay. Finally, the Exhibits are not relevant, as they do not make a fact at issue more or less likely.

Prosecution Exhibits for Identification 33, 34, and 109 should also be excluded, as the Government has failed to properly authenticate the webpages contained therein. The Government has offered no testimony from anyone with personal knowledge of what the sites actually looked like. Rather, they have offered only an affidavit from an individual who merely has personal knowledge of what a third party told him the sites looked like at a particular time. As such, the Exhibits constitute hearsay. Again, because the Government has failed to offer proof that PFC Manning actually saw the websites in question, the Government should not be permitted to smuggle hearsay into this proceeding for an alleged non-hearsay purpose. As with Prosecution Exhibits for Identification 31 and 32, Prosecution Exhibits for Identification 33, 34, and 109 are not relevant. They make no fact at issue more or less likely, and, as such, should be properly excluded.



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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.



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