

IN THE UNITED STATES COAST GUARD  
COURT OF CRIMINAL APPEALS

UNITED STATES,  
Appellee

v.

Ethan W. Tucker  
Seaman (E-3)  
U.S. Coast Guard,  
Appellant

20 December 2021

APPELLANT'S SECOND MOTION TO  
ATTACH MATERIALS TO THE  
RECORD OF TRIAL, FILED  
17 SEPTEMBER 2021

CGCMG 0380

DOCKET NO. 1472

ORDER

Appellant moves to attach two additional documents to the record: (1) Appellant's Initial Post-Referral Discovery Request of 27 December 2019; and (2) Commander, Coast Guard Pacific Area's (PACAREA) response, undated, to Appellant's Freedom of Information Act (FOIA) Request dated 4 June 2021. Although not styled as such, Appellant's motion also incorporates a request for appellate discovery, seeking production of the items that were denied in his FOIA request.

The Government opposes the motion to attach, asserting it is impermissible under *United States v. Jessie*, 79 M.J. 437 (C.A.A.F. 2020), as well as irrelevant to the appellate issues before us. We disagree. Appellant has met the low burden of showing that the documents are relevant to his claim of staff judge advocate disqualification. As such—consistent with our order of 13 October 2021—we conclude that *Jessie* does not apply. Accordingly, we grant the motion to attach the two documents.

Moving to the request for production of documents, Appellant's FOIA request sought correspondence between Captain Stephen Adler, then staff judge advocate of PACAREA, the convening authority, and members of the trial team. Commander, PACAREA, acknowledged existence of 87 pages of emails, but declined to provide them. Citing 5 U.S.C. § 552(b)(5), FOIA Exemption 5, he determined that the documents qualify for protection under the deliberative process and attorney work product privileges. Appellant now asks that we order the Government to produce the emails.

Courts of Criminal Appeals have the authority to compel production of evidence, *United States v. Lewis*, 42 M.J. 1, 5 (C.A.A.F. 1995), but to do so, an appellant must first meet "his threshold burden of demonstrating that some measure of appellate inquiry is warranted." *United States v. Campbell*, 57 M.J. 134, 138 (C.A.A.F. 2002). To decide

whether an appellant has met this burden, we consider, among other things, the following:

- (1) whether the defense has made a colorable showing that the evidence or information exists;
- (2) whether the evidence or information sought was previously discoverable with due diligence;
- (3) whether the putative information is relevant to appellant's asserted claim or defense; and
- (4) whether there is a reasonable probability that the result of the proceeding would have been different if the putative information had been disclosed.

*Id.*

Even when a Court of Criminal Appeals concludes that some measure of appellate inquiry is warranted, it retains considerable discretion in determining what form that inquiry will take. *Id.*

Here, we conclude that in camera review of the emails is appropriate. First, there is no doubt that the emails exist, are already in the Government's possession, and that Appellant's efforts to obtain them were denied. Second, Appellant makes a bare showing of at least potential relevance to his asserted claims. Third, it is difficult for us to assess potential impact of the information on the present proceedings without an in camera review. Finally, "in camera review is an appropriate mechanism to resolve competing claims of privilege and right to review information." *United States v. Wright*, 75 M.J. 501, 510 (A.F. Ct. Crim. App. 2015) (citing *United States v. Zolin*, 491 U.S. 554, 569 (1989)). In sum, we will review the emails in camera to assess for ourselves whether there are relevant, non-privileged materials appropriate for post-trial discovery to Appellant.

Accordingly, on consideration of Appellant's Second Motion to Attach Materials to the Record of Trial, it is, by the Court, this 20th day of December, 2021,

ORDERED:

That Appellant's Motion to Attach is granted.

That Appellant's request for post-trial production of evidence is partially granted. The Government shall provide this Court, ex parte for the Court's in camera review, the emails between Captain Adler and the trial team referenced in the response to the FOIA request no later than 14 days from the date of this order.



For the Court,

Sarah P. Valdes  
Clerk of the Court

Copy: Office of Military Justice  
Appellate Government Counsel  
Appellate Defense Counsel