

(i) Prior to the preliminary hearing, defense counsel shall provide to counsel for the Government a list of evidence under the control of the Government the accused requests the Government produce to the defense for introduction at the preliminary hearing. The preliminary hearing officer may set a deadline by which defense requests must be received. Counsel for the Government shall respond that either (1) the Government agrees that the evidence is relevant, not cumulative, and necessary to a determination of the issues under R.C.M. 405(a) and shall make reasonable efforts to obtain the evidence; or (2) the Government objects to production of the evidence on the grounds that the evidence would be irrelevant, cumulative, or unnecessary to a determination of the issues under R.C.M. 405(a).

(ii) If the Government objects to the production of the evidence, defense counsel may request that the preliminary hearing officer determine whether the evidence should be produced. The preliminary hearing officer shall determine whether the evidence is relevant, not cumulative, and necessary to a determination of the issues under R.C.M. 405(a). If the preliminary hearing officer determines that the evidence shall be produced, counsel for the Government shall make reasonable efforts to obtain the evidence.

(iii) The preliminary hearing officer may not order the production of any privileged matters; however, when a party offers evidence that an opposing party claims is privileged, the preliminary hearing officer may rule on whether a privilege applies.

(B) *Evidence not under the control of the Government.*

(i) Evidence not under the control of the Government may be obtained through noncompulsory means or by a pre-referral investigative subpoena issued by a military judge under R.C.M. 309 or counsel for the Government in accordance with the process established by R.C.M. 703(g)(3)(C).

(ii) Prior to the preliminary hearing, defense counsel shall provide to counsel for the Government a list of evidence not under the control of the Government that the accused requests the Government obtain. The preliminary hearing officer may set a deadline by which defense requests must be received. Counsel for the Government shall respond that either (1) the Government agrees that the evidence is relevant, not cumulative, and necessary to a determination of the issues under R.C.M. 405(a) and shall issue a pre-referral investigative subpoena for the evidence; or (2) the Government objects to the production of the evidence on the grounds that the evidence would be irrelevant, cumulative, or unnecessary to a determination of the issues under R.C.M. 405(a).

(iii) If the Government objects to production of the evidence, defense counsel may request that the preliminary hearing officer determine whether the evidence should be produced. If the preliminary hearing officer determines that the evidence is relevant, not cumulative, and necessary to a determination of the issues under R.C.M. 405(a) and that the issuance of a pre-referral investigative subpoena would not cause undue delay to the preliminary hearing, the preliminary hearing officer shall direct counsel for the Government to seek a pre-referral investigative subpoena for the defense-requested evidence from a military judge in accordance with R.C.M. 309 or authorization from the general court-martial convening authority to issue an investigative subpoena. If counsel for the Government refuses or is unable to obtain an investigative subpoena, the counsel shall set forth the reasons why the investigative subpoena was not obtained in a written statement that shall be included in the preliminary hearing report under R.C.M. 405(m).