

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA

v.

KHALID SHAIKH MOHAMMAD;
WALID MUHAMMAD SALIH
MUBARAK BIN 'ATTASH;
RAMZI BINALSHIBH;
ALI ABDUL AZIZ ALI;
MUSTAFA AHMED ADAM
AL HAWSAWI

AE 394C (GOV)

Government Response
To Defense Motion to Seal AE 394(WBA).

3 May 2016

1. Timeliness

The Prosecution timely files this Response pursuant to Military Commissions Trial Judiciary Rule of Court ("R.C.") 3.7.

2. Relief Sought

The Prosecution respectfully requests that this Commission deny the Defense motion to prevent the public release of AE 394 (WBA), and consequently allow for the public release of AE 394 (WBA) pursuant to Chapters 17 and 19 of the Military Commissions Trial Judiciary Rule of Court, and the Commission's oral ruling on AE 055.

3. Burden of Proof

As the moving party, the Defense must demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1)-(2).

4. Facts

On 29 January 2013, counsel for Mr. 'Bin 'Attash, during oral arguments on AE 055, noted the burden on the parties to ensure that unclassified pleadings be made available to the public.

"...I just want to emphasize that we think it's critically important that whenever possible, the pleadings, orders by the Commission that are not classified, that

these things be made available to the public so that they can inform themselves and educate themselves about this trial.”

Unofficial/Unauthenticated Transcript, *United States v. KSM, et al*, at 1633 (January 29, 2013).

Also on 29 January 2013, the Military Judge ruled that the Government release redacted versions of classified pleadings, noting that the “government is to comply with its own regulations, specifically... Chapters 17 and 19 (of the Regulation for Trial by Military Commission), and all parties are expected to comply with the normal rules for filing motions, including classified motions.” See Unofficial/Unauthenticated Transcript, *United States v. KSM, et al*, at 1642 (January 29, 2013).

On 14 December 2015, the Defense filed AE 394 (WBA), requesting that “the Commission compel the Government to produce unredacted copies of letters from family members sent to him through the International Committee of the Red Cross and Red Crescent (“ICRC”).” The filing contained redacted copies of correspondence sent to Mr. Bin ‘Attash through the ICRC.

Upon a security review following the filing of AE 394 (WBA), the motion was released to the public. However, the attached letters, as well as names of Mr. Bin ‘Attash’s family members contained in attached discovery memoranda, were redacted in the unclassified, publicly-released version.

On 22 April 2016, the Defense filed AE 394B (WBA), requesting that this Commission enter an order sealing both the underlying filing in AE 394 (WBA), as well as “the attached letter.”

5. Law and Argument

This Commission must be conducted in an open and transparent manner. See, e.g. R.M.C. 806 (military commissions shall be publicly held). Exceptions pertain to sensitive and classified information. See 10 U.S.C. § 949d(c)(2) (the military judge may close to the public all or a portion of the proceedings *only* upon making a specific finding that such closure is necessary to protect information the disclosure of which could reasonably be expected to cause damage to the national security or ensure the physical safety of individuals) (emphasis added).

With respect to court filings, the Trial Judiciary Rules of Court (R.C.) require that all motions, responses, replies, supplemental filings, and judicial orders be released to the public, subject to any security restrictions imposed by the Department of Defense unless filed under seal, filed *ex parte*, are classified or are otherwise ordered by the Military Judge not to be released. *See* R.C. 6.3.a; *see also* R.C. 3.

The Regulation for Trial by Military Commission (R.T.M.C.) articulates the procedure for reviewing and releasing court filings. *See* R.T.M.C. 17-1; 19-1 through 19-5. Generally, all filings must undertake a security classification review within 15 business days. *See* R.T.M.C. 19-4(c)(2). After the security review, unclassified filings are forwarded to the Court Security Officer who shall provide the filing to the Chief Clerk to ensure posting of the publicly releasable filing on the Office of Military Commissions website, unless the military judge articulates some other basis for it to remain under seal, consistent with the statutes, rules and regulations governing military commissions. *See* R.T.M.C. 17-1(c)(3)-(4).

In the instant case, defense counsel has asked the Military Judge to prevent public release of AE 394 (WBA), as well as a redacted letter that is attached to the filing.¹ The Defense bases its request on the notion that AE 394 (WBA) and its attachments “contain private, personal correspondence between Mr. bin ‘Atash and his family...” AE 394 (WBA), at 1-2. The Defense further states that AE 394 (WBA) and its attachment “*may* contain confidential communications.” *Id* (emphasis added). However, the exceptional brevity of the Defense motion, combined with the fact that the Defense is the party who put this correspondence into issue, as well as the contradictory position previously argued by Mr. Bin ‘Attash’s defense team on the need for transparency in this Commission, demonstrates that the Defense has not met its burden in justifying an order sealing AE 394 (WBA).

¹ In its Relief Sought section of AE 394B (WBA), the Defense requests that this Commission enter an order sealing AE 392 (WBA). The Prosecution believes that the reference to AE 392 (WBA) is a typographical error. If the Defense intends to request an order sealing AE 392 (WBA), in addition to AE 394 (WBA), the Prosecution requests that this Commission deny the Defense motion based on the law and argument cited herein.

The Defense provides absolutely no legal analysis to support its request to seal these documents. In eschewing a substantive law and argument section, the Defense also fails to distinguish between the attachment in AE 394 (WBA) and the motion itself. Instead, the Defense tosses a general statement regarding “private, personal correspondence between Mr. bin ‘Atash and his family” and then speculates that the correspondence may or may not contain confidential correspondence. The one-sentence “law and argument” contained in AE 394B (WBA) does not provide a definitive answer to this speculation. In fact, the “law and argument” fails to even address the issue. The proposed draft order the Defense attaches includes a request for a finding that sealing is necessary to “protect privileged information from being disclosed to parties outside of the privilege.” AE 394B (WBA), Attachment B. Common sense, however, suggests that non-legal letters that were attached by the Defense to public filings about four-months ago, and which previously had been passed from and through parties outside of the privilege, are not considered to contain privileged information or maintain confidence when inserted, by the Defense, into this adversarial process.

In AE 394B (WBA), the Defense never asserts why non-legal correspondence should be considered privileged. The Defense also fails to explain how such correspondence could possibly remain “confidential” when it was the Defense who entered the correspondence into the record in AE 394 (WBA). The Defense also does not address the fact that the correspondence is already redacted from the publicly-released filing, and does not explain how obtaining a sealing order for such “personal correspondence” among family members is consistent with the statutes, rules and regulations governing military commissions. *See* R.T.M.C. 17-1(c)(3)-(4). Moreover, the Defense does not explain why it took several months to request a blanket sealing order of a legal motion and its already-redacted attachment. As such, the Commission is simply left to speculate on how a sealing order for the entire AE 394 (WBA) filing is necessary to protect information expected to cause damage to national security or ensure the physical safety of individuals. *See* 10 U.S.C. § 949d(c)(2); *see also* R.T.M.C. 17-1(c)(3)-(4).

AE394 (WBA) and its attachment should be publicly released subject to the security review, as all other ordinary unclassified filings are released, because defense counsel have not proffered a valid basis to justify that its sealing request is consistent with the statutes, rules and regulations governing military commissions. The filing is not classified, nor are there any security concerns with its release. Any concerns that may have existed were evidently rectified with the redactions to the publicly-available filing; consequently, there is no need to seal AE 394 (WBA). Defense counsel's one-sentence rationale does not meet the burden in preventing public disclosure of the filing.

6. Conclusion

The Defense request to prevent the public release of AE 394 (WBA) and its attachment should be denied. The Defense has not cited any legal authority to support why the entire filing is not suitable for public release. As such, this Commission should order the public release of 394 (WBA) in conjunction with the statutes, rules and regulations governing military commissions.

7. Oral Argument

The Prosecution does not request oral argument.

8. Witnesses and Evidence

The Prosecution will not rely on any witnesses or additional evidence in support of this motion.

9. Additional Information

The Prosecution has no additional information.

ATTACHMENT A

