

**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 396A (GOV)

Government Response
to Mr. Ali's Notice of Position On
"Pending Classification Review"

6 January 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 the Commission deny the requested relief contained within AE 396 (AAA), Mr. Ali's Notice of Position on "Pending Classification Review"; specifically, as it pertains to the Defense request that "[t]he military commission should decline any discovery or other proposal which permits a party to mark information as classified 'pending classification review' without actually submitting the information for classification review." AE 396 (AAA) at 5.

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. Law and Argument

I. The Defense Position Is Unsupported By Relevant Regulatory Authorities

As stated by the Defense, during a December 2015 session of this Military Commission, the Military Judge directed the parties to file their position pertaining to the use of the marking

“Pending Classification Review”; specifically, whether a party marking a document “Pending Classification Review” has an obligation to submit the document for classification review. *See* AE 396 (AAA) at 1. In accordance with that direction, Defense counsel for Mr. Ali filed their position, on 23 December 2015, and argued in summary that “[r]elevant regulations permit a holder of potentially classified information to tentatively classify information, but the marking person must submit it for classification review by an Original Classification Authority (OCA).” *Id.* at 1. In support of this argument, the Defense cites as its primary authority Section 1.3(e) of Executive Order 13526, which states:

[w]hen an employee, government contractor, licensee, certificate holder, or grantee of an agency who does not have original classification authority originates information believed by that person to require classification, the information shall be protected in a manner consistent with this order and its implementing directives. The information shall be transmitted promptly as provided under this order or its implementing directives to the agency that has appropriate subject matter interest and classification authority with respect to this information. That agency shall decide within 30 days whether to classify this information.

However, in stating its position, Counsel for Mr. Ali fails to provide any legal authority that explicitly supports its conclusion that “[w]hen the originator is the government, the government must submit the information for classification review.” AE 396 (AAA) at 5. The above-cited provision also does not apply in the instant case on its face, because the material at issue, based on the types of information contained therein, gave the original classification authority a reason to believe that it was likely to contain classified information, which is why it was marked as such. Further, the Defense completely fails to address the fact that Section 6.2(d) of Executive Order 13526, its primary cited authority, explicitly states that “[it] is not intended to and does not create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.” As such, where the position put forth by the Defense is not explicitly provided for under relevant statutes or regulations, and is unsupported by federal court precedent, it must be rejected.

Under the Military Commissions Act of 2009 (“M.C.A”), the Prosecution is only required to work with original classification authorities for evidence that may be used at trial to ensure that such evidence is declassified to the maximum extent possible, consistent with the requirements of national security. *See* 10 U.S.C. § 949p-1(c).¹ The Prosecution has done so throughout the pendency of these proceedings. However, none of the discovery the Prosecution has disclosed, to date, marked as “[Classified] Pending Classification Review” is discovery the Prosecution seeks to use affirmatively in its case-in-chief² or in the pre-sentencing phase of the proceedings, pursuant to the above-stated provision of the M.C.A. The discovery provided is simply discovery the Prosecution disclosed under R.M.C. 701, or upon Defense request.

II. The Prosecution Seeks To Disclose Classified Discovery to Defense Counsel Safely and Expediently

Despite implicit assertions by Defense counsel,³ Executive Order 13526 requires that “[w]hen an employee, government contractor, licensee, certificate holder, or grantee of an agency who does not have original classification authority originates information believed by that person to require classification, the information *shall* be protected in a manner consistent with [the Executive Order].” E.O. 13526 § 1.1(e) (emphasis added). As such, and in accordance with its discovery obligations, the Prosecution reserves the right to provide Defense counsel with discovery it has reason to believe is classified as “[Classified] Pending Classification Review.” The Prosecution has done so in the limited instances where, (1) an OCA has reason to believe

¹ It is also important to note that a decision not to declassify evidence under 10 U.S.C. § 949p-1(c) shall not be subject to review by a military commission or upon appeal. *Id.*

² As the Defense has already been informed, the Prosecution intends to use affirmatively certain closely-related materials, but not the materials at issue marked as “[Classified] Pending Classification Review.”

³ Within the Defense Motion, Counsel for Mr. Ali asserts the classification review process “incorporates both the presumption of non-classification and interim protection procedures: if an individual believes information should be classified, *he or she has the option* to submit it and tentatively classify it pending review.” AE 396 (AAA) at 4 (emphasis added). The Prosecution strongly rejects any theory that a person has the *option* to submit a document for classification review if he or she already believes the information should be classified. Such a position is in direct contradiction with Executive Order 13526 § 1.1(e) as well as this Commission’s *Third Amended Protective Order #1*, *see* AE 013BBBB at ¶6.k., and undermines the integrity of information believed to be vital to U.S. national security interests.

certain information within the discovery is classified; (2) it does not intend to utilize the information affirmatively in its case-in-chief; (3) the information is voluminous in nature; and, (4) expedited disclosure to Defense counsel prior to a classification review is in the interests of justice. However, in providing discovery to Defense counsel in this expedited fashion, it does so with the expectation that the Defense will seek a classification review of only the information it intends to use (if any) in the preparation of the Accused's defense utilizing the capabilities this Commission previously provided to the Defense in its *Third Amended Protective Order #1*. See AE 013BBBB at ¶ 4.d. The Prosecution posits that such process is in the best interests of justice and also better focuses U.S. Government resources to the needs of the Defense. Following this issue being raised in the December 2015 session of these proceedings, the Prosecution has sought certain classified information marked as "Pending Classification Review," while remaining classified, also be permitted to be marked as "Display Only to the Accused" so Defense counsel can review that information with their clients, which may obviate any need for the Defense to request such a classification review.

The "Pending Classification Review" banner, as currently utilized for certain classified discovery materials, was/is not intended to convey to Defense counsel, or this Commission, that such material has been or will be submitted for classification review by the Prosecution. Instead, it was meant to inform Defense counsel that the disclosed material is believed to contain classified information, and that such material should be stored, handled, and controlled in a manner appropriate with its classification marking until a classification review, pursuant to *Third Amended Protective Order #1*, can be performed on whatever document the Defense seeks to determine current classification. While Counsel for Mr. Ali may deride the classification review process provided to it by this Military Commission, see AE 013BBBB at ¶ 4.d; AE 396 (AAA) at 4 (calling it "indirect, opaque, slow, and uncertain"), the disclosure of materials of a voluminous nature to the Defense with such markings allows Defense counsel to obtain discovery in an expedited fashion and then prioritize the information which they view as material to the preparation of the defense and submit it for classification review. Providing the Defense

does not abuse the process by simply putting every piece of discovery through the classification process before determining if the information is even material to the preparation of the defense, in certain instances, such a targeted process is far more efficient and would allow the Defense to utilize information in a much more expedited manner than if the Prosecution submitted the entire batch of voluminous information it had no intention of using as evidence at trial for classification review, and then only disclose that entire batch to the Defense upon completion of that review. Such a process, therefore, is much more responsive to the needs of the Defense and better promotes the interests of justice. While Counsel for Mr. Ali may disagree with this, the position the Prosecution asserts in this instance is consistent with other federal court cases handling similar classified information.

III. The Prosecution's Position is Supported by Federal Court Precedent Cited by the Defense

In *Bismullah v. Gates*, 501 F.3d 178 (D.C. Cir. 2007), a case the Defense cites to favorably, the D.C. Circuit Court of Appeals issued a protective order “upon the parties’ motions for a protective order to prevent the unauthorized disclosure or dissemination of classified national security information and other protected information that may be reviewed by, made available to, or [was] otherwise in the possession of, the Petitioner or Petitioner’s Counsel” 501 F.3d at 194. Within its protective order, the D.C. Circuit established certain procedures for filing documents with the Court, one of which specified that certain documents must be marked “Pending Classification Review” by petitioner’s counsel and for which the Government was required to secure a classification review of those documents. *See* 501 F.3d at 202. However, while Defense counsel is quick to make note of this fact, *see* AE 396 (AAA) at 5, it misapplies that requirement to the issue now before this Military Commission.

In *Bismullah*, the D.C. Circuit specified that “[u]ntil further order of this court, any pleading or other document filed by Petitioner that Petitioner’s Counsel *does not believe contains classified information* must be marked ‘Pending Classification Review,’” 501 F.3d at 202 (emphasis added) and that Counsel for the Government was required to secure a classification

review. However, the D.C. Circuit also specified that, “[a]ny pleading or other document filed by Petitioner that *Petitioner’s Counsel knows to be classified, believes may be classified, or is unsure of the proper classification*, must be filed under seal with the CSO,” who must “promptly examine the pleading or other document and forward it to the appropriate government agencies and departments for their determination as to whether the pleading or other document contains classified information.” *Id.* at 202-203 (emphasis added).

Here, in providing the discovery as “[Classified] Pending Classification Review,” the process is similar to that specified by the D.C. Circuit Court of Appeals for petitioner’s counsel in *Bismullah*. As in that case, the Defense have been provided with classified discovery that it knows to be classified, believes may be classified or is unsure of the proper classification. In such an instance, as in *Bismullah*, the Prosecution asserts that the Defense should utilize the classification review process this Commission previously established to determine the correct classification of information provided through the discovery process that is of interest to the Defense. Where this Commission has previously established “[t]o the extent the Defense is not certain of the classification of information it wishes to disclose, *the Defense* shall follow procedures established by the Office of Military Commissions for a determination as to its classification,” AE 013BBBB at ¶6.k (emphasis added), and has judicially provided for such process, *see id.* at ¶4.d., the Defense should be obligated to use the process to the extent they seek further classification review of the items of interest to them.

5. Conclusion

The “Pending Classification Review” banner, as currently utilized in certain classified discovery materials, was/is not intended to convey to Defense counsel, or this Commission, that such material has been or will be submitted for classification review by the Prosecution. Instead, it is meant to inform Defense counsel that the disclosed material is believed to contain classified information and that such material should be stored, handled, and controlled in a manner appropriate with its current classification marking until an appropriate Original Classification

Authority can review it for classification purposes. Where the Commission has previously provided for a process that enables the Defense to seek a classification review of information it receives, and the process is both in the best interests of justice and provides better focus of U.S. Government resources to the needs of the Defense, this Commission should find that in the limited circumstances that the Prosecution seeks to utilize the “[Classified] Pending Classification Review” banner, it is not prohibited from doing so by Executive Order 13526 or any existing law.

6. Oral Argument

The Prosecution does not request oral argument. Further, the Prosecution strongly posits that this Commission should dispense with oral argument as the facts and legal contentions are adequately presented in the material now before the Commission and argument would not add to the decisional process. However, if the Military Commission decides to grant oral argument to the Defense on its notice, the Prosecution requests an opportunity to respond.

7. Witnesses and Evidence

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

8. Additional Information

The Prosecution has no additional information.

Attachment A

