

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA v. ABD AL HADI AL-IRAQI	AE013A Defense Response To Government Motion to Protect Against Disclosure of National Security Information 18 July 2014
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1. Timeliness

This Motion is timely filed pursuant to Rule for Military Commission (R.M.C.) 905(b) and Military Commissions Trial Judiciary Rule of Court (R.C.) 3.7.

2. Relief Sought

The Defense objects to several provisions in the Government's proposed protective order #3, AE013 Attachment E and requests changes to those provisions prior to the issuance of a protective order #3. Specifically:

Paragraph	Current Language	Proposed Revision
II(g)(4)(c)	Information that would reveal or tend to reveal the names, identities, and physical descriptions of any persons involved with the capture, transfer, detention, or interrogation of the Accused or specific dates regarding the same, from the time he entered U.S. custody through 27 April 2007	Information that would reveal or tend to reveal the names, identities, and physical descriptions of any persons involved with the capture, transfer, detention, or enhanced interrogation of the Accused or specific dates regarding the same, from the time he entered U.S. custody through 27 April 2007
II(g)(4)(d)	Information that refers or relates to the interrogation techniques that were applied to the Accused from the time he entered U.S. custody through 27 April 2007, including descriptions of the techniques as applied, the duration, frequency, sequencing, and limitations of those techniques	Information that refers or relates to the enhanced interrogation techniques that were applied to the Accused from the time he entered U.S. custody through 27 April 2007, including descriptions of the techniques as applied, the duration, frequency, sequencing, and limitations of those techniques

II(k)	Unauthorized disclosure of classified information” means any knowing, willful, or negligent action that could reasonably be expected to result in a communication or physical transfer of classified information to an unauthorized recipient. Confirming or denying information, including its very existence, constitutes disclosing that information.	Unauthorized disclosure of classified information” means any knowing, willful, or negligent action that could reasonably be expected to result in a communication or physical transfer of classified information to an unauthorized recipient. Confirming or denying information, where the very existence of the information is classified, constitutes disclosing that information.
V(a)(3)	a need-to-know for the classified information at issue, as determined by the Original Classification Authority (OCA) for that information.	a need-to-know for the classified information at issue.

In addition, the Defense objects to the limitations in paragraph II(g)(5) as being overbroad, in that the Government cannot classify the observations and experiences of the Accused.

3. **Burden of Proof**

Because this motion presents a pure question of law, there is no burden of proof.

4. **Law and Argument**

Paragraph 2(k) states that, “Confirming or denying information, including its very existence, constitutes disclosing that information.” Under established law, confirming the existence of information as opposed to the actual information constitutes disclosure only if the very existence of the information is classified. The military commission should revise paragraph 2(k) by amending the phrase “including its very existence” to “where the very existence of the information is classified.”

The origin of the “existence” language is the so-called *Glomar* doctrine, which allows an agency responding to a FOIA request to refuse to confirm or deny the fact of records’ existence or nonexistence, if that fact itself is classified.¹ President Obama’s Executive Order 13526 incorporated this doctrine, providing that, “An agency may refuse to confirm or deny the

¹ See, e.g., *Larson v. Dep’t of State*, 565 F.3d 857, 861 (D.C. Cir. 2009); *Phillippi v. CIA*, 546 F.2d 1009, 1011 (D.C. Cir. 1976) (addressing the existence of records regarding a ship named *Hughes Glomar Explorer*).

existence or nonexistence of requested records whenever the fact of their existence or non-existence is itself classified under this order or its predecessors.”²

The *Glomar* doctrine applies only when the fact of the records' existence or non-existence, as opposed to the records' contents, is itself classified. For example, an agency is prohibited from providing a *Glomar* response if the United States has already acknowledged the existence of the information.³ Unless the existence of information is classified, confirming the existence or non-existence of the information is not disclosure of classified information. The statement in Paragraph 2(k) that confirming the existence of information constitutes disclosure is simply wrong. For example, the United States has officially and publicly declassified the existence of a CIA program to detain and interrogate suspected terrorists at sites abroad.⁴ The United States has acknowledged that the Accused was detained by the CIA prior to his transfer to Guantanamo Bay.⁵ The United States has not declassified the location of the foreign sites. If counsel states that “the location of a defendant's detention is classified,” for example, counsel has not disclosed classified information because the United States has already acknowledged the fact that the Accused was detained. Yet Paragraph 2(k) would define this statement, which confirms the existence of information regarding detention, as the “unauthorized disclosure of classified information,” implicating the punitive provisions in Paragraph 9. The military commission should address this error by amending Paragraph 2(k).

Paragraph V(a)(3) states that no member of the Defense, including defense witnesses, shall have access to classified information in connection with this case unless that person has “a need-to-know for the classified information at issue, as determined by the Original Classification Authority (OCA) for that information” The defense objects to the inclusion of the “as determined by the Original Classification Authority (OCA) for that information” language as we believe that does not accurately state the rule. Our understanding is that the OCA sets the classification level, but does not specifically determine who has a need to know, unless the information is further designated as ORCON.

² See E.O. 13526 § 3.6(a), “Classified National Security Information,” 75 Fed. Reg. 707 (Jan. 5, 2010)

³ See, e.g., *Wolf v. CIA*, 473 F.3d 370,239-40 (D.C. Cir. 2007); *Wilner v. NSA*, 592 F.3d 60, 69 (2d Cir. 2009).

⁴ Central Intelligence Agency Inspector General, Special Review: Counterterrorism Detention and Interrogation Activities at 1 (May 7, 2004).

⁵ Department of Defense News Release No:494-07, 27 April 2007
<http://www.defense.gov/releases/release.aspx?releaseid=10792>

Paragraph II(g)(5) includes in the definition of “classified national security information and/or documents,” “classified information,” and “classified documents” “any information which includes, without limitation, observations and experiences of the Accused with respect to the matters set forth in subparagraphs II.g.(4)(a)-(e)” Executive Order 13526 § 1.1(a)(2) prohibits the government from classifying the observations and experiences of the Accused because the government does not own, control, or produce his observations and experiences.

In *United States v. Pappas*, the Second Circuit held that, “[T]he scope of CIPA prohibitions on a defendant's disclosure of classified information may be summarized as follows: information conveyed by the Government to the defendant in the course of pretrial discovery or the presentation of the Government’s case may be prohibited from disclosure, including disclosure outside the courtroom, but information acquired by the defendant prior to the criminal prosecution may be prohibited from disclosure only “in connection with the trial” and not outside the trial.”⁶

In *Pappas* and two other cases⁷, federal courts have held that CIPA only regulates information disclosed by the government during litigation, not information obtained prior to litigation. These cases held that if the government could prohibit public disclosure, it had to do so on the basis of the contracts with the defendants.⁸ The Accused is under no contractual obligations with the United States.

5. Request for Oral Argument

The Defense requests oral argument.

6. Witnesses

None.

⁶ *United States v. Pappas*, 94 F.3d 795, 801 (2d Cir. 1996).

⁷ *United States v. Oakley*, 2008 U.S. Dist LEXIS 78721, *4-*7 (E.D. Tenn. Oct. 8, 2008); *United States v. Chalmers*, 2007 U.S. Dist. LEXIS 13640 (S.D.N.Y. Feb. 27, 2007).

⁸ *Oakley*, 2008 U.S. LEXIS 78721, at *7 (“If the defendant is under any other legal or contractual obligations to ensure the confidentiality of the information at issue, those obligations still bind him.”); *Chalmers*, 2007 U.S. Dist LEXIS, at *5 (“This ruling does not, however, release Wyatt from any contractual or other legal obligations imposed when he first acquired such information.”); *Pappas*, 94 F.3d at 801 (“Though the prohibition of public disclosure of previously acquired information may not be supported under CIPA, it may nevertheless be supported under ordinary principles of contract law.”)

7. Attachments

A. Certificate of Service, dated 18 July 2014

Respectfully Submitted,

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ATTACHMENT A

