

Office of the Presiding Officer
Military Commission

October 4, 2004

SUBJECT: Presiding Officers Memorandum (POM) # 9 - Obtaining Protective Orders and Requests for Limited Disclosure

1. This POM addresses Protective Orders and Limited Disclosure pursuant to Section 6D(5), Military Commission Order No. 1. Whether a Protective Order is granted or disclosure is limited is a decision for the Presiding Officer without involvement of other Commission members. See Section 5, Military Commission Instruction # 8 dated 31 August 2004.

2. **Protective Orders - generally.** As soon as practicable, counsel for either side will notify the Presiding Officer of any intent to offer evidence involving Protected Information. When counsel are aware that a Protective Order is necessary, they are encouraged to work with opposing counsel on the wording and necessity of such an order.

3. **When counsel agree to a Protective Order.** Counsel may agree - in writing - that a Protective Order is necessary. In such instances, it is unnecessary to involve the Presiding Officer or the Assistant while counsel work these issues. When counsel agree that a Protective Order is necessary, the counsel requesting the order shall present the order to the Presiding Officer for approval and signature along with those necessary representations that opposing counsel does not object. This may be done by email, or if during the course of a Commission session, in writing.

4. **When counsel do not agree to a Protective Order.** If a party requests a Protective Order and the opposing counsel does not agree with the necessity of the Order or its wording, the counsel requesting the Order shall:

a. Present the requested order to the Presiding Officer for signature along with the below information in writing. The below information may be transmitted in any format convenient to include in the body of an email:

(1). Why the order is necessary.

(2). Efforts to obtain the agreement of opposing counsel.

b. The requesting counsel will CC or otherwise provide copies of the requested information to opposing counsel unless Commission law permits the matter to come to the Presiding Officer's attention *ex parte*. In the case of a prosecution requested Protective Order, only the detailed defense counsel must always be served. The Civilian Defense Counsel will be served if they are allowed access to the information sought to be protected. Foreign Attorney Consultants shall not be served unless they are authorized under Commission Law to receive the items.

c. The Presiding Officer will, if time and distance permits, hold a conference with Prosecution counsel and the Detailed Defense Counsel, and if under circumstances that Commission Law permits, the Detailed civilian counsel, prior to signing a contested protective order. The objective of such conferences will be to have a contested protective order become an agreed upon protective order, consistent with security and other requirements, if possible and practical. Consequently, both sides will be prepared to explain their position on the proposed order.

5. Limited disclosure requests. When the prosecution requests that the Presiding Officer exercise his authority under Section 6D(5)(b), Military Commission Order No. 1, the prosecution shall provide to the Presiding Officer the following materials. An Order for the Presiding Officer's signature directing limited disclosure that contains the following information:

a. To whom the limitation shall apply (the accused, detailed defense counsel, civilian defense counsel.)

b. The method in which the limitation shall be implemented (which option under section 6D(5)(b)(i)-(iii)).

c. In the case of a limitation under section 6D(5)(b)(i), the information to be deleted.

d. In the case of a limitation under section 6D(5)(b)(ii), the nature of the information to be summarized and the summary to be substituted therefore.

e. In the case of a limitation under section 6D(5)(b)(iii), the nature of the information to be substituted, and the statement of the relevant facts that the limited information would tend to prove.

f. The reasons why it is necessary to limit disclosure of the information, and whether other methods of protecting information could be fashioned to avoid unnecessarily limiting disclosure.

g. Whether the prosecution intends to present the information whose disclosure is sought to be limited to the Commission.

h. If the request to the Presiding Officer was served on, or shared with, the detailed defense counsel, any submission by the detailed defense counsel. If the request was not served on or shared with the detailed defense counsel, the reasons why it was not.

Signed by:

Peter E. Brownback III
COL, JA, USA
Presiding Officer