

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

**UNITED STATES OF AMERICA**

v.

**KHALID SHAIKH MOHAMMAD,  
WALID MUHAMMAD SALIH  
MUBARAK BIN ‘ATTASH,  
RAMZI BIN AL SHIBH,  
ALI ABDUL AZIZ ALI,  
MUSTAFA AHMED ADAM AL  
HAWSAWI**

**AE 18MMMMM (MAH)**

**Defense Motion to Adopt  
Conforming Amendments to  
AE 18U (Second Amended)**

**Filed: 27 March 2019**

1. **Timeliness:** This Motion is timely filed.
2. **Relief Requested:** The Defense requests that the language in the Privileged Written Communications Order, AE 18U Second Amended (1 Aug 2018), be amended to conform to the Commission’s Order in AE18DDDDDD (1 Feb 2017), which, by consent of the parties, removed the requirement that Controlled Unclassified and Sensitive filings and discovery be identified as releasable to the Accused. The parties agree that such materials are releasable to the Accused, unless the Prosecution specifically marks them as “Not Releasable to” the Accused. A Proposed Order is attached hereto. *See* Attachment B.
3. **Burden:** As the moving party, on this motion the Defense has the burdens of proof and persuasion. R.M.C. 905(c).
4. **Facts:**
  - a. In 2013, this Commission issued an updated Privileged Written Communications Order, AE 18U, design to govern the written communications between the accused in this case and their respective defense teams.

b. In 2017, that Order was amended following the parties' agreement to certain changes to the Order.<sup>1</sup> However, neither the resulting Amended Order, nor a later, Second Amended Order, fully implemented an agreed-upon change regarding the marking requirements for "Other Case Related Material," including markings on filings and discovery. Specifically in AE 18DDDDDD, by agreement of the parties, the Commission removed the requirement that the prosecution had to affirmatively mark pleadings and discovery material as "Releasable to the Accused."<sup>2</sup>

c. The Second Amended Order (AE 18U) now in effect, however, under the requirements for handling "Other Case Related Material,"<sup>3</sup> still includes language indicating that certain filings and discovery going from Defense Counsel to the Accused must be marked as "releasable to the Accused."<sup>4</sup>

d. As a result of this lingering language in Order AE 18U (Second Amended), and notwithstanding the agreed upon changes adopted in 2017 in AE 18DDDDDD, the Privilege Team (which reviews the markings on all communications going into Mr. al Hawsawi or his co-accused, for compliance with AE 18U) continues to require "releasable to" markings on Sensitive or Controlled Unclassified filings and discovery sent to Mr. al Hawsawi.<sup>5</sup> Imposition

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<sup>1</sup> See AE 18DDDDDD, Second Interim Order, 1 February 2017; AE 18U, Amended Order (14 Jun 2017).

<sup>2</sup> See AE 18DDDDDD at para. 2(b) (deleting paragraph 3(e)(3) of the original Communication Order, 18U, under which the prosecution was marking all unclassified or FOUO pleadings as "Releasable to the Accused.").

<sup>3</sup> See AE 18U (Second Amended), "Defense Handling and Marking of Material," "Other Case-Related Material," paragraph 3(f).

<sup>4</sup> See 18U, Second Amended, at 2(g)(1) (defining the meaning of "Other Case Related Material," and specifying "This include discovery and related material that *is releasable to the Accused*, and records of commission proceedings, including court filings *when releasable to the Accused*.")

<sup>5</sup> The matter arose recently regarding a filing which included an attachment classified as "For Official Use Only." See AE 619R (MAH). The Prosecution addressed the issue and its position,

of this obsolete requirement is causing administrative challenges and delays in getting communications to Mr. al Hawsawi.

5. **Argument:**

The Defense requests that AE 18U, Second Amended Order, be changed to conform to the amendment the Commission adopted in February 2017, in AE 18DDDDDD, which deleted the requirement for the prosecution to place “releasable to” markings on discovery and filings being sent to Mr. al Hawsawi and his co-accused.

Because of the conflicting language between the change adopted in 2017, and the wording still contained in the current AE 18U, there have been delays in sending FOUO pleadings to Mr. al Hawsawi. The Defense has had to request that the prosecution mark such pleadings as “releasable to Mr. al Hawsawi,” despite the fact that this requirement should no longer exist, per the Commission and the parties’ 2017 agreement.

Specifically, the parties move for paragraph 2(g)(1) (Definitions, “Other Case-Related Materials”) be amended, as described in the attached Proposed Order.

The amendments in the Proposed Order at Attachment B merely seek to conform AE 18U to the agreed-upon change which this Commission adopted in 2017, in 18DDDDDD.

6. **Conference:** The Defense conferred with the Prosecution regarding this motion and the attached Proposed Order, and the prosecution does not oppose the motion and Proposed Order.

7. **Attachments:**

- A. Certificate of Service;
- B. Proposed Order amending AE 18U, Privileged Written Communications Order (Second Amended).

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in AE 619T (GOV).

//s//

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WALTER B. RUIZ  
Learned Counsel for  
Mr. al Hawsawi

//s//

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JENNIFER N. WILLIAMS  
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Detailed Defense Counsel for  
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//s//

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SEAN M. GLEASON  
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SUZANNE M. LACHELIER  
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//s//

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DAVID D. FURRY  
LCDR, JAGC, USN  
Detailed Defense Counsel for  
Mr. al Hawsawi

**A**

**CERTIFICATE OF SERVICE**

I certify that on the 27th day of March 2019, I electronically filed **AE 18MMMMM (MAH) - Defense Motion to Adopt Conforming Amendments to AE 18U (Second Amended)** with the Clerk of the Court and all the counsel of record by e-mail.

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//s//  
WALTER B. RUIZ  
Learned Counsel for Mr. Hawsawi

**B**

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**AE 018\_\_\_ [PROPOSED] Order**

**Privileged Written Communications**

\_\_\_ **March 2019**

1. This Commission issued AE 18DDDDD on 1 February 2017, implementing changes to the Commission’s Privileged Written Communications Order, AE 18U.
2. To conform AE 18U to the changes adopted in AE 18DDDDD, the Commission hereby orders the following amendments to AE 18U (Second Amended), which was filed on 1 August 2018:
  - a. Paragraph 2(g)(1) (Definitions, “Other Case-Related Material”):
    - i. Delete the sentence: “This includes discovery and related material that is releasable to the Accused, and records of commission proceedings, including court filings when releasable to the Accused.”
    - ii. Replace the above deleted sentence with “This includes discovery and related material,’ and records of commission proceedings, including court filings. Court filings may be



provided to the Accused including those marked as FOUO, unless they are specifically marked 'Not Releasable to the Accused.'”

So **ORDERED** this \_\_\_\_ day of March 2019.

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K. A. PARRELLA  
Colonel, U.S. Marine Corps  
Military Judge

DRAFT ORDER/MAH/26/03/19