

UNCLASSIFIED//FOR PUBLIC RELEASE  
MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA

<b>UNITED STATES OF AMERICA</b>  <b>v.</b>  <b>KHALID SHAIKH MOHAMMAD; WALID MUHAMMAD SALIH MUBARAK BIN ‘ATTASH; RAMZI BIN AL SHIBH; ALI ABDUL AZIZ ALI; MUSTAFA AHMED ADAM AL HAWSAWI</b>	<b>AE 523M</b>  <b>RULING</b>  <b>Defense Access to Current and Former Joint Task Force-Guantanamo Medical Providers</b>  <b>2 April 2019</b>
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**1. Procedural History.**

- a. On 17 August 2018, the Commission ordered the following:

Unless the Government invokes a privilege under M.C.R.E. 505 or 506, the Government will provide the Defense with the names, military email addresses, and military telephone numbers for all persons identified by pseudonym in the Accuseds’ medical records provided in discovery. If the Government cannot locate the identifying information for any of these individuals it will notify the Commission. The Government will (1) invoke a privilege under M.C.R.E. 505 or 506, or (2) provide the identifying information to the Defense, or (3) otherwise notify the Commission it cannot locate the identifying information, not later than 90 days from the issuance of this Order.<sup>1</sup>

b. On 12 November 2018, the Government filed an *ex parte* motion<sup>2</sup> requesting the Commission issue a protective order and provide other relief pursuant to Military Commission Rules of Evidence (M.C.R.E.) 505 and 506 to protect the classified and government information implicated by the Commission’s Order. Specifically, the Government asserted that any information that identifies a current or former JTF-GTMO medical provider and then associates that provider with a detainee is classified (*See* M.C.R.E. 505); any information that identifies a

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<sup>1</sup> AE 523J Order, Mr. al Baluchi’s Motion to Compel Production of Identities of Witnesses Referred to by Pseudonym in Discovery, dated 17 August 2018.

<sup>2</sup> AE 523K (GOV), Government Motion Invoking Privilege and Seeking Protective Order and Other Relief under M.C.R.E. 505 and M.C.R.E. 506 in Response to AE 523J (Order), filed 12 November 2018.

current or former JTF-GTMO medical provider but does not associate that provider with a detainee is government information privileged from disclosure to the Accused or the public. (*See* M.C.R.E. 506).

c. The Commission examined the Government's *ex parte* motion in camera. The motion requested the Commission:

(1) Maintain, under seal, all true names and contact information of current and former Joint Task Force-Guantanamo (JTF-GTMO) personnel who are identified by pseudonym in an Accused's medical records, and which are shared with cleared Defense team members and the Commission;

(2) Direct the parties to use unique medical-record identifiers (UMIs) (assigned by the Government and submitted to the Commission in AE 523K (GOV), Attach. C) in place of true names for such medical providers in all future commission-related filings, commission proceedings, attorney notes, and client discussions;

(3) Approve the UMI substitutions as adequate and in compliance with the Government's discovery obligations under applicable law and the Commission's Order; and

(4) Authorize the Government to relay the advisement of rights and responsibilities (Advisement) (submitted to the Commission in AE 523K (GOV), Attach. D) to JTF-GTMO personnel before releasing their true names or contact information to cleared Defense team members.<sup>3</sup>

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<sup>3</sup> In AE 523K (GOV), the Government informed the Commission of additional information investigators used in their efforts to locate and verify the contact information of medical providers subject to the Commission's Order in AE 523J. The Commission has reviewed this related document, consisting of a letter from Admiral Kurt W. Tidd, U.S. Navy, (former) Commander, U.S. Southern Command, dated 19 October 2018.

d. The Commission examined the material in AE 523K (GOV), including the underlying classified information, the Government's proposed substitutions, and the Government-proposed Advisement.

e. In examining the underlying classified intelligence information and the Government-proposed substitutions, the Commission considered theories of defense<sup>4</sup> advanced by Counsel for Messrs. Ali,<sup>5</sup> bin 'Attash,<sup>6</sup> and Hawsawi.<sup>7</sup>

## 2. Law.

### a. *Discovery of, and Access to, Classified Information by the Accused.*

(1) Before the Government may request to "delete, withhold, or otherwise obtain other relief with respect to the discovery of or access to any classified information," the Government must provide the Commission a declaration invoking the United States' classified information privilege and setting forth the damage to national security the discovery of, or access to, such classified information reasonably could be expected to cause.<sup>8</sup> This declaration must be signed by a "knowledgeable United States official possessing authority to classify information."<sup>9</sup>

(2) The M.C.A. empowers the military judge to then authorize the Government to:

(1) "delete or withhold specified items of classified information;" (2) "substitute a summary for

<sup>4</sup> AE 156C Order, Government's *Ex Parte, In Camera* Motion and Memorandum for Second Protective Order Pursuant to M.C.A., 10 U.S.C. § 949p-4, and M.C.R.E. 505, dated 8 May 2013.

<sup>5</sup> AE 156F (AAA), Defense *Ex Parte* Response to AE 156C Order, filed 22 May 2013.

<sup>6</sup> AE 275 (WBA), *Ex Parte and Under Seal* Mr. bin 'Attash's Notice of Reasons Supporting the Release to Defense Counsel of Classified Information Material to the Preparation of the Defense, filed 7 February 2014; supplanted by AE 275C (WBA), *Ex Parte and Under Seal* Mr. bin 'Atash's Notice of Reasons Supporting the Release to Defense Counsel of Classified Information Material to the Preparation of the Defense, filed 1 June 2015 and AE 275C (WBA SUP), *Ex Parte and Under Seal* Mr. bin 'Atash's Notice of Reasons Supporting the Release of Classified Information Material to the Preparation of the Defense, filed 10 June 2016.

<sup>7</sup> AE 156O (MAH), Mr. Hawsawi's *Ex Parte and Under Seal* Response to Order AE 156C/AE 073C/AE 156-2, Requesting Theories of Defense, filed 2 May 2014; AE 156O (MAH Sup), Supplement to Mr. al Hawsawi's *Ex Parte and Under Seal* Response to Order 156C/AE 073C/AE 156-2, Requesting Theories of Defense, filed 2 March 2015.

<sup>8</sup> 10 U.S.C. § 949p-4(a)(1); *see also* M.C.R.E. 505(f)(1)(A).

<sup>9</sup> *Id.*

classified information;” or (3) “substitute a statement admitting relevant facts that the classified information or material would tend to prove.”<sup>10</sup>

(3) The M.C.A. requires the Commission grant a Government request to substitute a summary or a statement admitting relevant facts “if the military judge finds that the summary, statement, or other relief would provide the accused with substantially the same ability to make a defense as would discovery of or access to the specific classified information.”<sup>11</sup>

(4) However, “[u]pon any determination by the military judge authorizing the disclosure of specific classified information under the[se] procedures . . . , the trial counsel may move that, in lieu of the disclosure of such specific classified information, the military judge order . . . any other procedure or redaction limiting the disclosure of specific classified information.”<sup>12</sup>

*b. Protective Orders.*

(1) “Upon motion of the trial counsel, the military judge shall issue an order to protect against the disclosure of any classified information that has been disclosed by the United States to any accused or counsel . . . .”<sup>13</sup>

(2) “The terms of any such protective order may include, among other things, provisions: (A) Prohibiting the disclosure of the information except as authorized by the military judge; (B) Requiring storage of material in a manner appropriate for the level of classification assigned to the documents to be disclosed;”<sup>14</sup> and “(F) Regulating the making and handling of notes taken from material containing classified information . . . .”<sup>15</sup>

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<sup>10</sup> 10 U.S.C. § 949p-4(b)(1)(A-C); *see also* M.C.R.E. 505(f)(2).

<sup>11</sup> M.C.R.E. 505(f)(2)(C).

<sup>12</sup> 10 U.S.C. § 949p-6(d)(1)(C); *see also* M.C.R.E. 505(h)(4)(A)(iii).

<sup>13</sup> 10 U.S.C. § 949p-3; *see also* M.C.R.E. 505(e).

<sup>14</sup> M.C.R.E. 505(e)(1)(A-B).

<sup>15</sup> M.C.R.E. 505(e)(1)(F).

c. *Government Information Privileged from Disclosure (M.C.R.E. 506).*

(1) “Except where disclosure is required by an Act of Congress, government information is privileged from disclosure if disclosure would be detrimental to public interest.”<sup>16</sup>

(2) “‘Government information’ includes official communication and documents and other non-classified information within the custody or control of the Federal Government.”<sup>17</sup>

(3) “The privilege may be claimed by the head of the executive or military department or government agency concerned.”<sup>18</sup>

(4) “If the government agrees to disclose government information to the defense subsequent to a claim of privilege under this rule, the military judge, at the request of the government, shall enter an appropriate protective order to guard against the compromise of the information disclosed to the defense.”<sup>19</sup>

(5) “The defense may not disclose any information known or believed to be subject to a claim of privilege under this rule unless the military judge authorizes such disclosure.”<sup>20</sup>

d. *Access to Witnesses.* R.M.C. 701(j) states that “[e]ach party shall have adequate opportunity to prepare its case and no party may unreasonably impede the access of another party to a witness or evidence.”

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<sup>16</sup> M.C.R.E. 506(a).

<sup>17</sup> M.C.R.E. 506(b).

<sup>18</sup> M.C.R.E. 506(c).

<sup>19</sup> M.C.R.E. 506(g).

<sup>20</sup> M.C.R.E. 506(h).

### 3. Findings.

a. In AE 523K (GOV), the Government provided the Commission with several attachments, and incorporated by reference evidence contained in prior filings, as well as witness testimony taken during previous sessions of the Commission.

b. The Government attached a signed declaration (523K (GOV), Attach. B)) and incorporated a declaration by reference.<sup>21</sup> These declarations properly invoke the United States' classified (M.C.R.E. 505) and sensitive information (M.C.R.E. 506) privileges and set forth the damages to national security and the public interest that discovery of, or access to, the underlying classified and sensitive information reasonably could be expected to cause.<sup>22</sup>

c. The declarations were signed by knowledgeable United States officials possessing the authority to classify information.<sup>23</sup>

d. The true names and contact information for current and former JTF-GTMO medical providers associated with detainee care (hereafter, "medical providers") constitutes classified and sensitive government information privileged from disclosure to the public and the Accused. The true names will be disclosed to cleared Defense Counsel.

e. The evidence offered by the Government in support of its motion proves a real and substantive threat to the safety and well-being of medical providers, should their true names or contact information be disclosed to detainees or the public. This threat extends to the family members of those medical providers. Furthermore, the threat is persistent and unlikely to abate over the course of this litigation.

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<sup>21</sup> *Citing* AE 014 (GOV), Attachment B, Declaration of General Douglas M. Fraser, Commander of U.S. Southern Command, dated 24 October 2011 (filed in camera and under seal).

<sup>22</sup> *See* 10 U.S.C. §§ 949p-4(a)(1) and 949p-6(d)(4); *see also* M.C.R.E. 506(c).

<sup>23</sup> *Id.*

f. The Government's proposed substitutions of UMIs in place of true names for current and former JTF-GTMO personnel identified by pseudonym in the Accused's medical records are an adequate alternative to discovery of that classified information to the Accused.

g. The disclosure of all known true names and contact information for current and former JTF-GTMO medical providers associated with detainee care, given only to cleared Defense team members via sealed and classified discovery, will provide the Accused with substantially the same ability to make a defense as would the Accused's direct access to the underlying classified information.<sup>24</sup>

h. In instances where the parties hold names or contact information of medical providers in such a way that they are *not* associated with any detainee, the use of additional administrative protective measures is necessary. The additional administrative protective measures will protect the identities and prevent the accidental disclosure of government information privileged from disclosure.

i. Current and former JTF-GTMO medical providers associated with detainee care are potential witnesses who possess knowledge of classified and sensitive official government information belonging to the Department of Defense and have signed non-disclosure agreements. These potential witnesses learned this classified and sensitive information in the course of their official duties. The Government retains an important interest in maintaining control over the disclosure of such information, and will be afforded an opportunity to advise these current and former government employees of their rights and responsibilities as potential witnesses and holders of classified and sensitive official information prior to disclosure to the Defense.

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<sup>24</sup> See 10 U.S.C. §§ 949p-4(b)(3) and 949p-6(d)(2).

j. The Commission examined the Government's proposed Advisement and has modified the Advisement to prevent any inadvertent appearance that it was either encouraging or dissuading witness participation. (Modified Advisement) (*See* Attach. A of this Ruling).

k. Informing the potential witnesses of rights and responsibilities, as contained in the Commission's Modified Advisement, appropriately protects the flow of classified and sensitive information without unreasonably impeding Defense access to witnesses or evidence.<sup>25</sup>

l. The classified disclosure of identifying medical personnel information, the assignment and use of UMIs, and the advisement of potential witnesses in accordance with the Modified Advisement, will give the parties an adequate opportunity to prepare their cases.

4. **Ruling.** Having considered the Government's motion, proposed substitutions, the theories of defense, and any materials that may be incorporated by reference or otherwise attached, the Commission rules that AE 523K (Gov) is **GRANTED IN PART** as provided in this paragraph.

a. The Government may assign UMIs to all JTF-GTMO personnel associated with the Accused's medical records. The assigned UMIs will be used in place of true names in all future unclassified commission filings, commission proceedings, and during client discussions.

b. The Commission authorizes the Government to convey the rights and responsibilities, as articulated in the Modified Advisement, to current and former JTF-GTMO medical providers associated with detainee care.

c. Within 21 days after being afforded an opportunity to convey the rights and responsibilities (as articulated in the Modified Advisement) to a current or former JTF-GTMO individual associated with an Accused's medical records, the Government is ordered to produce that individual's true name and contact information to the Defense in a classified spreadsheet,

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<sup>25</sup> *See* R.M.C. 701(j).



along with the assigned UMI. The classified spreadsheet will be handled in accordance with Protective Order #1 and is ordered to be sealed.

d. This order does not abrogate the Government's continuing obligation to produce discovery required by the Rules for Military Commission.

e. With the exception of the Modified Advisement found at Attach. A of this ruling, this Commission seals and preserves the Government's entire *ex parte*, in camera presentation (including the Government's motion, the underlying classified information, the proposed substitutions, and any other attachments, including any attachments that may be incorporated by reference) in the records of this Commission to be made available to an appellate court in the event of an appeal.

f. This Ruling shall be read in consonance with Protective Order #5.<sup>26</sup>

So **ORDERED** this 2nd day of April, 2019.

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

Attachment:  
A. Modified Advisement

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<sup>26</sup> AE 523L, Protective Order #5, dated 2 April 2019.

# Attachment A

Advisement Email of Rights and Responsibilities for Potential Witnesses Identified by Pseudonym in Accused Medical Records

Dear Sir or Ma'am,

The Military Judge in *United States v. Khalid Shaikh Mohammad, et al.* (the "9/11 case"), has approved the below advisement and classification guidance so you can understand your rights and responsibilities as a potential witness regarding your medical care and observations of the Accused, as well as the use of a four digit, "unique medical-record identifier" (UMI) that you have been assigned that will substitute for your true identity.

The Government is committed to seeking to protect your true name and contact information, and to preventing their disclosure to the Accused or the general public, consistent with the lawful proceedings of military commissions. Following this communication, defense counsel possessing security clearances will be provided your true identity and contact information and may seek to reach out to speak with you.

There are two protective orders already in place in this commission that will safeguard your personal information and the Military Judge recently issued a third specifically pertaining to your situation. This third order, "Protective Order #5," approves the substitution of your true name with a unique, randomly-generated functional identifier (such as "Dr. X4YZ" or "Corpsman J2TM") to be used in all commissions-related documents and proceedings going forward, to include, but not be limited to, any notes, correspondence, filings, or references made in open court. Defense counsel may share this information only with their own cleared defense teams, and they are not permitted to share your true identity or contact information with their clients or any member of the general public. The full list of true identities matched to pseudonyms on detainee medical records remains classified and has been ordered to remain under seal by the Military Commission.

Your unique medical-record identifier is "Corpsman J2TM." While the cleared defense counsel will know your true identity and how to contact you, should you agree to speak with them, all conversations and any notes derived therefrom shall substitute "Corpsman J2TM" for your true name. This will permit conversations regarding the health care you provided to their clients, or your observations of their clients, over an unclassified phone line. Use of your real name in regard to your medical treatment of certain detainees who are now on trial could otherwise make the conversation classified, which is why the substitute must be used in order to communicate over unclassified networks.

Please know that if the Defense does contact you, your status is only that of a potential witness, and that at this point the Defense is only gathering information. Regarding any requests for an interview, you have the absolute right to participate in an interview by the Defense team. You also have an equal right not to do so, if you choose. During the initial telephone call, you are free to ask the Defense team questions about the subject matter of the interview, who will be participating on their behalf, and any other questions you believe will assist you in making a decision whether to ultimately consent to an interview. Although you are not under investigation, you also may have an attorney join the call if you choose. You can retain an attorney, or you can ask that an attorney from JTF-GTMO join you in the interview. Again, the choice is yours to make. If you would like to speak with an attorney, including an attorney with

JTF-GTMO, prior to making your decision, you are free to do so. You may contact them at [REDACTED] using your unique medical-record identifier (UMRI) set forth in this letter.

The Department of Defense has given approval for you to disclose information, should you choose to do so, regarding the treatment you provided, or your observations of, the detainees who are currently on trial. Doing so in tandem with the use of the unique medical-record identifier you have been assigned will allow you to do so in an unclassified setting. You may not reveal the true identities of any other United States Government personnel you may have interacted with while working at JTF-GTMO, or any other classified information you may have learned during your time as a medical provider, unless you are communicating in a classified setting with proper protections for the discussion of classified information.

To the extent the Defense seeks information outside of the scope of the medical treatment you provided, or your observations of the detainees who are on trial, you should consult with the JTF-GTMO Staff Judge Advocates Office, Litigation Support Section, prior to releasing that information. You may send your questions [REDACTED] using your unique medical-record identifier (UMRI).

Special Agent

TCIU