

**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 525G (GOV) Government Notice Of Classification Guidance on What Would Constitute Defense Confirmation of Classified Facts 17 November 2017
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

1. Timeliness

This Notice is timely filed.

2. Notice

On 20 October 2017, during a classified session of the Military Commission, the Military Judge requested that the Prosecution brief the issue of what would constitute Defense confirmation of classified facts. In doing so, the Commission established a deadline of 3 November 2017, which was later extended to 17 November, for the Prosecution to file its pleading with the Trial Judiciary.

The Prosecution hereby provides the classification guidance requested by the Military Commission to the parties in this case.

3. Attachments

- A. Certificate of Service, dated 17 September 2017
- B. Classification Guidance

Respectfully submitted,

//s//
Clay Trivett
Managing Trial Counsel

Mark Martins
Chief Prosecutor
Military Commissions

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 17th day of November 2017, I filed AE 525G (GOV), Government Notice Of Classification Guidance on What Would Constitute Defense Confirmation of Classified Facts, with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

 //s//

Clay Trivett
Managing Trial Counsel
Office of the Chief Prosecutor

ATTACHMENT B



OFFICE OF THE
CHIEF PROSECUTOR

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF PROSECUTOR OF MILITARY COMMISSIONS
1610 DEFENSE PENTAGON
WASHINGTON, DC 20301-1610

17 November 2017

To: Defense Counsel, *United States v. Mohammad, et al.*

From: Managing Trial Counsel, *United States v. Mohammad, et al.*

Subject: Classification Guidance Regarding Actions by Clearance Holders that Disclose Classified Information by Confirming or Denying the Truth of Claims in Open Source Material

1. As contemplated by Third Amended Protective Order #1 (AE 013BBBB), paragraph 2(g)(4)¹, I am sending this correspondence as written classification guidance regarding actions that disclose classified information 1) by confirming allegations made in public media or 2) by confirming allegations derived from any other open source. This guidance supplements earlier guidance provided to you by the Original Classification Authority (OCA) on the use of open source computer searches.
2. During a closed hearing held pursuant to Rule for Military Commissions 806 on 20 October 2017, the Prosecution was asked to provide guidance on the following: in light of the fact that Defense counsel have TS//SCI clearances but no confirmation through government sources of the locations of RDI program detention sites, is it a disclosure of classified information for Defense counsel to go to a country that they believe hosted a detention site and ask questions or interview possible witnesses on the premise that a detention site was in that country?

¹ Pursuant to Third Amended Protective Order #1 (AE 013BBBB), the terms "classified national security information and/or documents," "classified information" and "classified documents" include any document or information as to which the Defense has been notified orally or in writing that such document or information contains classified information. This memorandum constitutes written notice of certain classified information.

3. To provide generally applicable guidance and to protect against the improper disclosure of classified information in the future, the Prosecution provides guidance below to that question, and on the following broader question: given that certain individuals employed by, affiliated with, or working on behalf of or in cooperation with the Defense teams (collectively "Defense Personnel") have security clearances authorizing them to receive - and requiring them to protect - classified information and given that no Defense Personnel have received information from government sources confirming certain categories of classified facts at issue in this litigation (including, but not limited to, certain identifying information about CIA personnel involved in the RDI program and the locations of RDI detention sites), what actions would constitute confirmation or denial of open source material such that Defense Personnel will have disclosed classified information?
4. Any individual who received access to classified information through Government channels (including discovery) or through conversations with a High Value Detainee (HVD) has an obligation to protect that classified information whether that information was received via official channels, learned from a client or other HVD, or found in the public domain. Any publicly-sourced document, including books, that reveals information identified as classified by the classification guidance provided in this case² will be marked and/or treated as classified when used in commission proceedings, unless advised otherwise by the equity OCA. Publicly-sourced documents must be treated as classified if used in these proceedings because the Defense Personnel using the document may have confirmed the information by reviewing Government-provided classified information or communicating with an HVD.
5. In representing any client in this (or any other) litigation or investigation, or in gathering facts for use in this (or any other) litigation or investigation, cleared Defense Personnel may not use any knowledge of facts that fall within the categories of classified information identified in the classification guidance provided in this case to direct, guide, or otherwise assist any uncleared individual's attempt to gather open-source information regarding the former RDI program.

² This set includes, but is not necessarily limited to, the January 2015 classification guide.

- a. Example #1: Cleared Defense Personnel may not provide confirmation of countries believed to have hosted RDI detention sites by directing unclassified individuals to travel to specific countries for the purpose of developing facts related to the former RDI program. Uncleared investigators may independently pursue leads developed via open source information.³
 - b. Example #2: On non-USG computers, Defense Personnel may access reports on the former RDI program posted by NGOs that investigated the program and use them in the litigation after classification review by the equity OCA.⁴
6. Regarding the categories of classified information identified in the classification guidance provided in this case, cleared Defense Personnel may not act in any way that expressly or impliedly confirms or denies to any unclassified individual any open-source claim that falls within the identified categories of classified information.
- a. Example #1: When traveling to countries believed to have hosted RDI detention sites, cleared Defense Personnel may not ask questions to a foreign national premised on the claim that that country hosted an RDI detention site.
 - b. Example #2: In working with an unclassified NGO investigator developing a report on the RDI program, cleared Defense Personnel may not provide information or advice that helps the investigator decide which leads regarding former RDI site locations the investigator should pursue.
 - c. Example #3: In working with an unclassified NGO investigator developing a report on the RDI program, cleared Defense counsel may receive and use (at the appropriate classification level) information developed independently by the unclassified NGO investigator.

³ All examples in this classification guidance are included to provide applications of the rules contained in this guidance. The examples do not limit - and should not be understood to limit - the scope of the rules in the numbered paragraphs.

⁴ Those reports, once used in the litigation, may be marked or treated as classified, because the individual who reviewed it likely learned or confirmed the information in the report by reviewing U.S. Government-provided classified information or by communicating with an HVD.

7. In the event that any Defense Personnel have questions regarding the application of this classification guidance, please contact the undersigned, or seek guidance from the appropriate OCA via Washington Headquarters Service.

Respectfully,



Clay Trivett
Managing Trial Counsel
United States v. Mohammad, et al.