

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

UNITED STATES OF AMERICA	AE 014A
v.	PROTECTIVE ORDER #3
ABD AL HADI AL-IRAQI	To Protect Against Disclosure of Sensitive But Unclassified Information in Discovery and During Military Commission Proceedings
	16 September 2014

I. FINDINGS

Upon consideration of the Government's Motion To Protect Against Disclosure of Sensitive But Unclassified Information in Discovery and During Military Commission Proceedings, the Classified Declaration of David M. Cattler, Director, Defense Combating Terrorism Center, Defense Intelligence Agency, dated 11 June 2014, and the Classified Declaration of John Giacalone, Assistant Director, Federal Bureau of Investigation, dated 30 June 2014, the Commission finds the need to protect public safety, the safety of participants, personal privacy of the Accused, participants, family members, and third parties, and to preserve the interests of justice consistent with national security.

The unclassified discovery materials that the Government intends to provide to Defense in discovery and present during Military Commission proceedings, if disseminated without protection from disclosure, could pose a threat to public safety and national security and implicate the privacy interests of the Accused, participants in the Military Commission, and third parties. Therefore, the Commission finds the need to issue a Protective Order.

Furthermore, the production of unclassified discovery materials would be substantially delayed if the Government were compelled to seek a protective order modifying, withholding, or delaying production of each particular item of discovery material, which the Government would arguably be required to do absent a generally applicable protective order. Therefore, the Commission finds that it is appropriate to issue a general Protective Order applicable to protect sensitive but unclassified information, some of which will be subject to the Government Information Privilege pursuant to Military Commissions Rules of Evidence (M.C.R.E.) 506.

This Commission has the authority to issue this Order under the Military Commissions Act of 2009, 10 U.S.C. §948a, *et seq.* (M.C.A.), the Rules for Military Commissions (R.M.C.) 701 and 806, M.C.R.E. 104, 506, 507, and 611, the Regulation for Trial by Military Commission (R.T.M.C.) ¶ 17-3, and the general supervisory authority of the Commission.

II. SCOPE

This Protective Order applies to all aspects of pre-trial, trial, and post-trial stages in this case, including any appeals, subject to modification by further order of the Commission or orders issued by a court of competent jurisdiction unless otherwise directed by the Military Judge.

Trial and Defense Counsel are responsible for advising their clients, translators, witnesses, experts, consultants, support staff, and all others involved with the prosecution or defense of this case, respectively, of the contents of this Protective Order.

Nothing in this Order shall preclude either party from seeking a further protective order as to particular items of discovery material pursuant to applicable law, or from seeking relief from the Commission.

Nothing in this Order shall preclude the Defense from entering into an agreement with the Government, or seeking an order from the Commission, excluding certain specified material from the scope of this protective order.

Nothing in this Order shall preclude the parties from seeking additional protections for Government information other than classified information in accordance with M.C.R.E. 506.

III. DEFINITIONS

As used in this Protective Order, the term “Defense” includes any counsel for the Accused in this case and any employees, contractors, investigators, paralegals, experts, translators, support staff or other persons working on behalf of the Accused or his counsel in this case.

The term “Government” includes any counsel for the United States in this case and any employees, contractors, investigators, paralegals, experts, translators, support staff or other persons working on behalf of the United States or its counsel in this case.

“General Discovery Materials” may include, among other information: unclassified law enforcement, intelligence, and military operational information; information relating to medical records and autopsy reports; and names of witnesses and potential witnesses. “General Discovery Materials” do not include: (i) classified material, the protections of which are addressed in Amended Protective Order #1 To Protect Against the Disclosure of National Security Information (AE 013C); and (ii) unclassified information in the public domain if the information was released by an authorized source, even if the information was provided in discovery.¹

¹ For example, a video that is publicly available on the internet may be provided in discovery. However, such open source materials would not have additional handling restrictions placed on them according to this Protective Order.

The term “Sensitive But Unclassified Discovery Materials” includes any materials for which the Government asserts the claim of the Government Information Privilege. The term “Sensitive But Unclassified Discovery Materials” may include: law enforcement activities; sensitive geographic locations; communications surveillance information; interrogation techniques; intelligence or law enforcement administrative data; detainee health; detainee family member information; the identities of certain U.S. Government personnel; and detention-related force protection measures at the detention facility operated by Joint Task Force-Guantanamo Bay Cuba (JTF-GTMO), and identifying information relating to DoD personnel.

IV. OVERALL DISCOVERY REQUIREMENTS

Pursuant to applicable law, the Government shall segregate the unclassified discovery material it produces to the Defense into two categories (a) “General Discovery Materials”, and (b) “Sensitive But Unclassified Discovery Materials.” The Government may provide the discovery in electronic media format.

The parties acknowledge the compelling interest in ensuring that “General Discovery Materials” and “Sensitive But Unclassified Discovery Materials” related to this national security investigation and prosecution that are being provided by the Government to the Defense solely for the effective representation of the Accused before this Military Commission. The parties further acknowledge that reciprocal discovery material produced by the Defense to the Government shall be used by the Government solely for the purpose of preparing its prosecution in this case.

V. ORDER

Consistent with the Commission's findings and with the Government's Motion To Protect Against Disclosure of Sensitive But Unclassified Information in Discovery and During Military Commission Proceedings (Government's Motion), it is hereby **ORDERED**:

1. "General discovery materials" shall be handled pursuant to this Protective Order, the Rules for Military Commissions, the Military Commission Rules of Evidence, and the applicable Rules of Professional Responsibility.
2. "General discovery materials" and "sensitive discovery materials" shall not be disseminated to the media or to any individuals, organizations, or other entities, other than (1) members of the Defense team, and (2) experts or consultants officially retained at government expense by the Accused. In this instance, "disseminated" means to provide, show, or describe to another either a particular piece of discovery or quotations, excerpts, or summaries derived therefrom, except during the course of a judicial proceeding or written submission to the Commission.
3. "General discovery materials" and "Sensitive But Unclassified Discovery Materials" shall be returned to the Government at the conclusion of this case, including any related appeal, petition for writ of certiorari, petitions for writ of habeas corpus and other collateral challenge including clemency.
4. "Sensitive But Unclassified Discovery Materials" shall not be further disseminated by the Defense counsel to the Accused or to any individuals, organizations, or other entities, outside of the Defense team.
5. Each of the individuals to whom disclosure is made pursuant to the above provision shall be provided a copy of this Protective Order and will be advised to not further disseminate the materials except by the express direction of Trial or Defense Counsel. In addition, the Defense

or Government may show, but not provide copies of, any general discovery material to witnesses, if it is determined that it is necessary to do so for the preparation of the prosecution or defense in this case.

6. It is expressly understood that Defense counsel for the Accused may not show any of the “sensitive discovery materials” to witnesses or potential witnesses, except experts or consultants officially retained at government expense and only with the Commission’s prior approval.

Notice of proposed dissemination to experts or consultants officially retained at government expense shall be provided to the Commission *ex parte* and under seal, and no dissemination to such individuals shall be made until approved by the Commission. Each of the individuals to whom disclosure is made pursuant to the above provision shall be provided a copy of this Protective Order and will be advised not to further disseminate the materials except by the express direction of Defense Counsel. Moreover, any copies provided by Defense Counsel shall be clearly marked as “Sensitive But Unclassified Discovery Materials.” No disclosure of items to witness or consultant shall be made until the Commission so permits and the Defense provides notice of the disclosure to JTF-GTMO with respect to information related to force protection measures.

7. “Sensitive discovery materials” that are used or referred to in a filing with the Commission by either party shall be filed under seal.

8. Privacy information, as described in the Government’s Motion at section III. A., contained in all discovery materials shall be properly protected.

9. Names and other identifying information for witnesses or potential witnesses, including the alleged victims of the charges offenses and their family members, except for information previously provided to the public by the witness or by one of the parties with consent of the

witness, as described in the Government's Motion at section III. B., shall be properly protected.

In the event the Government requests the name of a particular witness be withheld from the Accused, a separate request for protective order should be made to the Commission.

10. In accordance with M.C.R.E. 506, the government has properly asserted the Government Information Privilege with respect to the categories described in the Government's Motion in sections III.C. to III.I. Information in these categories should be properly protected from public disclosure. Furthermore, a narrow subset of information contained in section III.H all information in section III.I, *i.e.*, the names of certain U.S. Government personnel and foreign government personnel and JTF-GTMO Force Protection measures, should not be disclosed to the Accused. Information will be provided to the Defense Counsel for preparation of the Accused's defense. In these limited circumstances where information should not be disclosed to the Accused, the Government will follow procedures pursuant to M.C.R.E. 506.

11. The classified declarations in attachments B and C of AE 014 will remain under seal until further order of this Commission or a different court of competent jurisdiction directs.

So **ORDERED** this 16th day of September, 2014.

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J.K. WAITS
CAPT, JAGC, USN
Military Judge