

**IN A GENERAL COURT-MARTIAL
IN THE SECOND JUDICIAL CIRCUIT, U.S. ARMY TRIAL JUDICIARY
FORT BRAGG, NORTH CAROLINA**

UNITED STATES)	
)	
v.)	Protective Order for
)	Classified Information
SGT Robert B. Bergdahl)	
HHC, Special Troops Battalion)	
U.S. Army Forces Command)	
Fort Bragg, North Carolina 28310)	14 January 2016

1. In order to protect the national security and pursuant to the authority granted under MRE 505(g), the general supervisory authority of the Court under the Rules for Courts-Martial, and relevant executive orders by the President of the United States, and regulations of the Department of the Army, it is hereby ORDERED:

a. **PURPOSE.** The purpose of this Protective Order is to safeguard, and prevent the unauthorized disclosure or dissemination of, classified information in this case. The terms of this Order may be modified by further order of this Court. This Order is not intended to impede the Defense's ability to represent the Accused. Defense Counsel who meet the requirements for access set forth in this Order shall have access to classified information, consistent with the terms of MRE 505 and all other applicable Rules of Evidence and Courts-martial and as otherwise directed by the Court.

b. **APPLICABILITY.** This Protective Order applies to all classified information provided to, or otherwise obtained by, any party during these proceedings, both prior to and subsequent to the date of this Order. The following persons are subject to the terms of this Order: the Accused; all Defense Counsel (civilian and military) and support staff and assistants working on behalf of Defense Counsel; members of the Defense team; all Trial Counsel and support staff and assistants working on behalf of Trial Counsel; all other counsel involved in this case, and support staff and assistants working on their behalf; security officers; all Court personnel; and all other individuals who receive access to, or are otherwise in possession of, classified information provided in connection with this case. The terms of this Order shall apply to all pre-trial, post-trial, and appellate aspects of this case, as supplemented by the requirements of the Rules for Courts-Martial and the Military Rules of Evidence. This order supersedes all previous classified information protective orders issued in this case.

c. **DEFINITIONS.** The following definitions apply to this Protective Order:

(1) **Access to Classified Information:** the ability to review, discuss, learn, become aware of, or create notes or other written products regarding classified

information in electronic, documentary, or oral format in a facility and using procedures consistent with subparagraphs 1.h, i, and j of this Protective Order; “access to classified information” does not include authority to copy or reproduce classified information, remove that information from a secure government facility, or electronically send or otherwise disseminate that information outside of a secure government facility, except by the terms of this Order.

(2) Classified Information: any information or material in any form that has been determined by the United States Government pursuant to Executive Order 13526, Classified National Security Information, dated 29 December 2009, or its predecessor orders, to require protection against unauthorized disclosure for reasons of national security of the United States, or any information derived from such information. Classified information is designated and will normally be marked as CONFIDENTIAL (C), SECRET (S), or TOP SECRET (TS), and can additionally be controlled as SENSITIVE COMPARTMENTED INFORMATION (SCI), as part of a SPECIAL ACCESS PROGRAM (SAP) as that term is described in Executive Order 13526, or subject to an ALTERNATIVE COMPENSATORY CONTROL MEASURE (ACCM). All persons subject to this Protective Order shall consider any information which they have been notified may constitute classified information or which could reasonably be believed to constitute classified information to be classified information subject to this definition until it is confirmed to be unclassified by competent authority.

(3) Court Security Officer: an individual designated for this case to supervise security arrangements necessary to protect against the unauthorized disclosure of classified information submitted or made available to the Court. The court security officer is subject to the terms of this Protective Order.

(4) Document: any recorded information, regardless of the nature of the medium, or the method or circumstances of recording, including originals and copies of any type.

(5) Information: any knowledge that can be communicated in any manner, regardless of its form or characteristics.

(6) Need-to-Know: a determination within the executive branch in accordance with directives issued pursuant to Executive Order 13526 that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function.

(7) Original Classification Authority (OCA): an individual authorized in writing, either by the President, the Vice President, or by agency heads or other officials designated by the President or in accordance with Executive Order 13526, to classify information in the first instance.

(8) Secure Government Facility: a United States Government building that is approved for the handling and storage of classified information in accordance with military service or agency regulations up to the SECRET level.

(9) Security Officers: experts detailed to the Trial Counsel and Defense Counsel to provide advice concerning the proper procedures for appropriate storage, safeguarding, handling, and transmittal of classified information or presumptive classified information pursuant to this Protective Order and all applicable statutes, orders, and regulations.

(10) Unauthorized Disclosure: a communication or physical transfer of classified information to an unauthorized recipient or in an unauthorized manner.

d. UNAUTHORIZED DISCLOSURE. Direct or indirect unauthorized disclosure, retention, or negligent handling of classified information could cause serious and, in some cases, exceptionally grave damage to the national security of the United States, or may be used to the advantage of a foreign nation against the interests of the United States. The procedures in this Protective Order are designed to ensure that persons subject to this Order will not divulge classified information in an unauthorized manner or to anyone who is not authorized to receive it. Disclosure of classified information in these proceedings may only be done in conformity with the procedures in this Order.

(1) Persons subject to this Protective Order are obligated by law, regulation, and the terms of this Order not to disclose any classified information in an unauthorized manner or to an unauthorized recipient.

(2) Any breach of the security procedures in this Protective Order may result in the termination of a person's access to classified information. Any unauthorized disclosure, possession, or handling of classified information may violate the United States criminal code and the Uniform Code of Military Justice.

e. SECURITY OFFICERS. Security officers will be assigned to the Court, the Trial Counsel, and the Defense.

(1) Trial Counsel and Defense Counsel will consult with detailed security officers regarding any matter that could reasonably be believed to relate to classified information, including security clearance verifications, marking of classified documents, derivative classification, marking of attorney work product and filings, and proper handling of classified information or presumptive classified information. Trial Counsel and Defense Counsel will not seek classification determinations (i.e., whether a piece of information is classified due to the nature of the information) from their security officers. Such determinations must be made by the appropriate OCA.

(2) The Defense security officer is part of the Defense team and will maintain the confidentiality of all discussions with other members of the Defense team, and any observations made during Defense reviews or access to classified information.

Nevertheless, any security violations must be reported in accordance with Army Regulation 380-5, Department of the Army Information Security Program, and other applicable regulations. The Defense security officer is not required to inform Defense Counsel or receive Defense Counsel's permission to report a violation of either this Protective Order, or applicable statutes, orders, or regulations concerning the safeguarding, handling, and dissemination of classified information.

f. DECLASSIFICATION. All classified information shall remain classified and will be handled accordingly unless such classified information contains clear evidence that it has been properly declassified by the appropriate OCAs.

g. PUBLIC DOMAIN. Information in the public domain is ordinarily not classified. However, if classified information is reported in the press or otherwise enters the public domain, the information does not lose its classified status merely because it is in the public domain. Such classified information remains subject to MRE 505 and the terms of this Protective Order until such time as it is properly declassified by the appropriate OCA. Any attempt by the Accused or Defense Counsel to have classified information that has been reported in the public domain confirmed or denied at trial or in any public proceeding in this case shall be governed by MRE 505 and all provisions of this Order.

h. PERSONNEL ACCESS TO CLASSIFIED INFORMATION.

(1) In order to protect classified information in this case, no persons, except the Military Judge, appropriately cleared United States Government personnel supporting these proceedings as designated by the Military Judge, Trial Counsel, members of the prosecution team (including support staff), security officers, personnel of the originating agency, Defense Counsel, the Accused, and members of the Defense team (including support staff) shall have access to the classified information in this case. No one will be given access to classified information unless authorized by Executive Order 13526 and/or MRE 505.

(2) The Accused and the Defense team may gain access to classified information in possession, custody or control of the Trial Counsel in this case only through Government disclosures required by the Rules for Courts-Martial or Military Rules of Evidence, including, but not limited to, Rules for Courts-Martial 701 and 703. If Defense Counsel and other members of the Defense team seek access to classified information in furtherance of their representation of the Accused directly from any Government agency or department, any current or former Government employee, or any other United States entity and intend to disclose that information to others, Defense Counsel will comply with the terms of this Protective Order and MRE 505(i), including the notice requirements.

(3) No party to these proceedings nor their assistants and/or support staff may disclose classified information to any personnel—including potential witnesses in this court-martial—not listed above or in the definition of “need-to-know” in subparagraph 1.c without authorization from the Military Judge following notice to, and

an opportunity to be heard by, the United States. The Defense shall provide the Trial Counsel with the names of any intended recipients of classified information, and written notice of the classified information expected to be disclosed pursuant to the requirements of MRE 505(i). Under no circumstances will classified information be disseminated to any individual who does not meet the requirements of subparagraph 1.h(4) below. No one will be given access to classified information except to the extent authorized by Executive Order 13526 and MRE 505. If preparation of the defense requires that classified information be disclosed to persons not named in this Protective Order, the Defense Counsel shall promptly provide proper notice to the Trial Counsel and the Trial Counsel shall, as appropriate, promptly seek any required security clearances and/or OCA consent to disclose information to such persons.

(4) No person shall have access to any classified information in this case unless that person has a valid security clearance at the appropriate level, a signed Standard Form 312 Classified Information Nondisclosure Agreement, a need-to-know, and has executed the Memorandum of Understanding enclosed to this Protective Order agreeing to comply with the terms of the Order. In addition to these requirements, some classified information in this case may be compartmented (SCI), part of a SAP, or subject to an ACCM; no person may access that information without first having conducted any required "read on" or additional nondisclosure forms required for that compartment, SAP, or ACCM. Once a person subject to this Order with a need-to-know obtains a security clearance at the appropriate level, executes a Standard Form 312, and conducts any required read on, that person is eligible for access to classified information associated with this case only to the extent authorized by Executive Order 13526.

(5) The executed Memorandum of Understanding for each person signing the document will be filed with the Court and added to the appellate record. The substitution, departure, or removal of any person from this case will not release that person from the provisions of this Protective Order or the Memorandum of Understanding executed in connection with this Order, or from their obligations as listed in the Standard Form 312.

(6) Any person seeking access to classified information who does not have the requisite level of security clearance must execute all necessary forms and prerequisites in accordance with Army Regulation 380-67, Personnel Security Program, so that the Department of the Army may complete any required personnel security investigation to make a determination whether to grant access. Persons other than Court support personnel designated by the Military Judge, Trial Counsel, members of the prosecution team, security officers, and personnel of the originating agency must coordinate gaining the required security clearance through the Trial Counsel or defense security officer. The Trial Counsel or defense security officer will take all reasonable steps to facilitate the processing of security clearance applications in a timely manner. Pursuant to the procedures and requirements of Army Regulation 380-67, Personnel Security Program, paragraph 3-23f, any Defense Counsel requiring access to classified information to properly represent the Accused who does not currently hold the required

security clearance must submit their requests through the Office of The Judge Advocate General to the Office of The Deputy Chief of Staff for Intelligence. Trial Counsel will facilitate the processing of these applications in a timely manner.

(7) Accused will only be given access to classified information to the extent authorized by Executive Order 13526 and MRE 505. Under no circumstances will classified information be disseminated to the Accused if he does not meet the requirements of subparagraph 1.h(4) above. And, as stated in paragraph 1.h, even if the provisions of 1.h(4) are met, the Accused may only access classified information in this case in accordance with the terms of this Protective Order. Thus, if Trial Counsel informs the Defense in writing that certain classified information cannot be disclosed to the Accused, the Defense shall not disclose that information to the Accused without prior authorization by the Military Judge following notice to the United States and an opportunity for them to be heard. If Defense Counsel determine that provision of effective assistance of counsel requires disclosing other classified evidence to the accused for which the Accused is not properly cleared, the defense will promptly notify the Trial Counsel and the Military Judge.

i. PROCEDURES FOR SAFEGUARDING AND PROTECTION OF CLASSIFIED INFORMATION.

(1) Trial Counsel and Defense Counsel will agree on a secure government facility where the Accused and members of the Defense team may access classified information. In addition to this location, Trial Counsel will ensure appropriate secure government facilities for Defense access to classified information are available at Fort Bragg. Trial Counsel will also ensure that space is available in a sensitive compartmented information facility (SCIF) where Defense Counsel may confidentially discuss, store, review and otherwise access materials classified as TOP SECRET or SCI. The Trial Counsel will ensure that the secure government facilities used by Defense Counsel contain any secure office equipment requested by the Defense that is reasonable and necessary to the preparation of the Accused's Defense in this case. The security officer detailed to the Defense shall establish procedures to ensure that the secure government facilities are maintained and operated in the most efficient manner consistent with the protection of classified information against unauthorized disclosure.

(2) The Defense team and the Accused will only discuss, store, review, and otherwise access classified information made available to the Defense in this case in a secure government facility certified by the Defense security officer. All classified information will be stored in a United States Government-approved storage container. Classified information may only be disclosed or accessed by the Defense team outside this location, or removed from a secure government facility, with advance and express authorization of the Court or in accordance with the terms of this Protective Order, and applicable statutes, executive orders, and regulations, and only after proper physical and information security measures have been implemented in consultation with the Defense security officer.

(3) No persons subject to this Protective Order may discuss any classified information over a telephone, an inter-office communication system, computer system, computer or communications network, other communication method, or other electronic device that has not been approved to transmit or store classified information at the level of classification of the information at issue. No persons subject to this Order may discuss any classified information outside of a secure government facility or in the presence of any person who is not authorized to possess or receive such information.

(4) All Counsel and other members of the Trial and Defense teams will prepare all filings, documents, or communications that contain or may contain classified information in an approved secure government facility, using computers, printers, and other electronic office devices certified for classified information. The FORSCOM SJA will ensure such devices are provided to the Defense team as required. Trial and Defense Counsel and their support staff and assistants may take notes and prepare documents with respect to classified information, however, any notes or documents that are themselves classified cannot be removed from the secure government facility without advance and express authorization from the Court unless otherwise permitted by this Protective Order. All classified information possessed, created, or maintained by any party to these proceedings must be properly marked, and stored, maintained, and accessed only in a secure government facility. The Defense security officer will ensure appropriate physical security protection for any materials prepared or compiled by any member of the Defense team in relation to the preparation of the Accused's defense or submissions under MRE 505.

(5) All material or notes created or drafted by any member of the Trial or Defense teams while reviewing, discussing, or accessing classified information must be reviewed by the appropriate security officer to determine whether the information therein is classified. There may be instances where the OCA for the classified information contained in a document will require the agency's security officers to conduct the review of any material or notes derived from that material. All classified material or notes created by any member of the Trial or Defense teams will be retained in a secure government facility under the control of the appropriate security officer and may not be removed from the secure government facility without advance and express authorization from this Court unless otherwise permitted by this Protective Order. Unclassified notes can be removed from the secure government facility and retained by Trial or Defense Counsel or any other member of the Trial or Defense teams.

(6) No member of the Trial or Defense team shall copy or reproduce any classified information in any form, except under the direct and on-site supervision of the appropriate security officer.

(7) Defense Counsel shall have access to classified information made available to them in a secure government facility subject only to reasonable notification requirements when counsel seek to access a facility. Upon reasonable advance notice to the Defense security officer, persons on the Defense Team who are subject to this Protective Order, shall be given access to the classified information which the Trial

Counsel has made available to the Defense, or that the Defense has otherwise acquired, during normal business hours and at other times. Security logs are required to be maintained regarding access by all persons authorized to have access to the classified information in connection with this case.

(8) Persons subject to this Protective Order shall not disclose, disseminate, or otherwise transmit classified information to any individual who does not meet the requirements to access classified information, including a valid security clearance at the required level, a signed Standard Form 312, any applicable read-ons, and a need-to-know. The appropriate security officer will verify any potential recipient's security clearance, Standard Form 312, and read on status prior to any disclosure.

j. **FILINGS WITH THE COURT.** Any pleading, document, or other substantive communication filed by Trial Counsel or Defense Counsel that contains classified information shall be filed with the Court through the Court security officer either by approved courier or through SIPRNET email. The date and time of submission to the Court security officer shall be considered the date and time of filing. At the time of making a submission to the Court security officer, Trial Counsel or Defense Counsel shall notify the Court and the other party via unclassified email on the NIPRNET that a submission was made to the Court security officer and shall provide a title to the document(s) that does not disclose any classified information. The Court security officer shall promptly cause delivery of the classified pleading, document, or other substantive communication to the Court and the other party (unless such filing is *ex parte* in accordance with MRE 505).

k. **PROPERTY OF THE UNITED STATES.** All persons given access to classified information pursuant to this Protective Order are advised that all classified information to which they obtain access by the terms of this Order, and any documents, notes, or other material produced as a result of such access which are classified are now, and will remain, the property of the United States Government until such time as they are declassified. All persons will return all materials which may have come into their possession, or for which they are responsible because of such access, and any classified documents, notes, or other materials derived from such access, upon demand by a security officer. At the conclusion of this case, any attorney notes, summaries, work product, or other documents which the Defense Counsel want to be retained will be sealed and provided to the Office of the Staff Judge Advocate, U.S. Army Forces Command, for proper storage during the appellate process, if applicable. Any such documents the Defense Counsel do not wish to be retained will be destroyed by the Defense security officer in the presence of Defense Counsel. Nothing in this Order shall be construed to authorize Trial Counsel access to any attorney-client privileged information or Defense work product.

l. **VIOLATIONS.** Any unauthorized disclosure of classified information may constitute a violation of this Protective Order, the Uniform Code of Military Justice and/or the criminal laws of the United States. Any violation of the terms of this Order will immediately be brought to the attention of the Military Judge and otherwise reported

in accordance with Army Regulation 380-5, Department of the Army Information Security Program, and other applicable regulations. Any breach of this Order may also result in the termination of an individual's access to classified information.

m. DURATION. This Protective Order shall remain in effect until superseded or amended by the Military Judge. The provisions of this Order apply during the time persons subject to the Order are granted access to classified information and at all times thereafter consistent with their obligations pursuant to the nondisclosure agreement, and applicable statutes, orders, and regulations. Nothing contained in this Order shall be construed as a waiver of any right of the Accused.

ORDERED, this 14th day of January 2016.



JEFFERY R. NANCE
COL, JA
Military Judge

**IN A GENERAL COURT-MARTIAL
IN THE SECOND JUDICIAL CIRCUIT, U.S. ARMY TRIAL JUDICIARY
FORT BRAGG, NORTH CAROLINA**

UNITED STATES)	
)	
v.)	
)	
SGT Robert B. Bergdahl)	Memorandum of Understanding
HHC, Special Troops Battalion)	Regarding Protective Order for Classified
U.S. Army Forces Command)	Information
Fort Bragg, North Carolina 28310)	

1. I, _____ understand that I have already received or may become the recipient of classified information in the above-captioned case. I understand that this information pertains to the national security of the United States and remains the property of the United States. This information, together with the methods of collecting it, are classified according to security standards set by the United States Government.

2. I have received, read, and understand the provisions of the Protective Order entered in this case, including the procedures for proper safeguarding, storage, handling, access, and dissemination of classified information. I agree that I am subject to the terms of the Protective Order and that I will comply with the provisions contained therein, and understand the potential repercussions of violations of the Protective Order and of applicable statutes and regulations governing the safeguarding of classified information. I agree that I will not divulge, publish, or otherwise disseminate, in any manner, such classified information except as authorized by the terms of the Protective Order, or as authorized by the Military Judge in accordance with the procedures of Military Rule of Evidence 505.

3. I understand and agree that I will remain bound to this Memorandum of Understanding and any other nondisclosure agreement signed by me in connection with this case after the conclusion of proceedings in this case.

Signature: _____

Name: _____

Date: _____