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**ANNEX B**

**DEFENSE COUNSEL CHECKLIST  
FOR  
CLASSIFIED INFORMATION CASES**

References:

SECNAVINST 5510.36 DoN Information Security Program

JAGMAN 0126, 0137, 0138, 0143, 0144, 0159

M.R.E. 505

A. Initial Steps

- \_\_\_ 1. Notify your chain of command and command Security Manager (SM) that you have a case involving classified information.
- \_\_\_ 2. Read SECNAVINST 5510.36, DoN Information Security Program, to familiarize yourself with proper handling and marking of classified materials.
- \_\_\_ 3. Security Clearance and Access
- \_\_\_ (A). Verify your security clearance level with your Security Manager (SM). Make sure he/she records your “access” in JPAS. (Your security clearance level must be at least at the level of the highest level of classified information involved in the case. If necessary, submit necessary paperwork for an upgrade in clearance ASAP.)
- \_\_\_ (B). Verify security clearance of your paralegal or other staff/co-counsel who will assist you.
- \_\_\_ (C). Determine the security clearance status of the Accused by coordinating with your SM
- None ever given
  - Suspended by Command
  - Revoked by DoNCAF
  - Still in place:  (C)  (S)  (TS)  (SCI)
- \_\_\_ (D). Civilian Defense Counsel (CDC)? Determine security clearance of CDC by coordinating with your SM. Submit “Limited Access Authorization” for CDC’s temporary clearance via OJAG Code 17 (see template). Note that CDC may have to complete a SF 86 Security Clearance Questionnaire and submit fingerprint cards.
- LAA granted by DoNCAF Date: \_\_\_\_\_
- Expiration: \_\_\_\_\_
- NonDisclosure Agreement (SF 312) Executed?

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Protective Order Executed?

Note: CDC may store classified information, including motions, evidence, or notes, only in a government facility approved for classified material storage (such as the NLSO).

\_\_\_ 4. Handling of Classified Information

\_\_\_ (A). Classified Storage: Coordinate with your command SM, your host activity, or the CA's SM (via the TC) for a GSA-safe or other approved storage arrangement for classified material.

\_\_\_ (B). Classified Transmission via *secure* Phone/Fax/Email: Coordinate with your command SM, your host activity, or the CA's SM (via the TC) for a STE/STU III secure phone/fax and SIPRNET access in order to transmit classified material, if needed.

\_\_\_ (C). Determine if sensitive compartmented information or special access programs are involved because SCI information requires special handling. If so, immediately contact OJAG Code 17 or your local Special Security Officer (SSO) via your SM.

\_\_\_ (D). Communications with the Accused: If the Accused has a security clearance (or LAA), DC and ACC may discuss classified information without notifying the government but only up to the lower clearance level between them. For example, if DC has a Secret (S) clearance, and ACC has a Top Secret/Sensitive Compartmented Information (TS/SCI) clearance, they may discuss up to and including Secret information only.

\_\_\_ (E). Adhere strictly to the "third agency rule" (E.O. 12958, Part 4.1(i)) when dealing with non-DOD intelligence agencies. You must have permission of originating agency to disclose its classified information to the Accused or anyone else.

\_\_\_ 5. Speedy Trial: Assess and consider speedy trial implications.

\_\_\_ 6. National Security Case designation:

(A). Has the case been designated a "National Security Case" pursuant to JAGMAN 0126?

Identify NSCDA: \_\_\_\_\_

Date designated: \_\_\_\_\_

Does the case involve, to "a serious degree":

\_\_\_ the compromise of a military or defense advantage over any foreign nation?

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\_\_\_ an allegation of willful compromise of classified information?

\_\_\_ military or defense capability to successfully resist hostile or destructive action, overt or covert?

\_\_\_ terrorist activities?

(B). Determine the outcome of the NSCDA's decision about the proper disposition of the case.

(C). Read JAGMAN Sections 0126, 0137, 0138, 0143, 0144, 0159

**B. Pre-trial Discovery**

\_\_\_ 1. Submit written requests for classified evidence to the CA via the TC. CA must respond in writing per M.R.E. 505(d). Note that disclosure during discovery and subsequent use at trial are distinct issues.

\_\_\_ 2. Request copies of the CA's Preliminary Inquiry and JAGMAN reports and messages conducted under SECNAVINST 5510.36, Chapter 12, if this is a loss/compromise case.

\_\_\_ 3. Obtain copies of the Classification Reviews (CR), OCA letters, and M.R.E. 505 letters from TC.

(A). Does each CR state the *current* classification level of the material at issue?

(B) For loss/compromise cases, does each CR state the classification level of the material at issue *at the time of the offense*? Is the classification level stated in the CR different from that level marked on the item at issue?

\_\_\_ 4. Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. 1801-1811: Was any of the evidence obtained under a FISA warrant? If so, challenges to the FISA Order can only be litigated in Federal District Court.

\_\_\_ 5. Subject Matter Assistance: If needed, request a subject matter expert be assigned to the defense team.

**C. Litigation Issues**

\_\_\_ 1. Determine what classified information is likely to be used in your client's defense and submit written Notice under M.R.E. 505(h).

\_\_\_ substitution of the unclassified information

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\_\_\_ unclassified stipulation of facts

\_\_\_ redaction of the classified information

\_\_\_ dismissal of the selected charges/specifications

\_\_\_ dismissal of all charges and substitute alternative disciplinary or administrative actions against the accused

\_\_\_ 2. If government seeks to deny defense request, identify possible alternatives to complete disclosure of classified information:

\_\_\_ 3. Anticipate situations that may require the trial to be closed to protect disclosure of classified information. In coordination with military judge, TC, and Court Security Officer (CSO), determine if and when the courtroom should be closed to the general public per M.R.E. 505.

\_\_\_ 4. Plan cross and direct examinations of witnesses to accord with bifurcated (open/closed) testimony.

\_\_\_ 5. Plan introduction of classified evidence to accord with closed sessions.

\_\_\_ 6. Ensure Accused and Defense witnesses are briefed on the bifurcated testimony procedures.

\_\_\_ 7. Ex Writs.

\_\_\_ 8. Presentencing.

(A). Classified Evidence: Request alternatives to the relevant and material classified evidence unless no unclassified version is available, per M.R.E. 505(i)(4)(B).

(B). Extenuation & Mitigation:

Witnesses on Accused's lack of training on handling classified material?

Any possibility mishandled information was subsequently declassified, downgraded, or misclassified?

\_\_\_ 9. Special considerations for Designated National Security Cases

(A). PTAs must be approved by SECNAV.

(B). Immunity Requests must be approved by DOJ.

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D. Post-trial

(A). Records of Trial (ROT) authentication: If the ROT contains classified information, the CA must delete/remove it from the Accused's copy, attach a certificate to the ROT, and serve a copy on the Accused. Follow JAGMAN 0150C in the handling of ROTs.

(B). Clemency: If possible, keep clemency matters unclassified.

(C). If the ROT contains SCI, follow procedures set forth in the Memorandum of Agreement between OJAG and NCIS (contact OJAG Code 17).

E. Generally

(A). Contact the Investigation Security Officer (ISO) for Art. 32 assistance, and the Court Security Officer (CSO) for court-martial assistance.

(B). Request assistance from OJAG Code 17 to resolve any other problems.

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