

Office of the Presiding Officer
Military Commission

12 August 2004

SUBJECT: Presiding Officers Memorandum (POM) # 7 - Access to Evidence and Notice Provisions

1. One of the many components of a fair, full, and efficient trial is that the parties are able to obtain access to evidence. Failure to provide access to evidence as provided for by Commission Law can result in parties not being able to properly prepare their cases, unnecessary delays in the trial, and sanctions by the Presiding Officer. This POM is issued under the provisions of MCO No. 1: paragraph 4A(5)(a), (b), and (c); paragraph 6A(5), including subparagraphs (a), (c), and (d); and paragraph 6B(1) and (2).

2. Commission Law contains many provisions concerning access to evidence, time frames, notice, and the like. This POM is not intended to restate Commission Law, and parties are responsible for complying with Commission Law requirements. This POM:

a. Establishes procedures for counsel to obtain a ruling from the Presiding Officer if they believe the opposing has not complied with an access to evidence requirement.

b. Establishes time frames for providing access or notifications when modification of the time frames is within the discretion of the Presiding Officer.

c. Does not address requests for witnesses or “investigative or other resources.” (MCO #1, Section 5H.)

d. Does not modify those procedures established by Commission Law with respect to Protected Information.

e. Does not modify, circumvent, or otherwise alter any law, rules, directives, or regulations concerning the handling of classified information.

3. Basic principles:

a. When parties comply with access to evidence requirements and the parties provide what Commission Law requires at the time stated by Commission Law, POMs, or orders of the Presiding Officer, the access to evidence process will not ordinarily require involvement by the Presiding Officer or the Assistant.

b. The Presiding Officer and the Assistant should NOT be involved in the routine process of a party’s compliance with access to evidence requirements. The parties should provide that access in the manner required, and at the time required, as set out in Commission Law, POMs, orders of the Presiding Officer, or otherwise by direction of the Presiding Officer. There is

ordinarily no reason for the Presiding Officer or the Assistant to receive copies or access to that information that is the subject of complying with access to evidence requirements unless a dispute arises as to whether a party is entitled to access to evidence.

c. To avoid unnecessary disputes at trial concerning whether access has been given to certain information, the parties should have procedures to ensure they are able to demonstrate that access has been given to evidence. Because much access to evidence has probably been given before the publication of this POM, it is advisable for the parties to prepare lists of what has already been provided - and how and when that was done - if this has not been done already. Such lists, if any, should not be provided to the Presiding Officer or the Assistant unless specifically requested. Such lists should be brought to any session of the Commission.

4. Time frames. The time frames for access to evidence and notice shall be as prescribed by the Presiding Officer through POMs, Docketing Request ORDERS, other ORDERS, or other direction. In the absence of direction by the Presiding Officer, Commission Law shall govern.

5. Presiding Officer availability to resolve access to evidence issues.

a. The Presiding Officer is available to resolve access to evidence issues. This POM should not, however, be interpreted as a replacement for the usual professional courtesy of working with opposing counsel to resolve issues. For example in the case of a missed notification, it is professionally courteous to ask opposing counsel to provide the notice before requesting the Presiding Officer for relief. When such attempts have been tried without success, or counsel believes that a further request will be unproductive, this POM provides the procedure that should be used.

b. Counsel should immediately request the Presiding Officer's assistance in the following situations as soon as it appears to counsel that any of the following occurred and working with opposing counsel has been reasonably tried and has failed:

(1). A notice requirement was due, and the notice has not been given, despite a reminder.

(2). Access to evidence was required, and the access was not given, despite a reminder.

(3). Access was requested and denied by the opposing party.

c. When any of the situations listed in paragraph 7b, or other issues involving access to evidence arise, the party will prepare a *special request for relief* using the format generally as provided in POM #4. The email request to the Presiding Officer, Assistant, opposing counsel, and the Chief Prosecution and Defense and their deputies shall contain the information below. Each request shall be the subject of a single email with a helpfully descriptive subject line and contain the following as a minimum:

(1). Style of the case.

(2). One of the following as the case may be:

(a). If notice was due and not given, cite the requirement for the notice, when it was due, efforts to obtain notice, and that notice has not been received as of the date of the request to the Presiding Officer.

(b). If a party was required to give access and did not, cite the requirement for the access, when it was due, efforts to have opposing counsel to provide the access, and that access has not been provided as of the date of the request to the Presiding Officer.

(c). If counsel requested access and access was denied, cite the authority that requires opposing counsel to provide access, when it was requested, efforts to have opposing counsel to provide the access, and that access has not been provided as of the date of the request to the Presiding Officer.

(d). In every case of required access, or a request for access that was denied, how the documents are necessary and why the requesting party believes the requested evidence is reasonably available. (MCO #1, Section 5H.)

Original signed by:

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Presiding Officer