



## U.S. Immigration and Customs Enforcement

April 20, 2006

MEMORANDUM FOR: Offices of the Chief Counsel  
Headquarters Divisions

FROM: (b)(6),(b)(7)(C) (b)(6),(b)(7)(C)  
Deputy Principal Legal Advisor

SUBJECT: Guidance on Filing Protective Orders

### Purpose

This memorandum provides guidance from the Office of the Principal Legal Advisor (OPLA) to the Offices of the Chief Counsel (OCC) and Headquarters Divisions on the procedures to follow when an OCC contemplates filing a protective order in a pending removal proceeding.

### Summary

All motions for protective orders must be approved by the Deputy Principal Legal Advisor, or his designee, prior to filing with the Executive Office for Immigration Review.

### Background

8 C.F.R. § 1003.46 provides Immigration Judges with authority to issue protective orders and to seal evidence in Immigration Court proceedings. This regulation enables the Department of Homeland Security (DHS) to protect sensitive but unclassified law enforcement and national security information from public disclosure when DHS seeks to introduce such information in Immigration Court proceedings.

Protective orders may be issued for law enforcement or national security information that is not classified.<sup>1</sup> DHS must demonstrate that there is a substantial likelihood that disclosure or dissemination will harm the law enforcement or national security interests of the United States.

A protective order permits disclosure to the alien and his or her attorney or accredited representative, subject to the terms and conditions of the protective order. A protective order prohibits parties from divulging the protected information to third parties and requires them to exercise care when

<sup>1</sup> The use of classified information in removal proceedings is covered by separate regulations. See 8 C.F.R. §§ 1240.11(e)(3)(iv), 1240.33(e)(4), 1240.49(a), and 1240.49(c)(4)(iv). See also 8 C.F.R. §§ 103.2(b)(16)(ii), (iii), and (iv).

transmitting or storing the information. The rule provides Immigration Judges with administrative enforcement authority to ensure compliance.

An alien's willful violation of a protective order may result in the alien being denied all forms of discretionary relief, except bond.<sup>2</sup> An attorney's willful violation may result in the suspension of the attorney's privilege to practice law before the Immigration Court or the Board of Immigration Appeals.

The issuance of a protective order does not preclude an alien from challenging the admissibility of the information in Immigration Court proceedings. An alien may also challenge the protective order on appeal.

#### Process for Obtaining a Protective Order Under the Regulations

- At any time after filing a Notice to Appear or other charging document, ICE may file a motion, with or without sealed information, to acquire a protective order for that information. The motion shall describe, to the extent practical, the information that ICE seeks to protect from disclosure.
- The motion will be served on the alien, who may respond within ten (10) days. The information itself is not made available to the alien respondent. The Immigration Judge may review the information in camera only to determine whether to grant or deny the motion.
- The Immigration Judge shall give appropriate deference to the expertise of senior officials in law enforcement and national security agencies in any averments in any submitted affidavit in determining whether the disclosure of information will harm the national security or law enforcement interests of the United States.
- If a motion is denied, the information must be returned to ICE. ICE may appeal that decision immediately, and any appeal must be decided expeditiously. This process maintains the status quo to the greatest extent possible while the protective order is considered.
- If the motion is granted, an appropriate protective order is issued, and the alien will be provided with the information under the protective order.
- The alien may challenge the admissibility of the information as evidence. The alien may appeal the determination at the conclusion of proceedings.
- If information that is subject to a protective order under 8 C.F.R. § 1003.46 and filed under seal pursuant to 8 C.F.R. § 1003.31(d), the hearing or that portion of the hearing where such evidence is considered, must be closed to the public. 8 C.F.R. § 1003.27(d).

---

<sup>2</sup> See Matter of R-S-H, 23 I. & N. Dec. 629 (BIA 2003).

OPLA Approval Required Prior to Filing a Motion for a Protective Order with EOIR

Effective immediately, all motions for protective orders must be approved by the Deputy Principal Legal Advisor, or his designee, prior to filing with the Executive Office for Immigration Review.

When the OCC has identified the need for a protective order and for filing documents under seal, the OCC shall prepare a memorandum discussing the need for the protective order and demonstrating compliance with the regulations. Specifically, the memorandum should set out why there is a substantial likelihood that disclosure or dissemination will harm the law enforcement or national security interests of the United States. The OCC shall prepare and attach all the documents that the OCC intends to file, including the Motion, Sealed Annex cover sheet, and any declaration from a senior official in law enforcement or national security agency asserting the necessity for a protective order.<sup>3</sup>

The OCC shall forward the memorandum and attachments to the appropriate HQ Division for review and recommendation. If the case issues or subject matter overlaps between HQ Divisions, then the memorandum should be forwarded to all appropriate HQ Divisions.

The HQ Division will review the OCC request and submit a recommendation to the Deputy Principal Legal Advisor, or his designee, as to whether the circumstances warrant a protective order. The HQ Division will notify the OCC of OPLA's decision on the protective order.

The OCC should contact the appropriate HQ Division if exigent circumstances require the use of an abbreviated procedure in place of the procedures set forth in these Guidelines.

Please direct any questions regarding this process to (b)(6),(b)(7)(C).

cc: (b)(6),(b)(7)(C) Principal Legal Advisor  
Director of Field Legal Operations

---

<sup>3</sup> A sample motion and Sealed Annex cover sheet can be found on Docushare at <http://gcdocs.ice.dhs.gov/dscgi/ds.py/View/Collection-1442>.

**DEPARTMENT OF HOMELAND SECURITY**  
**U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT**



SEALED ANNEX

**Material Filed Under Seal**

**Contents**

<b>Document No.</b>	<b>Document Type</b>
1	
2	
3	
4	
5	
6	

UNITED STATES DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
IMMIGRATION COURT

In the Matter:

IN REMOVAL PROCEEDINGS

\_\_\_\_\_ /

**DEPARTMENT OF HOMELAND SECURITY**  
**MOTION FOR PROTECTIVE ORDER**

Pursuant to the authority contained in 8 CFR section 3.46 the United States Department of Homeland Security (“DHS”) hereby moves this Court to enter a protective order in the above captioned matter. DHS requests that said order shall act to bar the disclosure of \_\_\_\_\_ [*type of document, declaration, etc.*], which is filed with this motion in a Sealed Annex. DHS, pursuant to 8 CFR section 3.46(c), files a Sealed Annex in conjunction with this motion. The Sealed Annex is served only on the Court. 8 CFR § 3.46(c). The regulation provides that DHS shall serve a copy of the Sealed Annex on the respondent once this Court issues the requested protective order. See 8 CFR § 3.46(f)(3). DHS requests that the protective order bar disclosure, discussion, and any dissemination of said Declaration, contained in the Sealed Annex. DHS also requests that the protective order prohibit the disclosure, discussion, or dissemination of any information derived therefrom.

DHS further requests that the protective order apply to the respondent, counsel for the respondent, or accredited representative, and to any person or entity, other than authorized personnel of the Executive Office for Immigration Review or DHS, or such other persons approved by DHS or the Immigration Judge. See 8 CFR § 3.46(f)(2).

The Declaration contained in the Sealed Annex must be placed under a protective order due to a substantial likelihood that disclosure would harm law enforcement and national security interests of the United States. Issuance of this order will protect the interests of the United States and will not prejudice the rights of the respondent to meet the charges against him [or her].

The information included in the Sealed Annex implicates the compelling national security and law enforcement interest of the United States in expelling or excluding aliens. Disclosure of the information in the Sealed Annex places the investigative strategy and methods utilized by the Government at substantial risk. Disclosure could likewise provide insight as to how the Government obtains information about individuals suspected of involvement in terrorist networks. This information, if disclosed to the general public, could assist such individual(s) in the evasion of ongoing law enforcement and national security investigations. The disclosure or dissemination of the materials in the Sealed Annex could reveal the sources and methods utilized by Government to thwart threats and conspiracies to commit acts of terrorism. Knowledge of the sources and methods of investigation may allow others to build a picture governmental strategy. See generally 8 CFR § 3.46.

In hearing DHS's request for this protective order, the Court must give appropriate deference to the expertise of senior officials in law enforcement and national

security agencies in any submitted affidavits in determining whether the disclosure of information will harm the national security or law enforcement interests of the United States. 8 CFR § 3.46(d). DHS therefore attaches the affidavit of \_\_\_\_\_  
*[Name, Title, Organization]*.

The Department of Justice's highest priority since September 11<sup>th</sup> has been to prevent terrorism while preserving constitutional liberties. See AG Order No. 2585-2002, May 28, 2002. Since public or selective disclosure of the contents of the Sealed Annex may compromise the United States' interest in enforcing federal immigration law and the ongoing investigation of terrorists, this Court should issue the above-referenced protective order.

WHEREFORE, DHS respectfully moves the court to issue the above-described protective order.

Respectfully submitted,

---