

The FOIA and Classified National Security Information: Exemption 1 of the FOIA



Presented by -

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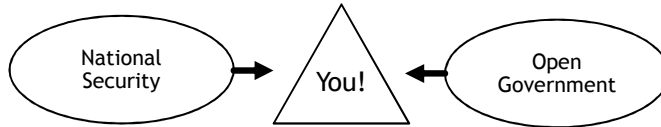
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Where does the authority to classify information come from?

- Responsibility of the Executive Branch to protect national security
- History of Classification Authority and Practice
- Executive Orders
- Classification in the Electronic Age
- Disclosure Meets National Security in Exemption 1

***Why is this Area of
Law so Challenging?***



Executive Authority v. Legislative Authority
Executive Order v. Statute
National Security v. Transparency
Secrecy v. Openness
Government v. Requesters?

**Do You Know the Biggest
Secret of All?**

Understanding Exemption 1

- The Government will withhold information that is currently and properly classified when it is requested under the FOIA.
- The Government will release information that is no longer classified when it is requested under the FOIA unless it warrants protection under another exemption.

Understanding Exemption 1

- Who asks for classified information under FOIA? Does it matter?
 - Researchers
 - Media
 - Special Interest Groups
 - Interested Individuals
- Why do “they” want it?
- What do “they” do with it?

Understanding Exemption 1

We must protect records that are:

- (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and
- (B) are in fact properly classified pursuant to such Executive order.

5 U.S.C. § 552(b)(1)

Exemption 1

Executive Orders on Classification

EO 10290 – President Truman,
September 24, 1951

EO 10501 – President Eisenhower,
November 5, 1953

EO 11652 – President Nixon,
March 8, 1972

EO 12065 - President Carter,
June 28, 1975

Exemption 1

Executive Orders on Classification

- EO 12356 – President Reagan,
April 2, 1982
- EO 12958– President Clinton,
April 12, 1995
- EO 13292 – President Bush,
March 25, 2003
(EO 12958, Amended)
- EO 13526 - President Obama,
December 29, 2009

Exemption 1

- Executive Order provides procedural and substantive requirements for making classification (and declassification) decisions
 - Classification decisions can only be made by designated subject matter experts who are given classification authority: “OCA’s”
 - Declassification decisions can only be made under the same authority as that given to OCA’s
 - In the FOIA Context, OCA’s can function as—or extend authority to--“Initial Denial Authorities (IDA)”
 - OCA/IDA’s have subordinate Subject Matter Experts (SME’s) review the records for current and proper classification
 - FOIA AO’s often are not SME’s on anything but FOIA compliance

Executive Order 13526

Our democratic principles require that the American people be informed of the activities of their Government...Nevertheless, throughout our history, the national defense has required that certain information be maintained in confidence in order to protect our citizens, our democratic institutions, our homeland security, and our interactions with foreign nations. Protecting information critical to our Nation's security and demonstrating our commitment to open Government through *accurate and accountable application of classification standards* and routine, secure, and effective declassification are equally important priorities.

Executive Order 13526

Some Key Changes from previous EO

- **Sections 1.1(b) and 1.2(c)** - The presumption against classification and in favor of a lower level of classification in cases of "significant doubt."
- **Section 1.5(d)** - No information may remain classified indefinitely

Executive Order 13526

Some Key Changes from previous EO

- **Section 1.7(c)** - Prohibits the reclassification of information after its declassification and release under proper authority except when agencies can comply with significantly tightened restrictions, particularly regarding records that have been accessioned into the National Archives.
- **Section 3.1(d)** - “In some exceptional cases, however, the need to protect such information may be outweighed by the public interest in disclosure of the information, and in these cases the information should be declassified.”

Executive Order 13526

Sec. 1.2. Classification Levels. (a) Information may be classified at one of the following three levels:

- (1) “**Top Secret**” shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security that the original classification authority is able to identify or describe.

Executive Order 13526

(2) “**Secret**” shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security that the original classification authority is able to identify or describe.

(3) “**Confidential**” shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause damage to the national security that the original classification authority is able to identify or describe.

Executive Order 13526

Sec. 1.4. *Classification Categories.* Information shall not be considered for classification unless its unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security in accordance with section 1.2 of this order, and it pertains to one or more of the following:

- (a) military plans, weapons systems, or operations;
- (b) foreign government information;

Executive Order 13526

- (c) intelligence activities (including covert action), intelligence sources or methods, or cryptology;
- (d) foreign relations or foreign activities of the United States, including confidential sources;
- (e) scientific, technological, or economic matters relating to the national security;
- (f) United States Government programs for safeguarding nuclear materials or facilities;

Executive Order 13526

- (g) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security; or
- (h) the development, production, or use of weapons of mass destruction.

Executive Order 13526

Section 1.7 *Classification Prohibitions and*

Limitations. (a) In no case shall information be classified, continue to be maintained as classified, or fail to be declassified in order to:

- (1) conceal violations of law, inefficiency, or administrative error;
- (2) prevent embarrassment to a person, organization, or agency;
- (3) restrain competition; or
- (4) prevent or delay the release of information that does not require protection in the interest of the national security.

Executive Order 13526

Classification after the receipt of a FOIA or MDR request

Section 1.7 (d)

- Information has not previously been disclosed to the public under proper authority
- Must meet the classification requirements of the EO order
- Accomplished on a document-by-document basis with the personal participation or under the direction of the agency head, the deputy agency head, or the senior agency official designated under section 5.4

Compilation/Mosaic Theory

- **PROBLEM:** PROTECTION OF RECORDS CONTAINING UNCLASSIFIED INFORMATION, THE UNAUTHORIZED RELEASE OF WHICH REASONABLY COULD BE EXPECTED TO CAUSE DAMAGE TO THE NATIONAL SECURITY.
- **CLASSIFICATION BASED ON COMPILATION THEORY**
 - APPLIES WHEN A GOVERNMENT AGENCY COMPILES SELECTED UNCLASSIFIED INFORMATION INTO A SINGLE RECORD OR PORTION THEREOF THAT IN ITS TOTALITY IS CLASSIFIED: FRONT END OF LIFE CYCLE MANAGEMENT OF DOCUMENT (LCM)
 - **EXAMPLE:** A LISTING OF TITLES BY DATE OR CONTROL NUMBER OF ALL INTELLIGENCE STUDIES DONE FOR A PARTICULAR PERIOD OF TIME.
- **CLASSIFICATION BASED ON MOSAIC THEORY**
 - APPLIES WHEN A GOVERNMENT AGENCY DETERMINES THAT RELEASE OF ALL UNCLASSIFIED RECORDS ON A PARTICULAR SUBJECT WOULD ENABLE A KNOWLEDGEABLE PERSON TO ANALYZE THE MATERIAL AND DETERMINE INFORMATION WHICH IS CLASSIFIED: TAIL END OF LCM
 - **EXAMPLE:** RELEASE OF ALL RECORDS CONCERNING ARMS SALES TO A FRIENDLY NATION FOR A SIGNIFICANT PERIOD OF TIME.

Executive Order 13526

The “Glomar” Response

- What is the genesis of the term?
- What does it mean to “Glomar” a request?
- How is it properly and consistently applied?

Executive Order 13526

Glomar Response

“The Department of Seriousness has determined that the fact of the existence or nonexistence of records, which would reveal a connection or interest in the matters set forth in your request, is classified in accordance with Executive Order 13526. Therefore, pursuant to 5 U.S.C. § 552(b)(1), DoS has denied your request. By this statement, the Department neither confirms nor denies that such records may or may not exist. Please understand that, for this reason, we have not done a search for responsive records.”

Exemption 1

Review Issues

- A classification marking does not automatically exempt the document under the FOIA
- It must undergo a line-by-line review
- It must be reasonably segregated
- When denying a document in its entirety, an estimate of the volume of information is not necessary if such the volume is itself classified
- What does a review look like?

~~SECRET~~

5. (U) C3 for North American Air Defense

a. (S)

b. (U) Capability

(1) (S)

(2) (S)

(3) (S)

c. (U) Rationale

(1) (S)

~~SECRET~~

UNCLASSIFIED

Proprietary Rights. According to the NAVAIR program manager, the reason for not breaking out the gearboxes for direct purchase [redacted] proprietary rights on special tooling for the gearboxes.

[redacted] tively on an Air Force contract (F41608-82-R-2618) for the gearboxes in the mid-1982. Our review of available documentation indicated that the special tooling in question had been paid for by the Government [redacted] objection to its use on a noninterference [redacted] we also noted that contract -0013 contains a special tooling clause which appears to us to give the Government full rights to usage (Defense Acquisition Regulation 7-104.25). Even if a legal claim for proprietary rights [redacted] shed [redacted]

substantial savings can be achieved by purchasing the gearboxes

For example, the Navy's Aviation Supply Office in Philadelphia, Pennsylvania, purchased the identical speed decenter gearbox directly from General Electric. General Electric's price to Navy's Aviation Supply Office under a basic ordering agreement (F34601-79-G-0213-GBMT) for 46 gearboxes ordered in August 1981 was \$79,968 each, for a total of \$3,678,528. This unit price is substantially lower than the \$124,880 price negotiated by NAVAIR with Kaman in June 1982 on contract -0113 (\$4,495,698 divided by 36). The following section shows potential savings by breaking out these items.

Potential Savings by Breakout. DCAS files showed that DCAA, DCAS, and the Navy Procurement Contracting Officer (PCO) recommended the gearboxes for breakout. Also, DCAS officials have stated that the overhead and profit charged by General Electric and Kaman were excessive and the PCO was so informed. The final decision on price and whether to break out the buy, however, was made by NAVAIR. In a January 11, 1983 memorandum the NAVAIR program manager indicated that although breakout could save costs, the contractor furnished equipment method was being used [redacted] time lag since it last manufactured this part. We were told that [redacted] however, no reason was given by the program manager for not buying the [redacted]

We also found no evidence [redacted] had adversely affected delivery of helicopters to the Government on the Navy contracts cited previously. Current [redacted] are ahead of Schedule. We therefore believe the Navy should avail itself of the substantial savings that can be achieved by breaking out these items as follows.

UNCLASSIFIED

PAGE CONTAINS PROPRIETARY CONTRACTOR INFORMATION

Executive Order 13526

Other Means of Declassification

Sec. 3.3 Automatic Declassification (a) all classified records that . . . are more than 25 years old and have permanent historical value.

Sec. 3.4 Systematic Declassification Review.

(a) Each agency. . . shall establish and conduct a program for systematic declassification review for records of permanent historical value exempted from automatic declassification under section 3.3 of this order

Executive Order 13526

Other Means of Declassification

Sec. 3.5 Mandatory Declassification Review.

(a) . . . information classified under this order or predecessor orders shall be subject to a review for declassification by the originating agency if:

(1) the request for a review describes the document or material containing the information with sufficient specificity to enable the agency to locate it with a reasonable amount of effort;

* * * * *

(e) *In accordance with directives issued pursuant to this order, agency heads shall develop procedures to process requests for the mandatory review of classified information They also shall provide a means for administratively appealing a denial of a mandatory review request, and for notifying the requester of the right to appeal a final agency decision to the Panel.*

Exemption 1 and Multi-Equity Records

Review Issues

- Can a declassifier at one agency/activity declassify documents from another?
Generally, no.
- Factors:
 - If it is your equity, then it is presumed that you have the most knowledge.
 - Subject Matter Expertise: OCA/IDA.
 - Exchange of declassification authority does not equal exchange of expertise.

Subject Matter Expertise

Review Issues

A reviewer at one agency/activity cannot make a disclosure decision of another agency's equities.

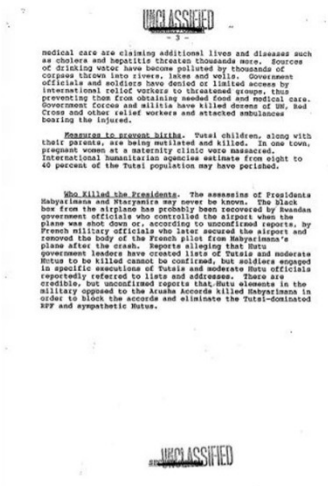
- Many types of documents/analytic products have multiple agency equities requiring coordination
- Official FOIA Referrals/Consultations with other agencies.

Exemption 1 and Subject Matter Expertise

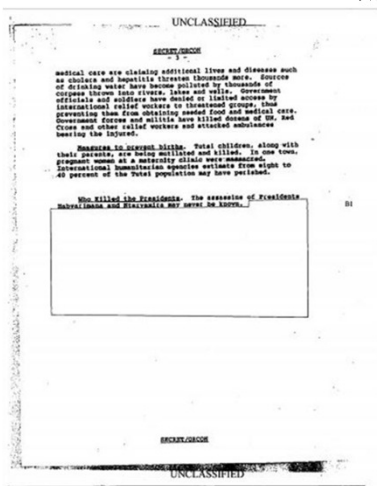
DoD, DoS, and the IC are Multi-Disciplinary Department/Agencies:

- Science, Technology, Foreign Affairs, Military Doctrine, Diplomacy, Personnel, Readiness, Intelligence (HUMINT/SIGINT/IMINT), Environmental Factors, Logistics, Aircraft, Ships, Weaponry, Law, . . .
- Each Discipline has many individual classification guides/standards
 - VERY difficult, without subject matter immersion, to understand each of these individually
 - IMPOSSIBLE to comprehend these in conjunction with each other

The Challenge of Knowing What Is Already Released – Rwanda 1

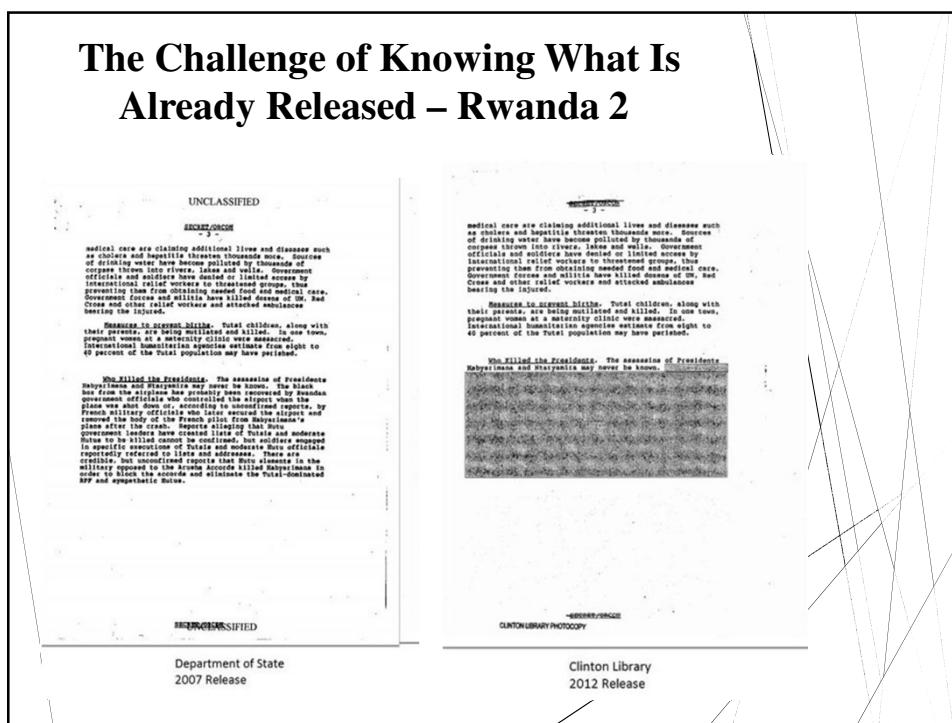


Department of State
2001 Release



Department of State
2003 Release

The Challenge of Knowing What Is Already Released – Rwanda 2



Exemption 1 and Interagency Decisions

- **Decision-making process is complex:**
 - Many Interests, many opinions, much input— inherently inter- or intra-agency: multi-equity
 - Many reviews and reconsiderations
 - Many drafts: high volume, high equity
- **FOIA process is the decision-making process in reverse:**
 - All interests potentially involved in a FOIA review
 - Many drafts = large volume of records
 - Review reflects timing of real-time decision-making
 - Interests of FOIA Requestor may conflict with interests of American public as a whole