


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



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**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.

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**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)

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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

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**Exemption 1**

Beginning with President Harry S. Truman in 1951, the uniform policy of the executive branch concerning the protection of national security information traditionally has been set by the President with the issuance of a new or revised national security classification executive order.

- EO 10290 – President Truman, September 24, 1951
- EO 10501 – President Eisenhower, November 5, 1953
- EO 11652 – President Nixon March 8, 1972

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**Exemption 1**

- EO 12065 - President Carter, June 28, 1975
- 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

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**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.

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**Executive Order 13526**

Executive Order provides procedural and substantive requirements for making classification (and declassification) decisions

Classification Authority – **The authority to classify information originally** may be exercised only by:

- (1) the President and the Vice President;
- (2) agency heads and officials designated by the President;
- (3) and United States Government officials delegated this authority

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**Executive Order 13526**

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 review the records for current and proper classification

FOIA AO's are experts on FOIA compliance and are not Subject Matter Experts (SME's)

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**Executive Order 13526**

**Sec. 1.2. Classification Levels.** 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.
- (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.

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**Executive Order 13526**

**Sec. 1.4. Classification Categories (25 years or less)**

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 intelligence activities (including covert action), intelligence sources or methods, or cryptology;
- (c) foreign relations or foreign activities of the United States, including confidential sources;

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**Executive Order 13526**

**Sec. 1.4. Classification Categories (25 years or less) cont'd**

- (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;
- (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.

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**Executive Order 13526**

**Sec. 3.3b Classification Categories (over 25 years)**

(1) reveal the identity of a confidential human source, a human intelligence source, a relationship with an intelligence or security service of a foreign government or international organization, or a nonhuman intelligence source; or impair the effectiveness of an intelligence method currently in use, available for use, or under development;

(2) reveal information that would assist in the development, production, or use of weapons of mass destruction;

(3) reveal information that would impair U.S. cryptologic systems or activities;

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**Executive Order 13526**

(4) reveal information that would impair the application of state-of-the-art technology within a U.S. weapon system;

(5) reveal formally named or numbered U.S. military war plans that remain in effect, or reveal operational or tactical elements of prior plans that are contained in such active plans;

(6) reveal information, including foreign government information, that would cause serious harm to relations between the United States and a foreign government, or to ongoing diplomatic activities of the United States;

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**Executive Order 13526**

(7) reveal information that would impair the current ability of United States Government officials to protect the President, Vice President, and other protectees for whom protection services, in the interest of the national security, are authorized;

(8) reveal information that would seriously impair current national security emergency preparedness plans or reveal current vulnerabilities of systems, installations, or infrastructures relating to the national security; or

(9) violate a statute, treaty, or international agreement that does not permit the automatic or unilateral declassification of information at 25 years.

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**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.

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**Executive Order 13526**

**Section 1.7 Classification Prohibitions and Limitations. (c)** Information may not be reclassified after declassification and release to the public under proper authority unless:

- (1) the reclassification is personally **approved in writing** by agency head based on a document-by-document determination by the agency that reclassification is **required to prevent significant and demonstrable damage to the national security**;
- (2) The information may be reasonably recovered w/o bringing undue attention to the information;
- (3) the reclassification action is reported promptly to the Assistant to the President for National Security Affairs (National Security Advisor) and the Director of the Information Security Oversight Office; and
- (4) for documents in the physical and legal custody of the National Archives and Records Administration that have been available for public use, the agency head has, after making the determinations required by this paragraph, notified the Archivist of the United States.

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**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.

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### Compilation/Mosaic Theory

Compilations of items of information that are individually unclassified may be classified if the compiled information reveals an additional association or relationship that: (1) meets the standards for classification under this order; and (2) is not otherwise revealed in the individual items of information.

#### Section 1.7 (e)

- **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
  - **EXAMPLE:** A listing of titles by date or control number of all intelligence studies done for a particular period of time.

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### Compilation/Mosaic Theory

- **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:
  - **EXAMPLE:** Release of all records concerning arms sales to a friendly nation for a significant period of time.

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### Executive Order 13526

#### The “Glomar” Response

What is the genesis of the term?

CIA denial to neither confirm or deny the existence of a ship that was built with help from Howard Hughes to salvage and examine a Soviet Golf-II class submarine –and its three one-megaton nuclear missiles– which had sunk to the bottom of the ocean floor 1,560 miles northwest of Hawaii: <https://unredacted.com/2014/02/11/neither-confirm-nor-deny-the-history-of-the-glomar-response-and-the-glomar-explorer/>

If the agency were to respond by saying it could neither confirm nor deny the existence of records, i.e., provide a Glomar response, it would have to answer that way for all requests because a Glomar response is not effective unless it is used for all similar requests.

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### 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.”

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### 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?

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~~SECRET~~

b1, 1.4a

5. (U) C3 for North American Air Defense

a. (S)

b1, 1.4a

b. (U) Capability

(1) (S)

(2) (S)

b1, 1.4a

(3) (S)

c. (U) Rationale

(1) (S)

b1, 1.4a

~~SECRET~~

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**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.

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**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.

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