

EXEMPTION 1: Defense, Foreign Relations & Classified Information

Kellie Robinson
Charles Melton

1

EXEMPTION 1

Exemption 1 protects from disclosure national defense or foreign policy information that has been properly classified pursuant to an appropriate Executive Order.

- Specifically authorized under criteria established by an Executive order to be kept secret in the interest of **national defense** or **foreign policy**; and
- Are in fact properly classified pursuant to such Executive order.

2

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.

3

EXECUTIVE ORDER 13526

- Purpose of the FOIA
- Free flow of information
- January 2010 - Executive Order 13526: Classified National Security Information. ... 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.
- Prescribes a uniform system for classifying, safeguarding, and declassifying national security information, including information relating to defense against transnational terrorism.

4

EO-Executive Order 13526

Some Key Changes from previous EO

Sections 1.1(b) and 1.2(a)(3) – If there is significant doubt about the need to classify information it shall not be classified...If there is significant doubt about the level of classification it shall be classified at the lower level.

Section 1.5(d)-No information may remain classified indefinitely

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.”

5

EO-Executive Order 13526

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 1.9(a)-Fundamental Classification Guidance Review-periodic review of classification guidance, particularly classification guides...

6

WHAT IS CLASSIFICATION?

Classifying is identifying and marking information whose unauthorized disclosure could damage the national defense or foreign relations of the United States government.

7

ORIGINAL CLASSIFICATION AUTHORITY (OCA)

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

CLASSIFICATION AUTHORITY

8

Derivative classification authority vs Original Classification Authority (OCAs)

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

Derivative Authority: an employee or contractor with a security clearance can classify using a classification guide or source materials that are already classified.

Original Classification Authority: usually a senior employee in a designated position; most of the time a SME. Can classify in the first instance based on the EO. Marking requirements are more detailed than derivative classifiers.

9

- **TOP SECRET** – When disclosure could reasonably be expected to cause “**exceptionally grave damage**” to national security.
- **SECRET** – When disclosure could reasonably be expected to cause “**serious damage**” to the national security.
- **CONFIDENTIAL** – When disclosure could reasonably be expected to cause “**damage**” to the national security.

CLASSIFICATION LEVELS

10

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:

11

CLASSIFICATION CATEGORIES

- military plans, weapons systems, or operations;
- foreign government information;
- intelligence activities (including covert action), intelligence sources or methods, or cryptology;
- foreign relations or foreign activities of the United States, including confidential sources;
- scientific, technological, or economic matters relating to the national security;
- United States Government programs for safeguarding nuclear materials or facilities;
- vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security;
- the development, production, or use of weapons of mass destruction.

12

DURATION OF CLASSIFICATION

The OCA shall establish a specific date or event for declassification upon reaching the date or event, the information shall be automatically declassified.

Except for information that should clearly and demonstrably be expected to reveal the identity of a confidential human source or a human intelligence source or key design concepts of weapons of mass destruction, the date or event shall not exceed the time frame established in paragraph (b) of this section.

13

DURATION OF CLASSIFICATION – CONT'D

- No information may remain classified indefinitely.
- Must establish a specific date or event for declassification based upon the duration of the national security sensitivity.
- Information is automatically declassified upon reaching that date or event.

Note: In “exceptional cases” the public interest in disclosure may outweigh the need to protect the information and in those cases, the information should be declassified.

14

DURATION OF CLASSIFICATION – CONT'D

- If there is no earlier specific date or event for declassification, information shall be marked for declassification 10 years from the date of the original.
 - Determined that the sensitivity of the information requires that it be marked for declassification for up to 25 years from the date of the original decision.
- May extend the duration of classification up to 25 years from the date of origin of the document, change the level of classification, or reclassify specific information only when the standards and procedures for classifying information under this order are followed.

15

IDENTIFICATION AND MARKINGS

Required markings on each classified document include:

- Appropriate classification level
- The identity of the original classification authority
- The identity of the agency and office classifying the document
- Declassification instructions
- A concise reason for classification

16

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: Document Creation – beginning of document lifecycle.
- **EXAMPLE:** A listing of titles by date or control number of all intelligence studies done for a particular period of time

17

COMPILATION/MOSAIC THEORY

- **PROBLEM:** (CONT'D)
- 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: Document Aggregation – end of document lifecycle.
- **EXAMPLE:** Release of all records concerning arm sales to a friendly nation (e.g., Israel) for a significant period of time.

18

CLASSIFICATION AFTER THE RECEIPT OF A FOIA OR MDR REQUEST

Records will be protected from disclosure under Exemption 1, if:

- Properly classified
- Proper markings have been applied to the classified documents
- Information that has not previously been disclosed to the public under proper authority may be classified or reclassified after an agency has received a request for it under the FOIA, the Presidential Records Act, the Privacy Act, or the mandatory review provisions.

19

CLASSIFICATION PROHIBITIONS AND LIMITATIONS

You may not classify records to:

- Conceal violations of law, inefficiency, or administrative error;
- Prevent embarrassment to a person, organization, or agency;
- Restrain competition; or
- Prevent or delay the release of information that does not require protection in the interest of the national security.
- Scientific research information not clearly related to the national security.

20

CLASSIFICATION PROHIBITIONS AND LIMITATIONS – CONT'D

Information may not be reclassified after declassification and release to the public under proper authority unless:

- Approved in writing by the agency head based on a document-by-document;
- Information may be reasonably recovered without bringing undue attention to the information;
- 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
- NARA is notified of documents in its physical and legal custody and an agency requests suspension of public access.

21

WHO ASKS FOR CLASSIFIED INFORMATION UNDER FOIA?

- Researchers
- Media
- Special Interest Groups
- Interested Individuals

22

REQUEST STRATEGY:

- Documents that shed light on policy-making, policy implementation
- Cable traffic
- Briefing materials
- Position papers
- Memoranda of conversation
- Intra-agency policy discussions
- Discussions with foreign government officials

23

RELEASED ALREADY?

- Before submitting your request, check public websites for previously "officially" disclosed documents
- State Cables at NARA (1973-1979)
- CIA
- ODNI
- ICONTHERECORD
- Presidential Libraries
- ISCAP
- State Department (161K documents); FRUS
- SSCI/HPSCI

24

RELEASE OF INFORMATION

- FOIA or MDR Programs?
- Identify similar documents that were “officially” released.
- Stress the age of the documents to be reviewed.
- Identify published works, often by former government officials drawing on government records, that contain similar information.

25

RELEASE OF INFORMATION CON'T

- 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

26

~~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~~

27

UNCLASSIFIED

Proprietary Rights. According to the NAVAIR program manager, the reason for not breaking out the gearboxes for direct purchase [redacted] letary rights on special tooling for the gearboxes. [redacted] rively 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] noted that objection to its use on a noninterference [redacted] 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] jhed [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 deceser 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 40 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 buy 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] problems [redacted] time lag since it last manufactured this part. We were told that [redacted] yet, no reason was given by the program manager for [redacted]

We also found no evidence [redacted] had adversely affected delivery of helicopters to the Government on the Navy contracts cited previously. Current [redacted] 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

28

OTHER GOVERNMENT AGENCIES - SUBJECT MATTER EXPERTISE

- 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.

29