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4 Executive Order 10501

cc: Mr. Wozencraft ✓
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This will reply to your memorandum of January 16, 1967 which forwarded a copy of the circular letter of December 16, 1966 seeking evaluation of experience with Executive Order No. 10501.

Since we have infrequent contact with classified defense information, and since we seldom have occasion to originate the security classification of documents, we have no substantial experience or evaluation to report.

We invite your attention, however, to a problem concerning the content of E.O. 10501 which is raised by the enactment of P.L. 89-487. This new law, which becomes effective on July 4, 1967, amends the "public information" section of the Administrative Procedure Act (i.e. Section 3, recently enacted into positive law as 5 U.S.C. 552).

Subsection (a) of the new law requires that specified information be published in the Federal Register. Subsection (b) requires that other information be made available to the public. Subsection (c) requires agencies to make "identifiable records" (other than records and information available under subsections (a) and (b)) promptly available to "any person" who requests them. All of these requirements are subject to nine exemptions for categories of matters established in subsection (e) of the new law. In short, records or information which can be subsumed within one of the categories in subsection (e) need not be made available in any form.

Pertinent to the problem we raise is the first exemption:

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7 "(e) EXEMPTIONS. - The provisions of this section shall not be applicable to matters that are (1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy; . . ."

1 While construction of this language is not entirely fixed, one possible interpretation is that the exemption is available only for those matters which are specifically described or categorized in an Executive order. Review of E.O. 10501 indicates that its structure does not comport very well with this interpretation. The order does not list categories of matters which require classification as Top Secret, Secret, or Confidential - such as organization, strength or disposition of troops and equipment, characteristics and quantities of armament, etc. Instead, it provides standards for the three classifications stated in terms of the severity of harmful effect to the national defense, which is explained in turn by examples of avoidable results which disclosure would cause. Thus, the Top Secret classification applies to -

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7 ". . . information or material the defense aspect of which is paramount, and the unauthorized disclosure of which could result in exceptionally grave damage to the Nation such as leading to a definite break in diplomatic relations affecting the defense of the United States, an armed attack against the United States or its allies, a war, or the compromise of military or defense plans, or intelligence operations, or scientific or technological developments vital to the national defense."

1 Except in this fashion, categories of matters which should not be disclosed are not specified, and the question has been raised whether greater specificity is practicable and necessary.

In his statement upon signing the new law, the President said:

10 "I am hopeful that the needs I have mentioned can be served by a constructive approach to the wording and spirit and legislative history of this measure. I am instructing every official in this administration to cooperate to this end and to make information available to the full extent consistent with individual privacy and with the national interest." (Weekly Compilation of Presidential Documents, July 11, 1966, pp. 895-6.)

In keeping with this instruction, it would seem desirable to amend E.O. 10501 at least to include recognition of the burden it carries in connection with exemption (e)(1). Greater specificity, in the Executive order, of categories of classifiable information would permit more consistent administration by the agencies than the broad concepts of the current definitions in the order. If such specificity is practicable, it would seem to constitute a valuable step in the "constructive approach" desired by the President.

A related suggestion which has been made to us is that if the order is amended to include specific categories of matters which should be classified for national defense or foreign policy purposes, it should also include categories of information which might not be classifiable, but which still should not be made public in the interest of the national defense or foreign policy.

In connection with our continuing work with the departments and agencies on problems arising out of P.L. 89-487, we would appreciate your assessment of the problems stated above, any possible solutions thereto you may wish to suggest, and your views as to which of these problems you think are significant enough to warrant further study.