



UNITED STATES DEPARTMENT *of* JUSTICE

**National Security Classification
And Exemption 1 of the
Freedom of Information Act**



Executive Order 13526

Our democratic principles require that the American people be informed of the activities of their Government. Also, our Nation's progress depends on the free flow of information both within the Government and to the American people.



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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.



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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.

- President Barack Obama

December 29, 2009



Exemption 1

Applies to matters 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.



Applying Exemption 1

Two-Part Test:

- (1) Does the info substantively fall within one of the defined categories of an Executive Order?
- (2) Were all procedural requirements of an EO met such that the info is properly classified?



Who Determines What Should be Classified?

- The President is responsible for protecting national security, which includes:
 - Developing policies that establish what information should be classified to prevent harm to national security
- Every president since Harry Truman has issued a new or revised Executive Order



EO 13526 (2009)

- Reflects main elements of last EO (12958, as amended)
- Few changes affecting FOIA Exemption 1
- Same section for classification categories –
Section 1.4 (a-h)
- Retained “infrastructures” in section 1.4 (g)
- Refined section 1.4(h) for weapons of mass destruction



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Classification Standards

- 1) Classification decisions must be made by an Original Classification Authority (OCA)
 - OCAs often have subordinate Subject Matter Experts (SME's) review the records
- 2) Gov't must maintain control of the information
 - An unauthorized disclosure (leak) does not nullify classification



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Classification Standards

- 3) Information must fall within one of the qualifying categories in Section 1.4

- 4) OCA must determine that release could reasonably be expected to damage national security



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Section 1.4 - Qualifying Categories

What type of information may be classified?

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



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Section 1.4 - Qualifying Categories cont'd

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;



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Section 1.4 - Qualifying Categories cont'd

- e) scientific technological, or economic matters relating to the national security;
- f) U.S. Government programs for safeguarding nuclear materials or facilities;



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Section 1.4 - Qualifying Categories cont'd

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



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Determination of Harm

Information may be classified if release of the information could cause harm to national security or foreign policy.



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What kind of harm?

- CONFIDENTIAL – “damage”
- SECRET – “serious damage”
- TOP SECRET – “exceptionally grave damage”



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Compilation Theory

A document made up of entirely unclassified information, that when compiled into one document creates a classified picture.



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Mosaic Theory

Pieces of unclassified information that when matched with information already in the public domain, complete a classified picture.



Limitations of Classification under Executive Order 13526

Information may not be classified 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 disclosure of information that does not require national security protection



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Markings Required by EO 13526

- Classified documents should contain:
 - ✓ Appropriate classification level
 - ✓ Identity of original classification authority
 - ✓ Identity of agency or office
 - ✓ Declassification instructions, including date or event for declassification
 - ✓ Concise reason for classification (Sec. 1.4)
- Portion Markings - 1.6(c)



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**What about the other markings
on the page?**

- **FOUO: For Official Use Only**
- **SBU: Sensitive But Unclassified**
- **LES: Law Enforcement Sensitive**
- **SSI: Sensitive Security Information**
- **CII: Critical Infrastructure Information**



Declassification



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“No information may remain classified indefinitely”

Declassification Timeline:

- Specific date or event
- 10 years after classification decision
- 25 years if justified by sensitivity of information
- 75 years if reveals confidential human source, human intelligence source, or design concepts of weapons of mass destruction



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Sec. 3.3 – Automatic Declassification

- 25 years or older, of permanent historical value, but not necessarily reviewed before declassification

Sec. 3.4 – Systematic Declassification

- Systematic declassification review of records of permanent historical value exempted from automatic declassification



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Sec. 1.8 – Classification Challenges

- Authorized holders of information who believe, in good faith, that classification is improper

Sec. 3.5 – Mandatory Declassification Review

- Request from public for declassification of specific documents



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Can information be classified even after a FOIA request for it has been received?

- “Personal participation” or under the direction of agency head, deputy agency head, or designated senior agency official
- Determination made on a document-by-document basis



Reclassifying a Document

Can information be classified even after it has been released?

- No, except if strict criteria are met:
 - Document-by-document review that reclassification is required to prevent “significant and demonstrable damage to national security
 - Personally approved in writing by agency head
 - “Reasonably recoverable” without bringing undue attention to information
 - Must be reported to Information Security Oversight Office (ISOO)



FOIA Request



FOIA Request

Segregability Analysis

- Duty to segregate and release all unclassified, non-exempt information



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GLOMAR

- What was the Glomar?
- What does it mean now?
- How does it relate to classified information?



Original Glomar Response

“[The CIA Director] has determined that, in the interest of national security, involvement by the U.S. Government in the activities which are the subject matter of your request *can neither be confirmed nor denied*. Therefore, he has determined that *the fact of the existence or non-existence* of any material or documents that may exist which would reveal any CIA connection or interest in the activities of the Glomar Explorer is duly classified Secret in accordance with criteria established by Executive Order 11652.”



Defending Exemption 1 in Litigation

Agency affidavits are key to success

- Affiant must have direct knowledge of classification decision
- Reasonably specific and no evidence of bad faith
- Provide as much information as possible without disclosing classified information



Defending Exemption 1 in Litigation

Before the bench

- Federal Judges have automatic clearance
- May order an in camera review
- Generally “the court will not conduct a detailed inquiry to decide whether it agrees with the agency’s opinions.”

Edmonds v. DOJ, 405 F. Supp. 2d 23, 29 (D.D.C. 2005).



Defending Exemption 1 in Litigation

Standard of Review

- “Expansive standard of deference”
- “[L]ittle proof or explanation is required beyond a plausible assertion that information is properly classified.”

Morley v. CIA, 508 F.3d 1108, 1124 (D.C. Cir. 2007).



Defending Exemption 1 in Litigation

Standard of Review

- National security officials are uniquely positioned to view “the whole picture” and “weigh the variety of subtle and complex factors” in order to determine whether the disclosure of information would damage national security.

CIA v. Sims, 471 U.S. 159, 179-80 (1985).



Waiver of Exemption Protection

- Plaintiff bears the burden
- Waiver only if the requested information is (1) as specific as the released information; (2) matches the released information; and (3) has been made public through an official and documented disclosure. Fitzgibbon v. CIA, 911 F.2d 755 (D.C. Cir. 1990)



Questions?