The Classification Subcommittee of the 2020-2022 term of the FOIA Advisory Committee is composed of three Committee members (Co-Chairs James Stocker and Kristin Ellis and member Kel McClanahan).

At the request of Classification Subcommittee member and author Kel McClanahan, this draft document is being circulated to the full Committee as an aid to Mr. McClanahan's presentation to the full Committee on Thursday, April 7, 2022. OGIS will also post this document online at https://www.archives.gov/ogis/foia-advisory-committee/2020-2022-term/meetings. This document serves as an aid for Thursday's presentation and does not represent the Classification Subcommittee's recommendations.

Important caveats to note:

1. The Classification Subcommittee met on Tuesday, April 5, 2022. Mr. McClanahan was unable to attend. As a result, all three members of the Classification Subcommittee have not had the opportunity to fully discuss or vet this draft document prior to the April 7, 2022 full Committee meeting, although the Subcommittee has engaged in several discussions of the content in the past several months.
2. Two (2) Classification Subcommittee members voted in favor of moving this draft document forward to the full Committee as an aid to the presentation at the April 7, 2022 full Committee meeting; one (1) Classification Subcommittee member voted against moving this draft document forward.

FOIA Advisory Committee, 2020-22 Term
Classification Subcommittee member Kel McClanahan, National Security Counselors
Recommendations Regarding Classification Harmonization (Draft)

April 7, 2022

Summary of Report

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Overview of Recommendations

1. We recommend that either the FOIA statute or Executive Order 13,526, or both, be amended to clarify that information which does not comport with all of the requirements of the Executive Order is not properly classified for purposes of Exemption (b)(1).
2. We recommend that either the FOIA statute or Executive Order 13,526, or both, be amended to clarify that information may not be withheld under Exemption (b)(1) if it does not contain complete declassification instructions.
3. We recommend that either the FOIA statute or Executive Order 13,526, or both, be amended to clarify that information may not be withheld under Exemption (b)(1) if the markings specified in the governing Executive Order are not present in a manner that is immediately apparent.

Current Disparities

FOIA Exemption (b)(1) covers matters which 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."[1] The current Executive order governing such national security classification is Executive Order 13,526.[2]

Under a plain language reading of Exemption (b)(1), a piece of information which does not satisfy *any* part of E.O. 13,526 would not be "in fact properly classified pursuant to such Executive order." However, courts have consistently interpreted this criterion significantly more narrowly, stating that "an agency need only satisfy the requirements of Executive Order § 1.1(a) to classify information properly for purposes of FOIA Exemption 1."[3] Section 1.1(a) states:

> (a) Information may be originally classified under the terms of this order only if all of the following conditions are met:

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[1] 5 U.S.C. 552(b)(1).
[2] Executive Order 13,526, *Classified National Security Information*, *available at* https://www.archives.gov/isoo/policy-documents/cnsi-eo.html.
[3] *Mobley v. CIA*, 924 F. Supp. 2d 24, 50 (D.D.C. 2013). *See also ACLU v. DOJ*, 808 F. Supp. 2d 280, 298 (D.D.C. 2011).

> (1) an original classification authority is classifying the information;
> (2) the information is owned by, produced by or for, or is under the control of the United States Government;
> (3) the information falls within one or more of the categories of information listed in section 1.4 of this order; and
> (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe the damage.

The problem arises, however, from the fact that Sec. 1.1(a) is but the first paragraph in the first subsection of the first section of E.O. 13,526, and there are numerous other requirements peppered throughout the full Order. For example, Sec. 1.3 governs who is authorized to properly classify information. Sec. 1.5 governs how long information is allowed to remain classified, most relevantly stating that "[n]o information may remain classified indefinitely."[4] Secs 1.6 and 2.1 govern the information which must be "indicated in a manner that is immediately apparent" when information is classified. Sec. 1.7 explicitly prohibits the classification of certain types of information and establishes rules for when other information can be classified (such as after receipt of a FOIA request). However, because of the cited case law, courts which address this issue consistently hold that even if the agency violates other provisions of E.O. 13,526, they are still allowed to withhold information under Exemption (b)(1).

In effect, courts have transformed the clear statutory language "are in fact properly classified pursuant to such Executive order" into "are in fact properly classified pursuant to the first paragraph of such Executive order." Put another way, an agency can violate literally every other provision of Sec. 1 of the Executive Order and have the janitor (Sec. 1.3) classify a document in its entirety as "Super Duper Classified" (Sec. 1.2) forever (Sec. 1.5) without marking it (Sec. 1.6) because it embarrassed him (Sec. 1.7). As long as the agency's declarant states that the janitor was named—however improperly—as an original classification authority (Sec. 1.1(a)(1), that the information belonged to the agency (Sec. 1.1(a)(2)), that the information had *anything* to do with national security or foreign affairs (Sec. 1.1(a)(3)), and that the janitor decided that its release could cause damage (Sec. 1.1(a)(4)), a court will decide that it can be withheld under Exemption (b)(1). Simply put, classification misconduct that could get an agency employee fired is still considered "proper classification" for the purposes of FOIA.

While the above example is admittedly fanciful, this disconnect between the strict requirements for what an agency must do to properly classify information and the loose requirements for what an agency must do to withhold information from a FOIA request as "currently and properly classified" has real-life consequences, especially when marking requirements are involved.[5]

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[4] E.O. 13,526 § 1.5(d).

[5] While the main topic of discussion is the marking requirements for original classification, the rules for derivative classification are no less applicable in the case of derivatively classified information—which, statistically speaking, is the vast majority of classified information. Those rules, set forth in Sec. 2.1, in part require original classification markings to be copied to derivatively classified information, meaning that if the originally classified information is improperly marked, then its derivatively classified information will be too. And, as noted above, even if the

Many classified documents are not properly marked as such, but under the current system there is little to no incentive to correctly mark them once the problem is discovered. Some agencies do allegedly have a standard practice of correctly marking any inadequately marked documents they discover during the FOIA process, but this practice is not universal, and when it is not followed, it can cause several problems:

- Failure to indicate the identity of the classification authority (Sec. 1.6(a)(2)) and the agency and office of origin (Sec. 1.6(a)(3)) makes it difficult to understand who made the original determination, preventing any corrective action if the person was not authorized to classify the information.
- Failure to indicate the date or event for declassification (Sec. 1.6(a)(4)) makes it difficult to know when the information is required to be declassified—or even when it was *classified*—which can lead to the information continuing to be withheld even after it was supposed to be declassified.
- Failure to indicate the reason for classification (Sec. 1.6(a)(5)) makes it difficult to understand why the information was classified in the first place, which does not allow a future reviewer—or judge—to intelligently decide whether that determination was correct.
- Failure to include proper portion markings (Sec. 1.6(a)(5)(c)) leads to the withholding of documents in full when segregable portions are non-exempt.

In fact, the Executive Order itself contemplates the harm that can arise from improper marking, stating, "When [previously classified but improperly marked] information is used in the derivative classification process or is reviewed for possible declassification, holders of such information shall coordinate with an appropriate classification authority for the application of omitted markings."[6] However, this provision has some significant restrictions. It only applies to information classified under a previous Executive Order, and therefore does not apply to information improperly marked after 2009. It does not apply to the FOIA process, since agencies do not consider a FOIA review to be a "review[] for possible declassification." And most importantly, as noted above, if an agency outright fails to follow this rule, *it is still allowed to withhold the information under Exemption (b)(1)*.

While the above examples demonstrate why allowing agencies to continue to withhold inadequately marked information is bad for transparency, it is also bad for security. The main purpose of the marking requirements is to allow other government officials who were not involved in the classification decision to understand it, so that, among other things, they can continue to protect the information. If the information is not properly marked, then a future reviewer may reach the wrong conclusion about why it was classified and release information which should have been withheld.

In closing, there are far more reasons to harmonize these two authorities than to maintain the status quo, yet each time a litigant argues that the agency must follow the terms of the relevant Executive Order before it can withhold information under Exemption (b)(1), the agency

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originally classified information is properly marked, there are *no consequences* for not copying the markings, since the derivatively classified information can still be withheld under Exemption (b)(1).

[6] E.O. 13,526 § 1.6(f).

aggressively resists the notion and the Department of Justice aggressively argues that the argument is meritless. Such cases were the genesis of this line of case law in the first place. Moreover, the fact that so many documents are withheld in their entirety under Exemption (b)(1) means that it is impossible for an outside viewer to know exactly how prevalent this issue is, and we are left having to assume—perhaps incorrectly—that the Department of Justice would not defend an agency's right to withhold information that did not satisfy the requirements of the Executive Order so vigorously if agencies were not doing so.

In furtherance of bringing FOIA in harmony with the governing Executive orders, the Subcommittee hereby recommends that the Archivist make the following recommendations to harmonize FOIA and the governing Executive Order.

Recommendations

In order to crystallize the issues, the Subcommittee is making one general recommendation followed by two specific recommendations tied to specific parts of the Executive Order which are most often applicable.

1. **Harmonization in General**

We recommend that either the FOIA statute or Executive Order 13,526, or both, be amended to clarify that information which does not comport with all of the requirements of the Executive Order is not properly classified for purposes of Exemption (b)(1).

There are two potential options for correcting this disparity in general. Either the FOIA statute can be amended to specify that information which does not satisfy all of the requirements of the governing Executive Order is not to be treated as properly classified for purposes of Exemption (b)(1), or a new Executive Order can state as much.

Even in the absence of the other recommendations, approving this recommendation by itself would, if it is followed, create a meaningful change in the status quo. It would expressly authorize courts to consider whether the other requirements of the governing Executive Order were followed, and if they were not, to find that the information in question was not properly withheld.

That being said, it should be emphasized that this recommendation is *not* that any improperly marked information must be released; it is simply that it may not be *withheld*. While the two ideas may sound the same, they are materially distinct. The former would require that an agency release any information which was not properly marked when it was located during the FOIA process, while the latter simply requires that the agency must bring the information into compliance with the Executive Order—by properly marking it and confirming that it was properly classified according to the other criteria—before it may issue a response claiming that it is exempt under Exemption (b)(1). This approach allows agencies a chance to correct mistakes and only compels disclosure if the agency outright refuses to do so.

2. **Prohibition on Withholding Indefinitely Classified Information**

We recommend that either the FOIA statute or Executive Order 13,526, or both, be amended to clarify that information may not be withheld under Exemption (b)(1) if it does not contain complete declassification instructions.

According to Sec. 1.5(d), "No information may remain classified indefinitely. Information marked for an indefinite duration of classification under predecessor orders, for example, marked as 'Originating Agency's Determination Required,' or classified information that contains incomplete declassification instructions or lacks declassification instructions shall be declassified in accordance with part 3 of this order." According to the plain language of this paragraph, if an agency does not "establish a specific date or event for declassification based on the duration of the national security sensitivity of the information" at the time of classification,[7] it must be declassified.

However, "it must be declassified" is not the same as "it is not classified" for the purposes of FOIA, and courts have held that information may continue to be withheld under Exemption (b)(1) even if it meets the standard for automatic declassification under Sec. 3.3 of the governing Executive Order.[8] In practical terms, this means that even if an agency follows this rule, it does not have to actually *release* the information in question until some indeterminate future date when it gets around to processing it for declassification, and it may continue to withhold it from FOIA requesters up until that date.

Accordingly, this disparity should be clarified and either Sec. 1.5(d) should be amended to add "and shall not be withheld from a FOIA request as properly classified information" after "this order," or FOIA should be amended to clarify that information for which insufficient declassification instructions is available shall not be withheld pursuant to Exemption (b)(1).

3. Prohibition on Withholding Inadequately Marked Information

We recommend that either the FOIA statute or Executive Order 13,526, or both, be amended to clarify that information may not be withheld under Exemption (b)(1) if the markings specified in the governing Executive Order are not present in a manner that is immediately apparent.

According to Sec. 1.6(a), several pieces of information are required to be "indicated in a manner that is immediately apparent" at the time of original classification, including the classification level, the identity of the original classification authority, the agency and office of origin, declassification instructions, and a concise reason for classification. Sec. 1.6(c) requires the application of portion markings during original classification to delineate the classified and unclassified portions of documents. According to Sec. 2.1, these markings must be carried over during derivative classification, and the identity of the derivative classifier must also be indicated in a manner that is immediately apparent.

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[7] E.O. 13,526 § 1.5(a).

[8] Citation needed.

However, as noted above, violations of this subsection carry no consequences for an agency for the purposes of FOIA. They are allowed to withhold entire documents in full based solely on the word of an agency FOIA officer that they satisfied Sec. 1.1(a) of the Executive Order, even if those documents do not bear a single marking or are actually marked Unclassified in whole or in part.

Accordingly, this disparity should be clarified and either the FOIA statute should be amended to specify that information for which the specified markings are not present in a manner that is immediately apparent may not be withheld pursuant to Exemption (b)(1), or a new Executive Order which states as much.