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Classified Information and Legal Research

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Much U.S. government information is withheld from public scrutiny under classification procedures established by executive order. Mr. Mitchel traces the development of federal policy in this area into the Reagan presidency.

Introduction

Although the United States government has the most extensive sources of information for legal researchers, it withholds from the public, for purposes of national security, much information that would have useful legal applications. The daily news is filled with topics—agent orange, civilians and soldiers exposed to atomic bomb tests, alleged Nazi war criminals who entered the United States illegally, and the internment of Japanese-Americans during World War II—where investigations and litigation would be greatly assisted by documents that the federal government keeps secret in the name of national security.

Classified information also could contribute to historical and current research into the internal functioning of government, the development of foreign policy, and the United States' role in international agreements. Legal work, such as advising clients on foreign investments, could be enhanced with information gathered by the federal government on the economy, population, and political conditions in foreign countries. Yet, because much of this information is gathered to aid in developing foreign policy, significant portions of it are classified.

Much classified information that would still be useful today dates back to the 1940s and 1950s, the period of heaviest classifying activity. An organized system for classifying documents in the United States dates back to World War I, when military authorities adapted regulations from the long-established systems of their European counterparts. These regulations continued in effect until President Roosevelt issued Executive Order 8381 in 1940, setting the precedent for establishing security classification procedures by Executive

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Order.¹ This brief Order allowed numerous records to be classified during World War II, when a variety of nonmilitary as well as military information was considered beneficial to the enemy.

Wide-ranging security classification continued during the Cold War, when Presidents Truman and Eisenhower issued more Executive Orders, allowing more agencies to classify documents, but describing declassification procedures only vaguely.² Throughout the 1950s and 1960s, government personnel freely classified millions of documents without making provisions for eventually declassifying those of permanent value. The National Archives and Records Services (NARS) accumulated a billion pages of classified records that agencies had sent for preservation without instructions for declassification.³

The Executive Orders kept the classification of information produced by the executive branch in executive control. Congress partially addressed this situation in the Freedom of Information Act (FOIA) in 1966.⁴ Rather than giving Congress control of the executive's authority to restrict access to information, the Act provided legal means for challenging that authority in specific cases. The FOIA allowed anyone to petition executive agencies for the release of specifically identified documents, whether classified or not. If an agency decided to withhold the document under any of nine exemptions (including security classification) it had to justify the refusal in writing to the requestor, who ultimately could appeal the agency's decision to the courts.

Executive Policy under Presidents Nixon and Carter

By the early 1970s, the classification system and the great stores of protected documents had become so unwieldy that President Nixon overhauled the regulations in Executive Order 11,652.⁵ Its stated purpose was to reduce the amount of material classified, and to provide for speedier—even automatic—declassification. It also stated:

In no case shall information be classified in order to conceal inefficiency or administrative error, to prevent embarrassment to a person or Department, to restrain competition or independent initiative, or to prevent for any other reason the release of information which does not require protection in the interest of national security.⁶

1. Exec. Order No. 8,381, 3 C.F.R. 634 (1938-1943).

2. Exec. Order No. 10,104, 3 C.F.R. 298 (1949-1953); Exec. Order No. 10,290, 3 C.F.R. 789 (1949-1953); Exec. Order No. 10,501, 3 C.F.R. 979 (1949-1953).

3. ACCESS TO GOVERNMENT DOCUMENTS: PAPERS PRESENTED TO A SESSION OF THE AMERICAN HISTORICAL ASSOCIATION DECEMBER, 1972, at 5 (1974).

4. Freedom of Information Act, Pub. L. No. 89-554, 80 Stat. 378, 383 (1966) (codified as amended at 5 U.S.C. § 552 (1982)).

5. Exec. Order No. 11,652, 3 C.F.R. 678 (1971-1975).

6. *Id.* § 4.

The Order defined three levels of classification ("Top Secret," "Secret," and "Confidential")⁷ and reduced the number of agencies with authority to classify from forty to twenty-five.⁸ Which personnel in each agency had authority to classify documents had to be designated in writing.⁹

An especially innovative feature of the Order was the General Declassification Schedule. Each "Top Secret" record was to be downgraded to "Secret" after two years, to "Confidential" after another two, and finally declassified in another six, after a total of ten years.¹⁰ A classifier could exempt a document from this schedule by writing a specific date beyond ten years on the document and explaining the rationale for the exemption, or by reviewing the security status after ten years, when the document came up for declassification.¹¹

Any material still classified after ten years was subject to "mandatory review," which required the classifying authority to reconsider its secrecy designation and declassify the material if its release would no longer cause damage to national security.¹² An agency's decision not to release information under mandatory review could not be appealed to the courts, but only to the newly established Interagency Classification Review Committee (ICRC).¹³

The ICRC was itself another innovative feature of the Order. Placed under the National Security Council, the ICRC was to oversee the implementation of the Order in each agency having classification authority, compile reports on the agencies' compliance, and receive appeals, complaints, and suggestions from agencies and members of the public.¹⁴

Executive Order 11,652 prompted a great deal of activity over the next few years. President Nixon directed NARS to set up a "systematic review" program to get rid of the backlog of classified records more than thirty years old, some dating back to World War I. For this project NARS established the Records Declassification Division (RDD) to review the millions of pages involved, separating the material still deemed sensitive, and releasing the rest for access by researchers. By 1975 it had met its goal of reviewing all documents dated before 1945, and had declassified all but one percent of them.¹⁵

Individual federal departments were expected to review their own classified files in a similar manner. The Department of Defense, for example, reviewed

7. *Id.* § 5(A).

8. *Id.* § 2(A), (B). In addition, the President could designate in writing certain offices in the Executive Office that have such authority.

9. *Id.*

10. *Id.*

11. *Id.* § 5(B).

12. *Id.* § 5(C).

13. *Id.* § 7.

14. *Id.*

15. Thompson, *Records Declassification in the National Archives*, 7 PROLOGUE 235, 236-37 (1975).

some two hundred million records that were more than thirty years old, and declassified ninety-eight percent of them.¹⁶

NARS and the departments also had to handle a great influx of requests for mandatory review of classified information more than ten years old. The ICRC reported a total of more than one thousand requests per year, about half of which were rejected. Two percent of the rejections were appealed to the ICRC, and half of them eventually led to declassification of the requested documents.¹⁷

Meanwhile, Congress strengthened the FOIA with significant amendments in 1974.¹⁸ The amendments limited charging for search and copying fees to the direct costs involved, gave the courts more authority to speed appeals and impose sanctions, set a ten-day response time to requests, and required the release of any "segregable portion" of a document, the rest of which was properly exempted due to any exemption, including security classification.

The liberalizing of access policies continued under President Carter, who issued Executive Order 12,065 in 1978 to provide further reforms in the security classification system "in order to balance the public's interest in access to Government information with the need to protect certain national security information from disclosure."¹⁹ The Order started by advising that, when in doubt, a classifier should use a less restrictive classification category, or not classify at all.²⁰

Instead of a General Declassification Schedule, E.O. 12,065 required that documents in all three categories be declassified after six years.²¹ An exemption could be set at the time of classification for up to twenty years.²² In a related change, the systematic review program at NARS and other agencies was widened to cover records only twenty years old, instead of thirty.²³

The mandatory review procedure was continued, with the stipulation that requests be acted upon within sixty days.²⁴ The ten-year limit before information could be requested was removed, except for information originated by the President, White House staff, or others acting on behalf of the President.²⁵ This change meant that the classification of much information could be challenged from the day of its creation.

16. *Security Classification Exemption to the Freedom of Information Act: Hearing Before a Subcomm. of the House Comm. on Government Operations, 95th Cong., 1st Sess. 85 (1979).*

17. INTERAGENCY CLASSIFICATION REVIEW COMMITTEE, 1975 PROGRESS REPORT 12 (1976).

18. Act of Nov. 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561.

19. Exec. Order No. 12,065, 43 C.F.R. 190 (1978).

20. *Id.* § 1-101.

21. *Id.* § 1-401.

22. *Id.* § 1-402.

23. *Id.*

24. *Id.* § 3-501.

25. *Id.* § 3-503.

Finally, the Order replaced the ICRC with the Information Security Oversight Office (ISOO), and moved this new entity from the National Security Council to the General Services Administration.²⁶ The functions of the ISOO were similar to those of the ICRC.

Reagan Administration Policy

Much of the progress made by Nixon and Carter was reversed in the latest Executive Order governing security classification. President Reagan's E.O. 12,356, announced in June 1982,²⁷ reverses the earlier Carter policy by advising that, when there is doubt about whether to classify, documents should be classified.²⁸ Moreover, the new Order entirely does away with the downgrading and declassification schedule, allowing documents to be classified for "as long as required."²⁹

Three new provisions allow for reclassification of information previously released,³⁰ for classification of unclassified documents *after* they have been requested,³¹ and for denying the existence of requested documents if acknowledging their existence could in itself pose a threat to national security.³²

Under the Carter Executive Order, classified presidential documents less than ten years old were exempt from mandatory review, but E.O. 12,356 exempts these documents from review indefinitely.³³ Meanwhile, the sixty-day limit for responding to a request was lifted.³⁴

While the new Order calls for increased classification, it also weakens the programs for declassifying documents that were classified in the past. Carter's requirement that documents more than twenty years old be reviewed for declassification was changed to thirty years, and all agencies except NARS were exempted from the program altogether.³⁵

This is how security classification policy stands today, including the procedures for requesting classified information. Both mandatory review and

26. *Id.* § 5-1.

27. Exec. Order No. 12,356, 3 C.F.R. 166 (1983), *reprinted in* 50 U.S.C. § 401 note at 51-56 (1982).

28. *Id.* § 1.1(c). For a thorough discussion of the effects of E.O. 12,356, see SECURITY CLASSIFICATION POLICY AND EXECUTIVE ORDER 12,356: TWENTY-NINTH REPORT BY THE COMM. ON GOVERNMENT OPERATIONS, H. REP. No. 731, 97th Cong., 2d Sess. (1982); *Executive Order on Security Classification: Hearings Before a Subcomm. of the House Comm. on Government Operations*, 97th Cong., 2d Sess. (1982) (hereinafter *Hearings*).

29. Exec. Order No. 12,356, *supra* note 27, § 1.4(a).

30. *Id.* § 1.6(c).

31. *Id.* § 1.6(d).

32. *Id.* § 3.4(f)(1).

33. *Id.* § 3.4(b).

34. *Id.* § 3.4(f).

35. *Id.* § 3.3; *cf.* U.S. GENERAL ACCOUNTING OFFICE, SYSTEMATIC REVIEW FOR DECLASSIFICATION OF NATIONAL SECURITY INFORMATION—DO BENEFITS EXCEED COSTS? (1980).

the FOIA provide avenues for access to classified records for research or discovery. Each agency establishes its own regulations, including addresses for submitting requests, phone numbers for further information, fee requirements, time limits, criteria for fee waivers, appeal procedures, and other information that the requestor should consult before submitting a request.³⁶

Both procedures require a request in writing. If the request is rejected, it may be appealed to a higher authority within the agency. Executive Order 12,356, however, has changed the overall policy for weighing appeals. When an official considered an appeal under E.O. 12,065, the need for continued security had to be weighed against the public interest.³⁷ The new Order reverses this standard, emphasizing national security alone.³⁸

In some cases, rather than receiving a denial, a requestor may receive a "sanitized" document. A sanitized document is one in which a segregable portion of a record is released, while the rest remains classified. The State Department, for example, defines "segregable" as producing "an intelligible record which is not distorted out of context and does not contradict the record being withheld."³⁹ When a request is met with a sanitized document, the action must be explained in writing, and can be appealed.⁴⁰

When an appeal to a higher authority within an agency is denied, the further appeal procedures under FOIA and mandatory review diverge. Under mandatory review, a requestor has no recourse to the courts, but may appeal to the ISOO. Previously, the requestor was to submit the original request and all subsequent correspondence with the agency to the ICRC, which explained its review procedure in the *Code of Federal Regulations*. Amazingly, the ISOO has never promulgated its administrative procedures, including the procedure for appeal, and in general has kept a low profile.⁴¹

The FOIA, on the other hand, provides for appeal to the courts. An agency can use security classification to deny an FOIA request if the document has been properly classified according to existing regulations.⁴² Technically, a court can overturn the agency's denial only if the document has been improperly classified. Courts have shown, however, that this can include the justifiability of continued secrecy, requiring that the agency prove potential damage to national security, as well as how properly the classification stamp

36. See also 32 C.F.R. § 2001.32 (1986) (Information Security Oversight Office's regulations regarding mandatory review).

37. Exec. Order No. 12,065, *supra* note 15, § 3-303.

38. *Hearings*, *supra* note 17, at 303.

39. 22 C.F.R., Ch. 1, subchapter R, § 171.11(b), at 441.

40. *Id.* §§ 171.50, 171.60.

41. 32 C.F.R. ch. 20 (1986). See also *Hearings*, *supra* note 17, at 129-34 (statements of Steven Garfinkel, Director of ISOO, and Richard Willard, Department of Justice).

42. 5 U.S.C. 552b(c)(1) (1982).

was applied to the paper.⁴³ This brings the FOIA closer to mandatory review, which challenges the classification designation directly, and asks the agency to reconsider the need for continued security.

The courts most frequently determine the legitimacy of a security designation by relying on affidavits from the agency. If the affidavits are inconclusive, the judge may order in camera inspection of the documents, reviewing them in private and making a decision without revealing their contents.⁴⁴ Courts, however, have proven reluctant to use this option.⁴⁵

Identifying Classified Documents

One of the most troublesome aspects of the process of requesting classified information is the requirement under both FOIA and E.O. 12,356 to "reasonably describe" the desired document.⁴⁶ General requests for whole files or "everything" on a given subject are likely to be rejected. This may seem ironic, since it seems impossible to describe a document that the public has been forbidden to see. Yet, there are sources that can help a researcher identify specific records to request.

Articles by investigative journalists are the best sources for leads on issues that classified documents may illuminate, and on specific documents rumored to exist that can be formally requested. Although not written with legal research in mind, exposes in newspapers, magazines, books, and broadcasts should not be overlooked.⁴⁷ Memoirs by former officials who created or had access to classified documents also may refer to documents still classified.⁴⁸

Many classified documents are released as a result of FOIA requests made as part of discovery in specific court cases. Once released, these documents become part of the court record as exhibits, and can be reviewed by interested parties. Transcribed testimony also may refer to additional documents that were not released.

As a compromise between FOIA requests and the government's insistence that documents remain classified, a court sometimes orders that an index of the relevant documents be released so that the parties involved can get

43. *See, e.g.*, *Times Newspapers of Great Britain v. Central Intelligence Agency*, 539 F. Supp. 678 (S.D.N.Y. 1982); *Porter v. United States Dep't of Justice*, 717 F.2d 787 (3d Cir. 1983); *Ray v. Turner*, 468 F. Supp. 730 (D.D.C. 1979).

44. 5 U.S.C. 552(a)(4)(B).

45. *See* 1984 EDITION OF LITIGATION UNDER THE FEDERAL FREEDOM OF INFORMATION ACT AND PRIVACY ACT 228-29 (9th ed. 1983). This annual volume has valuable practical discussion of FOIA litigation.

46. 5 U.S.C. 552 (a)(3)(A); Exec. Order No. 12,356, *supra* note 17, § 3.4(a)(2).

47. *See, e.g.*, H. WASSERMAN, *KILLING OUR OWN: THE DISASTER OF AMERICA'S EXPERIENCE WITH ATOMIC RADIATION* (1982); P. AGEE, *INSIDE THE COMPANY* (1975).

48. *See, e.g.*, D. ACHESON, *PRESENT AT THE CREATION: MY YEARS IN THE STATE DEPARTMENT* (1969); R. KENNEDY, *THIRTEEN DAYS: A MEMOIR OF THE CUBAN MISSILE CRISIS* (1969).

some idea of what is at issue. These are sometimes known as Vaughn indexes, after the first case in which such an index was produced.⁴⁹ If the index is not classified, it becomes part of the court record that anyone can see for references to documents still classified.

Some Congressional publications also include declassified documents and make reference to documents still classified. Witnesses at hearings may make reference to classified documents, and some of the appendixes may reproduce declassified documents in full.⁵⁰ Research published as committee prints and reports on historical topics, issues in foreign relations, and investigations into government activities also may cite classified and declassified documents in footnotes.⁵¹

An example of a useful executive branch publication is the State Department's *Foreign Relations of the United States (FRUS)*. This series is a compilation of major documents that highlight the foreign relations activities of the United States each year. Some of the documents are declassified, and the series has a wealth of editorial notes and footnotes that refer to documents not included in the series, some of which are still classified.⁵² Unfortunately, the release of this series now lags behind about thirty years.

Declassified documents are valuable sources of information in themselves, and also may provide leads on classified documents to request. When agencies declassify their records, however, they rarely make any effort to disseminate them, but, instead, store them in their files as before. To view these records, one usually must make a regular FOIA request, although some agencies have FOIA reading rooms where indexes to nonclassified records are available to help with the requesting process.

The only commercially produced guide to declassified material is the *Declassified Documents Reference System (DDRS)*, started in 1975 by Carrollton Press, now produced by Research Publishing. It consists of three parts: the text of declassified documents on microfiche, abstracts to these documents, and a subject index. Supplemented quarterly, the set now includes more than 35,000 documents, mostly from the 1950s and 1960s, that the editors have selected from the millions of documents that have been declassified. This

49. *Vaughn v. Rosen*, 484 F.2d 820 (1973).

50. See, e.g., *Health Effects of Low-Level Radiation: Joint Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce and the Health and Scientific Research Subcomm. of the Senate Comm. on Labor and Human Resources*, 96th Cong., 1st Sess. (1979).

51. See, e.g., CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, FOR THE SENATE COMM. ON FOREIGN RELATIONS, 98TH CONG., 2D SESS., *THE U.S. GOVERNMENT AND THE VIETNAM WAR* (Comm. Print 1984).

52. Another good source is *REPORT TO THE PRESIDENT BY THE COMMISSION ON CIA ACTIVITIES WITHIN THE UNITED STATES* (1975).

sampling is useful for finding the full text of documents that a researcher may have heard about from newspapers or some other established source, or for getting an overview of the types of materials being declassified. Browsing the abstracts indicates the surprising range of events and issues on which declassified documents can be revealing.

Other sources for declassified documents in microfiche are two University Publications of America sets called *Confidential U.S. State Department Central Files* and *Confidential U.S. Diplomatic Post Records*. These are taken from the documents that the State Department has deposited with NARS, dating from 1914 to 1954. The huge sets are useful primarily for historical research on international relations, and pick up where *FRUS* leaves off.

The National Archives and Records Service is, of course, the biggest source of declassified documents, with its millions of pages declassified through the systematic review program. Starting in the fall of 1973, *Prologue*, the journal of the National Archives, has included a column entitled "Declassified Records," announcing the general subjects of blocks of records recently declassified. This column now has been merged with the announcements of recent acquisitions in a column entitled "Accessions and Openings."

The systematic review program, however, has suffered in recent years from budget cuts.⁵³ In its heyday, the Records Declassification Division reviewed large blocks of records and hoped eventually to review all of the old records, which took up thousands of feet of space. The RDD now has abandoned that goal and instead concentrates on reviewing State Department files and related records that are to be opened in conjunction with the publication of *FRUS*, as well as reviewing files that researchers have specifically requested. A researcher must fill out an FOIA request for these materials, which requires that the researcher reasonably describe the documents to be reviewed. Therefore, the advantage to researchers of having access to the whole range of materials without having to know exactly what to look for in advance is lost.

Conclusion

Executive Order 12,356 is one example of how the current administration's policies concerning security have affected the management of classified information. In addition to revising the security classification system, the Reagan administration has encouraged efforts in Congress and the Justice Department to weaken the FOIA.⁵⁴ A bill already signed into law, for example, exempts the CIA's "operational files" from the FOIA.⁵⁵

53. Wash. Post, May 8, 1985, at A21.

54. Wash. Post, July 16, 1981, at A6.

55. Central Intelligence Agency Information Act, Pub. L. No. 98-477, 98 Stat. 2209 (1984).

Requestors have reported more denials, more bureaucratic foot-dragging, and more denials of fee waivers.⁵⁶ Fees themselves have become an issue, and increased fees have been suggested as a way to discourage requests.⁵⁷ Even if the agencies have not made it a policy to use fees as a deterrent, they have increased fees tremendously in a renewed effort to recover costs even remotely related to filling requests.⁵⁸

Abuses of the classification system which were detected under Carter have been allowed to continue under Reagan. Congress criticized Reagan's executive order and its predecessors as being too weak on enforcement and too lenient on violations. In fact, investigations by Congress and the General Accounting Office have confirmed that agencies have failed to report the full number of personnel given authority to classify, have classified as many as two hundred times the number of documents reported, and have exempted over ninety percent of all classified information from the now-defunct declassification schedule.⁵⁹ In addition, the Information Security Oversight Office has acknowledged the possibility that some agencies have developed the habit of classifying more documents than necessary to make their activities appear more important.⁶⁰

The handling of classified records has come full circle. Future generations of researchers will face the obstacles that Nixon's and Carter's policies attempted to remove, but that current policies and continuing abuses of the system have reinforced.

56. Simon, *FOIA Requests: Resistance Growing?*, Nat'l L. J., Oct. 11, 1982, at 20, col. 2.

57. Wash. Post, *supra* note 54.

58. *Less Access to Less Information by and about the U.S. Government*, 76 SPECIAL LIBR. 138, 153-54 (1985).

59. U.S. GENERAL ACCOUNTING OFFICE, IMPROVED EXECUTIVE BRANCH OVERSIGHT NEEDED FOR THE GOVERNMENT'S NATIONAL SECURITY INFORMATION CLASSIFICATION PROGRAM: REPORT TO THE CONGRESS 10-22 (1979); U.S. GENERAL ACCOUNTING OFFICE, CONTINUING PROBLEMS IN DOD'S CLASSIFICATION OF NATIONAL SECURITY INFORMATION: REPORT TO THE CONGRESS 5-20 (1979).

60. Wash. Post, *supra* note 53.