



UNITED STATES DEPARTMENT *of* JUSTICE

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

*National Security vs. Open Government*



## *FOIA Exemption 1*

(b)(1) applies to information which is *currently* and *properly* classified in the interest of national defense or foreign policy, as specifically authorized under the criteria established by Executive Order and implemented by regulations.  
(emphasis added)



## *The Relationship Between the FOIA and Classification*

When requested under the FOIA, information will be withheld if it is *currently* and *properly* classified pursuant to Section 1.4 of Executive Order 13526 (formerly E.O. 12958, as amended)



## *The Relationship Between the FOIA and Classification*

When requested under the FOIA, classified information will be released if:

- it is no longer *currently* and *properly* classified pursuant to Section 1.4 of Executive Order 13526, and
- no other FOIA exemptions or exclusions can be applied



## *Access to Classified Information*

- Access is limited to those with both:
  - Personnel security clearance at the appropriate level of classification
  - A need-to-know the information



## *Access to Classified Information*

- Automatic clearances are granted to:
  - The President and Vice President
  - Members of Congress
  - Federal Judges



## *Exemption 1 – Where Do We Start?*

- National security classification is controlled by the President through guidance issued by Executive Orders.
- The current Executive Order was issued by President Obama on December 27, 2009 and became fully implemented as of June 27, 2010.



## *Executive Order 13526*

### Sec. 1.1 – Classification Standards

- Original Classification Authorities (OCA)
  - Government must maintain control of the information
  - There must be a determination that the release of the information could cause harm to national security or foreign policy
  - Unauthorized disclosures do not nullify classification





## *Executive Order 13526*

### Sec. 1.1 – Classification Levels

- CONFIDENTIAL – “damage”
  
- SECRET – “serious damage”
  
- TOP SECRET – “exceptionally grave damage”
  
- TOP SECRET/SENSITIVE  
COMPARTMENTED INFORMATION



## *Executive Order 13526*

### Sec. 1.4 – Classification Categories

Information will be considered *currently* and *properly* classified if it concerns:

- a) Military Plans, Weapons Systems, or Operations;
- b) Foreign Government Information;



## *Executive Order 13526*

### Sec. 1.4 – Classification Categories (continued)

- c) Intelligence Activities (including special activities), Intelligence Sources or Methods, or Cryptology;
- d) Foreign Relations or Foreign Activities of the United States, including Confidential Sources;



## *Executive Order 13526*

### Sec. 1.4 – Classification Categories (continued)

- e) Scientific Technological, or Economic Matters Relating to the National Security;
- f) United States Government Programs For Safeguarding Nuclear Materials or Facilities;



## *Executive Order 13526*

### Sec. 1.4 – Classification Categories (continued)

- g) Vulnerabilities or Capabilities of Systems, Installations, Infrastructures, Projects, or Plans Relating to the National Security; or
- h) Development, Production, or Use of Weapons of Mass Destruction



## *Executive Order 13526*

### Sec. 1.5 – Duration of Classification

- Generally, information is classified for 10 years after its creation, unless the OCA determines that 25 years is necessary
- Classification can be extended beyond 25 years but only under specific criteria (see Automatic Declassification)



## *Executive Order 13526*

### Sec. 1.6 – Identification & Markings

- Ideally, a classified document should contain:
  - Date or event for declassification
  - Reason for classification per the relevant E.O.
  - Proper portion markings
- The importance (or lack thereof) of other markings



## Executive Order 13526

### Sec. 1.7(c) – Reclassification After Release

- Must be conducted under the authority of agency head or deputy head
- Must be “reasonably recoverable”
- Must be reported to ISOO





## Executive Order 13526

### Sec. 1.7(d) – Post-Request Classification

- Must be done on a document-by-document basis
- Must involve the “personal participation” of senior management



## Executive Order 13526

Sec. 1.7(e) – Mosaic/Compilation Theory

Sec. 1.8 – Classification Challenges



## Executive Order 13526

Sec. 3.1(d) – Exceptional circumstances in which public interest outweighs national security

Sec. 3.3 – Automatic Declassification

Sec. 3.4 – Systematic Declassification

Sec. 3.5 – Mandatory Declassification

Sec. 3.7 National Declassification Center



## Executive Order 13526

### GLOMAR and the c(3) Exclusions

- Acknowledging possession of the records will cause the harm
- History of the GLOMAR response
- GLOMAR Examples
- What do people think of GLOMAR?
- The c(3) FOIA Exclusion



## *Requests for Documents Containing Classified Information*

- Accomplish normal (although extremely important) administrative up front processing.
- If applicable, contact requester to discuss scope of request.
  - Requesters be as specific as possible.
- Task out accordingly within your staff.



# *Requests for Documents Containing Classified Information*

## Search for Records

- People searching for records must know where there records are.
- Age of potentially responsive records may be a factor in where records are stored.
- “All of the documents responsive to this request are classified.”
  - Must identify responsive information.



# *Requests for Documents Containing Classified Information*

## Search for Records

- Designation of fee status and requester willingness to pay may affect time spent on search.
  - Staff must keep track of time spent on search
- If no responsive documents are found:
  - The component that conducted the search must be prepared to explain the methods of its searches.
  - Likely appeal.



# *Requests for Documents Containing Classified Information*

## Review of Classified documents responsive to FOIA requests

- “All the documents responsive to this request are classified.”
  - Review page by page within the document and identify information that is currently and properly classified.
  - If the determination is that everything within the document is classified, the cognizant component must be prepared to say why.





# *Requests for Documents Containing Classified Information*

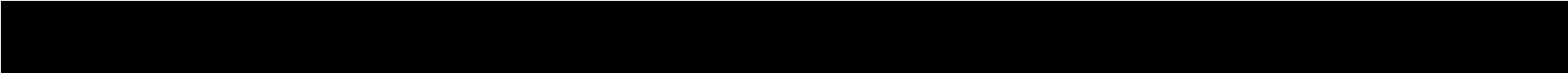
## Duty to Release All Unclassified Information

- We always have the duty to segregate out all non-exempt information!
- This duty applies to classified documents as well.



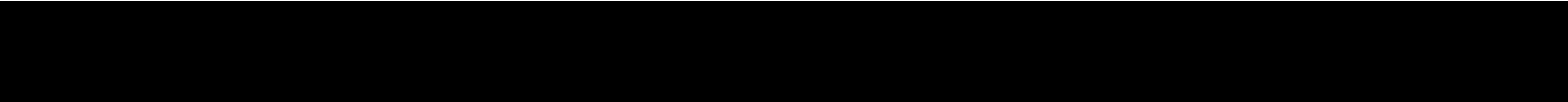
5. (U) C3 for North American Air Defense

a. ~~(S)~~

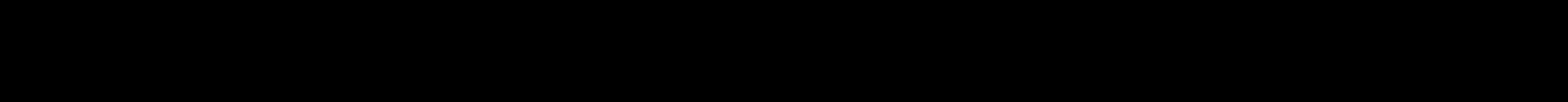


b. (U) Capability

(1) ~~(S)~~



(2) ~~(S)~~

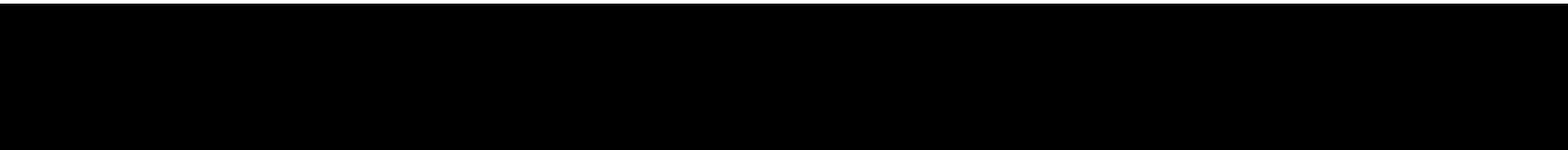


(3) ~~(S)~~



c. (U) Rationale

(1) ~~(S)~~



## UNCLASSIFIED

**Proprietary Rights.** According to the NAVAIR program manager, the reason for not breaking out the gearboxes for direct purchase [REDACTED] proprietary rights on special tooling for the gearboxes. [REDACTED]

[REDACTED] 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] no objection to its use on a noninterference [REDACTED]. We also noted that [REDACTED] 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 could be established by [REDACTED] substantial savings can be achieved by purchasing the gearboxes [REDACTED]

For example, the Navy's Aviation Supply Office in Philadelphia, Pennsylvania, purchased the identical speed decreaser 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 46 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 by 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 and the time lag since it last manufactured this part. We were told that [REDACTED] was given by the program manager for not buying the [REDACTED]

We also found no evidence [REDACTED] had adversely affected delivery of helicopters to the Government on the Navy contract [REDACTED] previously. Current [REDACTED] are 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*



## *Classification in Litigation*

- Role of the Federal Judge
- Opinions of Former Officials Are Not Considered
- In Camera Review
- Deference to Agency Expertise
- Agency Affidavits are Key to Success
- Your application of Exemption 1 is only as strong as the administrative procedures on which it is based!