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New Executive Order Expected to Curb Secrecy

January 4th, 2010 by Steven Aftergood

For the first time, each executive branch agency that classifies information will be required to perform “a comprehensive review” of its internal classification guides to validate them and “to identify classified information that no longer requires protection and can be declassified.” The new requirement is one of the most potentially significant features of [an Executive Order](#) on national security classification policy that was signed by President Obama last week.

There are more than two thousand agency classification guides currently in use and they constitute the detailed operating instructions of the classification system. If the so-called Fundamental Classification Guidance Review (set forth in section 1.9 of the new Order) is faithfully implemented by the agencies, it should eliminate numerous obsolete classification requirements and effectively rewrite the “software” of government secrecy.

Other outstanding features of the new [Executive Order 13526](#) include the establishment of a National Declassification Center to coordinate and streamline the declassification process (section 3.7); the adoption of the principle that “No information may remain classified indefinitely” (section 1.5d); and the elimination of an intelligence community veto of declassification decisions made by the Interagency Security Classification Appeals Panel. This veto authority had been granted by the Bush Administration in 2003.

But the Order contains many dozens of other changes in language that are subtle but important. So, for example, section 3.1g states that “no information may be excluded from declassification... based solely on the type of document or record in which it is found.” What this simple formulation does (or is expected to do) is to eliminate the permanent classification of the President’s Daily Brief (PDB), the daily intelligence compilation that is delivered to the President each morning. The CIA has long argued that by virtue of being presented to the President, the information contained in PDBs is inherently and permanently classified. Now it’s not.

Not all of the changes are in the direction of increased disclosure. Section 4.3 authorizes the Attorney General, as well as the Secretary of Homeland Security, to establish highly secured Special Access Programs, an authority reserved in the previous Executive Order to the Secretaries of Defense, State, Energy and the then-Director of Central Intelligence. Sections 1.8c and 3.5g exclude material submitted for prepublication review from classification challenges and mandatory declassification review.

Some of the changes suggest previously unsuspected problems or issues. Section 4.1c states curiously that “An official or employee leaving agency service may not ... direct that information be declassified in order to remove it from agency control.” There may be a story behind that new provision, but I don’t know what it is. Section 3.1h states for the first time that classified “artifacts” and other classified materials that are not in the form of records shall be declassified in the same way as classified records.

The detailed changes in the new Executive Order can best be discerned in [a “red line” version](#) of the Order which highlights the deletions and additions that have been made in the text.

The promise of transparency can easily backfire and engender cynicism if it turns out to be a mere pretense. But in the development of the new Executive Order, the Obama Administration successfully avoided that pitfall, and then some. To a degree previously unsurpassed not only in classification policy but in most other policy areas as well, the Administration both solicited and acted upon suggestions and recommendations from members of the public and public interest groups.

Members of the White House staff, the National Security Council staff, and the Information Security Oversight Office did more than go through the motions of receiving public input. They sought it out and, in a surprising number of cases, incorporated it in the final Order. The Fundamental Classification Guidance Review, the elimination of the intelligence community veto on declassification decisions, the establishment of a date certain for eliminating the backlog of 400 million pages of records awaiting declassification, a “drop dead” date to set a period of time after which classification must expire — all of these and several other provisions in the new Order are traceable to recommendations from the public. (The National Declassification Center was originally proposed by the 1997 [Moynihan Commission report](#).)

Naturally, not all of the public recommendations were accepted. A proposal that the Declassification Center be given its own authority to declassify historical records without the concurrence of the originating agencies was rejected as “a bridge too far,” said one official. So was a recommendation to strengthen internal oversight by granting the Director of the Information Security Oversight Office the unilateral authority to declassify erroneously classified records government-wide. A proposal for a series of pilot projects to help develop further innovations in information security and disclosure was not acted on. And quite a few other suggestions from the public were set aside.

Nor was the Administration’s interaction with members of the public perfectly frictionless. A request by public interest groups for access to an interim draft of the Executive Order was specifically rejected by the National Security Advisor in [a September 2 letter](#) (pdf). But after the draft [leaked into the public domain](#) later that month, an NSC official said, the resulting public comments “proved to be tremendously useful in defending and refining” the provisions of the Order.

Beyond the unparalleled degree of public participation in its development, the new [Executive Order](#) is the only such Order to be issued in the first year of a Presidential Administration. (The last two Presidents issued their classification Orders in their third year in office). And it is the first to be completed in a comparatively brief seven months. It is also the first Order to be accompanied by a personal [Memorandum from the President](#) affirming the terms of the Order, and going beyond them to impose several additional requirements. Not only that, but the President [affirmed](#) his instruction to the National Security Advisor to pursue “a more fundamental transformation of the security classification system” that goes well beyond the latest adjustments.

There are still many ways that the implementation of the new Executive Order can be frustrated, defeated or undermined, although public reporting requirements and public vigilance should help to keep it on track. But it is clear that this Administration is now invested in the process of secrecy reform. “There’s a real potential for us to be criticized if the reforms we’re advocating don’t pan out,” one White House official told Secrecy News.