

**THE FREEDOM OF INFORMATION ACT – THE HISTORICAL
AND CURRENT STATUS OF WALKING THE TIGHT ROPE
BETWEEN PUBLIC ACCESS TO GOVERNMENT RECORDS
AND PROTECTING NATIONAL SECURITY INTERESTS**

*Julia P. Eckart**

I. INTRODUCTION	242
II. THE HISTORY BEHIND PRESIDENT LYNDON BAINES JOHNSON’S SIGNING OF THE FOIA	243
III. THE HISTORY BEHIND ACCESS OR RATHER LACK OF ACCESS TO GOVERNMENT RECORDS	247
A. <i>The Records Act of 1789</i>	247
B. <i>The Administrative Procedures Act</i>	248
IV. PROCEDURAL REQUIREMENTS OF THE FOIA	251
V. JUDICIAL STANDARD OF REVIEW UNDER THE FOIA	251
VI. WHAT IS THE DIFFERENCE BETWEEN CLASSIFIED INFORMATION AND FOR OFFICIAL USE ONLY INFORMATION?	253
A. <i>What Is for Official Use Only Information and How Does It Relate to the Classification Regulations and Releases Under the FOIA?</i>	254
B. <i>Will Executive Order 13556, Controlled Unclassified Information, Solve the Confusion Between a Restrictive, Unclassified Dissemination Control Label and Releases Under the FOIA?</i>	257
VII. RECORDS CLASSIFIED PURSUANT TO EXECUTIVE ORDER 13526, CLASSIFIED NATIONAL SECURITY INFORMATION, AND RELEASES UNDER THE FOIA	263
A. <i>Which Executive Order Applies to the Classified Information?</i>	264
B. <i>Procedural Requirements Pursuant to Executive Order 13526, Classified National Security Information</i>	264

* Ms. Julia P. Eckart, USAF Civilian Attorney, B.A. Economics, Mount Holyoke College (1985); J.D. Emory University School of Law (1989). Ms. Eckart is a member of the Florida Bar. The views expressed in this article are those of the author and do not reflect the views of the United States Air Force, the Department of Defense (“DoD”), or the U.S. Government.

C. *Substantive Requirements Pursuant to Executive Order 13526, Classified National Security Information* 267

D. *Judicial Standard of Review and Analysis for Classified Records Requested Under the FOIA* 268

VIII. PROHIBITIONS ON CLASSIFYING SPECIFIC CATEGORIES OF INFORMATION 272

IX. WAIVER OF CLASSIFICATION EXEMPTION – OTHERWISE KNOWN AS THE WIKILEAKS ARGUMENTS 279

X. SUMMARY 280

I. INTRODUCTION

The Freedom of Information Act¹ (“FOIA”), a law that appears to be relatively straight-forward on its face, has generated a substantial amount of case law over the last forty-five years that clearly reflects the tension between the public’s right of access to government records and the government’s need to withhold records in order to protect national security interests, whether those interests pertain to classified or sensitive but unclassified information. While the FOIA does not require a requester to cite a reason or purpose when submitting a FOIA request for government records,² FOIA requesters will sometimes articulate reasons why they are requesting the records and those reasons may include the following: educational purposes, need for public debate on government actions and/or proposed actions, authorities for said government actions, notification to the public as to how the United States Government (“USG”) is spending taxpayer dollars, and/or fundamental principles of democracy. On the other hand, there are those who place their lives on the line for national security reasons and those charged with protecting the United States who are concerned that releasing too much information places the nation’s security, its citizens, and those who defend the nation at risk.

¹ Administrative Procedures Act [hereinafter “APA”] § 3, 5 U.S.C. § 552 (2015); The Freedom of Information Act (“FOIA”) was passed in 1966 pursuant to the APA of 1966, Pub. L. No. 89-487, 80 STAT. 250 (1966), which amended the APA of 1946, ch. 324, 60 STAT. 238 (1946). However, as initially drafted, the APA of 1966, § 3, 80 STAT. 250, placed the FOIA in Title 5 of the U.S.C., specifically 5 U.S.C. § 1002 (1966), with the title of Public Information, availability. Further, Pub. L. No. 90-23, 81 STAT. 54 (1967) amended the FOIA and placed the statute in its current location, specifically, 5 U.S.C. § 552.

² See 5 U.S.C. § 552 (a)(3)(A)(ii) (2015).

II. THE HISTORY BEHIND PRESIDENT LYNDON BAINES JOHNSON'S SIGNING OF THE FOIA

In viewing the FOIA from today's perspective, one could argue that the tension between public access to government records and protection of national security was clearly evident on July 4, 1966,³ the day President Lyndon Baines Johnson signed the FOIA into law. On more recent anniversaries of the FOIA's date of enactment, commentators have discussed President Johnson's (supposed) feelings about the FOIA and concluded that he was not in favor of it for multiple reasons.⁴ First, commentators note that President Johnson only issued a written statement, rather than having a formal bill signing ceremony.⁵ Further, there was no appointment annotation made to President Johnson's daily calendar.⁶ Mr. Bill Moyers, former White House Press Secretary, bolstered the proposition that President Johnson was not in favor of the law when, as the guest speaker at the Twentieth Anniversary of the National Security Archive at George Washington University, he stated:

I was there, as the White House press secretary, when President Lyndon Johnson signed the act on July 4, 1966; signed it with language that was almost lyrical – 'With a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded.'

Well yes, but I knew LBJ [Lyndon Baines Johnson] had to be dragged kicking and screaming to the signing ceremony. He hated the very idea of the Freedom of Information Act; hated the thought of journalists rummaging in government closets and opening government files; hated them challenging the official view of reality. He dug in his heels and even threatened to pocket veto the bill after it reached the White House.⁷

³ The FOIA was signed into law on July 4, 1966 and took effect on July 4, 1967. See Pub. L. No. 89-487, 80 Stat. 250 (1966); see also and Pub. L. No. 90-23, 81 Stat. 54 (1967).

⁴ See Ted Bridis, *LBJ Loath to Approve Information Act in 1966, Feared the Disclosure of National Secrets*, BOSTON.COM NEWS (July 4, 2006), http://www.boston.com/news/nation/washington/articles/2006/07/04/lbj_loath_to_approve_information_act_in_1966; see also Thomas S. Blanton, Ed., *Freedom of Information at 40, LBJ Refused Ceremony, Undercut Bill with Signing Statement*, THE NAT'L SEC. ARCHIVE GEO. WASH. UNIV. (2006), <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB194> (last visited Apr. 24, 2017), available at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB194>.

⁵ Bridis, *supra* note 4.

⁶ See President's Daily Diary, July 4, 1966, 1963-1969, Gen FE 14-1, Access to Records, WHCF, LBJ Library; see also THOMAS S. BLANTON, ED., *Freedom of Information at 40, LBJ Refused Ceremony, Undercut Bill with Signing Statement*, Doc. 39, THE NAT'L SEC. ARCHIVE GEO. WASH. UNIV. (2006), available at <http://nsarchive.gwu.edu/NSAEBB/NSAEBB194>.

⁷ Mr. Bill Moyers, Address at the Twentieth Anniversary of the National Security Archive: In the Kingdom of the Half-Blind (Dec. 9, 2005) (*transcript available at* <http://www2.gwu.edu/~nsarchiv/anniversary/moyers.htm>).

However, possibly the strongest evidence that President Johnson was not in favor of the FOIA may be the substantial changes made to the bill signing statement as initially drafted, the revised statements, the press release statement, and the bill signing statement with President Johnson's signature. As noted by Mr. Thomas S. Blanton, Director of The National Security Archive, "the signing statement includes more about the need to keep secrets than the urgency of openness."⁸

The National Security Archives has obtained numerous documents pertaining to the enactment of the FOIA from President Lyndon Baines Johnson's Library and Museum.⁹ The documents include two marked drafts of the bill signing statement, both with handwritten edits, a press release statement (dated July 4, 1966), and a final bill signing statement with President Johnson's signature.¹⁰ There are differences between all four documents; some more substantial than others. Excerpts of the first draft bill signing statement (with no label), as originally typed, are as follows:

This legislation implements a principle of paramount importance to our democratic system. A democracy functions best when people have access to information about their government. They must be able to ascertain the policies and rules by which departments and agencies operate. Mistakes should not be hidden by pulling the curtains of secrecy around a decision which can be revealed without injury to the public interest. Good government functions best in the open, in the full light of day.

At the same time, the welfare of the nation or the rights of individuals may require that some documents not be made available to the public. As long as threats to peace exist, there must be military secrets. A citizen must have the right to complain to his government and to give information in confidence...I sign this measure with a deep sense of pride that our nation, unlike some nations, values highly the right of the people to know how their government is operating.¹¹

Corresponding excerpts of the second draft bill signing statement (marked "Draft II"), as originally typed, show only slight modifications

⁸ Blanton, *supra* note 4.

⁹ Blanton, *supra* note 4.

¹⁰ See Statement by the President, Includes Variants, (includes variants: (1) Unsigned Draft; (2) Unsigned Draft; Draft II Annotated by LBJ himself, and (3) Annotated Draft with Handwritten Note from G.C., <http://nsarchive.gwu.edu/NSAEBB/NSAEBB194/Document%2031.pdf>), Records of White House Offices, 1963–1969, White House Press Office Files, Box 49, June 30, 1966 – July 15, 1966, PR 210a – PR 2134a, LBJ Library [hereinafter "Statement by the President 1963-1969"]; see also Thomas S. Blanton, Ed., *Freedom of Information at 40, LBJ Refused Ceremony, Undercut Bill with Signing Statement*, THE NAT'L SEC. ARCHIVE, DOC. 31 (2006), available at <http://nsarchive.gwu.edu/NSAEBB/NSAEBB194/>.

¹¹ Statement by the President 1963-1969, *supra* note 10.

2017]

THE FREEDOM OF INFORMATION ACT

245

from the first draft when compared to the second draft. The second draft's corresponding excerpts are as follows:

This legislation springs from one of our most essential principles: a democracy works best when the people know what their government is doing. They must have access to the policies and rules by which departments and agencies operate. Government officials should not be able to pull curtains of secrecy around decisions which can be revealed without injury to the public. Good government functions best in the full light of day.

At the same time, the welfare of the nation or the rights of individuals may require that some documents not be made available. As long as threats to peace exist, for example, there must be military secrets, a citizen must be able in confidence to complain to his government and to provide information just as he is—and should be—free to confide in the press without fear of intimidation or reprisal....

I signed this measure with a deep sense of pride that the United States is an open society in which the decisions and policies—as well as the mistakes—of public officials are always subjected to the scrutiny and judgement [sic] of the people.¹²

The Office of the White House Press Secretary issued a press release of the bill signed into law; however, it is not only different from the first and second drafts, but is also different from the bill signing statement that contains President Johnson's signature. The corresponding excerpts of the press release statement are as follows:

This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the nation permits. No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest.

At the same time, the welfare of the Nation or the rights of individuals may require that some documents not be made available. As long as threats to peace exist, for example, there must be military secrets. A citizen must be able in confidence to complain to his government and to provide information just as he is—and should be—free to confide in the press without fear of reprisal or of being required to reveal or discuss his sources. . .

I signed this measure with a deep sense of pride that the United States is an open society in which the people's right to know is cherished and guarded.¹³

¹² Statement by the President 1963-1969, *supra* note 10.

¹³ See White House Press Release, Statement by the President upon Signing S. 1106 (July 4, 1966), <http://nsarchive.gwu.edu/NSAEBB/NSAEBB194/Document%2037.pdf> (available at Records of White House Offices, 1963-1969, White House Press Office Files, Box 49,

The corresponding typed excerpts of the bill signing statement with President Johnson's signature reflect substantial differences with the first and second drafts as well as the press release statement. The corresponding excerpts from President Johnson's hand-signed statement are as follows:

This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the nation will permit. At the same time, the welfare of the nation or the rights of individuals may require that some documents not be made available. As long as threats to peace exist, for example, there must be military secrets, a citizen must be able in confidence to complain to his government and to provide information just as he is—and should be—free to confide in the press without fear of reprisal or being required to discuss or reveal his sources. . .

I signed this measure with a deep sense of pride that the United States is an open society.¹⁴

In examining the statement with President Johnson's signature, it is interesting to note that it did not contain the following statement: "No one should be able to pull curtains of secrecy around decisions which can be revealed without injury to the public interest."¹⁵ It is also interesting to note, when examining various legislative records marking significant milestones of the FOIA, the legislative records do not cite the bill signing statement with President Johnson's signature; rather the legislative records cite the White House Press Release statement containing the sentence deleted from President Johnson's signed statement.¹⁶

The first and second draft statements contain handwritten edits, and, upon viewing, one could reasonably conclude that the edits were made by two different individuals. In addition to the draft statements and President Johnson's signed statement, the National Security Archive also located a handwritten note from President Johnson's library (with the initials *G.C.*). It reads: "We have talked to Bill Moyers and given him this statement along with your thought about newspapers protecting their

6/30/66-7/15/66, PR 210a – PR 2134a, LBJ Library) [hereinafter "White House Press Release"]; see also Blanton, *supra* note 4.

¹⁴ See White House Press Prelease, *supra* note 13; see also Blanton, *supra* note 4.

¹⁵ See White House Press Prelease, *supra* note 13; see also Blanton, *supra* note 4.

¹⁶ See STAFF OF S. COMM. ON THE JUDICIARY, FREEDOM OF INFORMATION ACT SOURCE BOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES, 93rd Cong., 2nd Sess. (1974) and JOINT COMM. ON GOV'T OPERATIONS, COMM. ON THE JUDICIARY, FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974 (PUB. L. NO. 93-502) SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS AND OTHER DOCUMENTS, 94th Cong., 1st Sess. (1975). However, President Johnson did not include this particular sentence in the statement he ultimately signed; see also *supra* note 10.

2017]

THE FREEDOM OF INFORMATION ACT

247

sources of information. He will work on it and be back in touch later.”¹⁷ According to Mr. Blanton, it is unclear from the documents whether President Johnson personally edited the statements or directed his Press Secretary, Mr. Moyers, to make the changes.¹⁸ This article is not attempting to answer this question or resolve the apparent conflicts between the various documents (e.g., press release statement versus hand-signed statement). Rather, the revisions to the bill signing statements (drafts, press release statement, and final, hand-signed statement) show the tension that existed, from the onset, between the public’s right to access and the USG’s need to protect national security interests, and determining what that balance should be. This foreshadows the litigious debate between the two competing interests that continues to exist to this day.

III. THE HISTORY BEHIND ACCESS OR RATHER LACK OF ACCESS TO GOVERNMENT RECORDS

According to the National Freedom of Information Coalition, Dr. Harold L. Cross is generally given credit as the author of the FOIA, as it was DR. CROSS’ 1953 book, *The People’s Right to Know: Legal Access to Public Records and Proceedings*, which “laid the groundwork for the legislation.”¹⁹ In his 1953 book, Dr. Cross identified three legal authorities the USG historically relied upon as a legal basis to withhold records from the public and/or Congress and opined that, “through legislative inaction, the weed of improper secrecy had been permitted to blossom and was choking out the basic right to know”²⁰ Those three legal authorities were the Records Act of 1789,²¹ the Administrative Procedures Act (“APA”) of 1946,²² and the Executive Privilege.²³

A. *The Records Act of 1789*

The Records Act of 1789 is also known as the *housekeeping statute*

¹⁷ Statement by the President 1963-1969, *supra* note 10.

¹⁸ Bridis, *supra* note 4.

¹⁹ *National FOIA Hall of Fame*, NAT’L FREEDOM OF INFO. COAL., <http://www.nfoic.org/print/national-foia-hall-fame> (last visited Sept. 9, 2016); *Hall of Fame*, FIRST AMENDMENT CENTER, <http://www.firstamendmentcenter.org/hall-of-fame/harold-l-cross> (last visited Sept. 9, 2016).

²⁰ H.R. REP. NO. 89-1497, pt. 1, at 23 (1966).

²¹ *Id.* (citing the Records Act of 1789, 1 Stat. 68 (1789)) (codified in Rev. Stat. Title IV § 161 (1875)), *amended by* 5 U.S.C. § 22 (1958), *amended by* 5 U.S.C. § 301 (1966).

²² *Id.* (citing APA, 5 U.S.C. § 1002 (1946)), *amended by* APA, § 3, 5 U.S.C. § 552 (1966).

²³ *Id.*

as it gave the executive agencies authority to set up offices and maintain government records.²⁴ While various FOIA cases indicate that the USG relied upon the Records Act of 1789 as authority to withhold records, there is nothing within the Act itself that mentions access and/or lack of access to government records by the public.²⁵

In 1875, the Records Act of 1789 was subsequently amended and codified as follows: “The head of each Department is authorized to prescribe regulations, not inconsistent with law, for the government of his Department, the conduct of its officers and clerks, the distribution and performance of its business and the custody, use, and preservation of the records, papers, and property appertaining to it.”²⁶ Again, the amended statute, on its face, does not purport to authorize the USG to withhold records requested from an individual or entity. However, according to a 1958 Congressional Report, the first apparent use of the Records Act of 1789 as authority to withhold records was in 1877 when the United States Department of Justice (“DOJ”) provided this recommendation to President Rutherford B. Hayes.²⁷ From 1877 to March 1958, the Records Act of 1789 was routinely used by various federal agencies as authority to withhold records requested from individuals and/or entities.²⁸ On August 12, 1958, Congress again amended the Records Act of 1789 to add the following statement: “This section does not authorize withholding information from the public or limiting the availability of records to the public.”²⁹ While the added sentence placed federal agencies on notice that the Records Act of 1789, as amended, should no longer be used as legal authority to withhold records, a few federal agencies still relied upon this statute as the legal basis to withhold records from the public up until 1972.³⁰

B. The Administrative Procedures Act

As compared to the Records Act of 1789, the APA has a relatively short history as it was enacted in 1946.³¹ Section 3 of the APA of 1946, entitled *Public Information*, requires federal agencies to publish or make available organizational data, general statements of policy, rules, and

²⁴ *Chrysler Corp. v. Sec’y of Def.*, 441 U.S. 281, 309-310 (1979).

²⁵ 1 Stat. 68 (1789).

²⁶ Rev. Stat. Title IV § 161, (1875), *amended by* 5 U.S.C. § 22 (1958), *amended by* 5 U.S.C. § 301 (1966).

²⁷ H.R. REP. NO. 85-1621, 1958 WL 3907 (1958) (Leg. Hist.).

²⁸ *See* H.R. REP. NO. 85-1621.

²⁹ Pub. L. No. 85-619, 72 Stat. 547 (1958).

³⁰ *See* Joint Comm. Freedom of Information Act and Amendments of 1974, Pub. L. No. 93-502.

³¹ CONG. REC. 2135, 2165 (daily ed. Mar. 12, 1946).

final orders, unless the records pertained to or involved “(1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of any agency”³² The APA of 1946 also permits the USG to withhold requested records if there was a confidential need, based upon good cause, or the person requesting the records was not “properly and directly concerned”³³ to the records requested.³⁴ Again, Congressional history reveals that, in spite of the APA of 1946 Section 3’s title, *Public Information*, federal agencies routinely used the law as authority to withhold information rather than releasing information to the public when requested,³⁵ and that “[i]mproper denials occur[ed] again and again. For more than ten years, through the administration of both political parties, case after case of improper withholding based upon 5 U.S.C. [§] 1002 has been documented.”³⁶ In drafting the 1966 FOIA, Congress wanted to firmly establish a philosophy of full agency disclosure to any person³⁷ unless information was specifically exempt from release under clearly delineated statutory language, to provide an avenue of redress of judicial review (which was not available in 5 U.S.C. § 1002) to those that may have been wrongfully denied access to government records.³⁸

At the time Congress drafted the FOIA, Congress believed that it had established workable solutions between the public’s right of access to government records and the USG’s need for withholding records.

It is not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places

³² *Id.*

³³ COMM. ON GOV’T OPERATIONS, 89TH CONG. 48, FEDERAL PUBLIC RECORDS LAW: FIRST SESSION ON H.R. 5012-21, 5237, 5406, 5520, 5583, 6172, 6739, 7010, 7161 BEFORE THE SUBCOMMITTEE OF THE COMMITTEE ON GOVERNMENT OPERATIONS HOUSE OF REPRESENTATIVES, 89th Cong. 48 (1965).

³⁴ SEN. REP. NO. 89-813, at 38 (1965).

³⁵ H.R. REP. NO. 89-1497, pt. 3 at 26.

³⁶ *Id.*

³⁷ The FOIA, as initially enacted, did not define *any person*. However, in the Intelligence Authorization Act of 2002, Congress restricted access under the FOIA and noted that for any records of the intelligence community (as defined in section 3(4) of the National Security Act of 1947), if the requester is a government or representative of a government that is not a State, territory, commonwealth, or district of the United States. National Security Act of 1947, 50 U.S.C. § 401a(4). See Pub. L. No. 107-306 § 312, 116 Stat. 2383 (codified at 5 U.S.C. § 552(a)(3)(E) (2003)).

³⁸ See STAFF OF S. COMM. ON THE JUDICIARY, FREEDOM OF INFORMATION ACT SOURCE BOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES, 93rd Cong., 2nd Sess. (1974), at 6-8.

emphasis on the fullest possible disclosure.³⁹

Nonetheless, it is clear to anyone who works with the FOIA and government releases of information (whether the record is labeled classified, for official use only, unclassified, controlled unclassified information or has no marking at all) that, under the current rules and regulations, legal determinations for releases under the FOIA appear to be as varied as the number of federal attorneys who work in this area of law. While some may consider this an exaggeration, all one has to do is briefly review the 2009 *Department of Justice Guide to the Freedom of Information Act*⁴⁰ to understand how complex the FOIA and government releases of information can be and currently is. When one combines the FOIA with Executive Orders (e.g., Executive Order 13526, *Classified National Security Information*⁴¹), Department of Defense (“DoD”) classification regulations, and then each individual Services’ and/or Combatant Commands’ classification regulations (if the entity has implemented any), the complexity of the issues are multiplied many times over.

Since the FOIA’s enactment, it has been amended at least seven times,⁴² sometimes as a result of court decisions and sometimes as a result of a political scandal (e.g., Watergate).⁴³ Some of the tension and/or frustration between access to government records and non-disclosure of government records exists because of the changes in technology, the current world situation, the United States prolonged “War on Terror,”⁴⁴ the current fight against al-Qaeda and/or those that seek to attack the

³⁹ SEN. REP. NO. 89-813, at 38.

⁴⁰ U.S. DEP’T OF JUSTICE, DOJ GUIDE TO THE FREEDOM OF INFORMATION ACT, (2009), <http://www.justice.gov/oip/doj-guide-freedom-information-act> (last visited Sept. 9, 2016).

⁴¹ See Exec. Order No. 13526, 75 Fed. Reg. 705 (Jan. 5, 2010).

⁴² *FOIA Legislative Materials*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/oip/foia-legislative-materials> (last visited Sept. 9, 2016).

⁴³ The 1974 Amendment was passed over President Gerald Ford’s veto. The 1976 Amendment was part of the Government Sunshine Act. The 1996 Amendment is known as the Electronic Freedom of Information Act Amendment. The 2002 Amendment placed limits on foreign agents’ ability to request records under the FOIA. Other amendments were made in 1986, 2007, and 2009. See *FOIA Legislative History*, THE NAT’L SEC. ARCHIVE, <http://nsarchive.gwu.edu/nsa/foialeghistory/legistfoia.htm> (last visited Sept. 9, 2016); *FOIA Legislative Materials*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/oip/foia-legislative-materials> (last visited Sept. 9, 2016).

⁴⁴ On August 6, 2009, Director John Brennan, then head of the White House’s Homeland Security Office, stated at a speech to the Center for Strategic and International Studies, that “war on terrorism,” “global war,” and “fighting jihadists” would no longer be “acceptable words inside the White House . . . The only terminology . . . the administration is using is that the U.S. is ‘at war with al Qaeda.’” See *White House: ‘War on Terrorism’ Is Over*, WASH. TIMES (Aug. 6, 2009), <http://washingtontimes.com/news/2009/aug/6/white-house-war-terrorism-over/>.

United States (whether from within the United States or outside of the United States). However, some of the tension exists because of a lack of understanding of the DoD's rules and regulations about how the DoD labels (or marks) documents, what those labels mean, and what is required under the information security and/or classification rules and regulations.

IV. PROCEDURAL REQUIREMENTS OF THE FOIA

When a federal agency receives a proper FOIA request, which includes a reasonable description of the requested records and is submitted in accordance with the agency's published regulations, the federal agency "shall make the records promptly available to any person."⁴⁵ The agency generally has twenty business days to comply with the request, although the agency may extend the time limit by no more than ten working days for unusual circumstances.⁴⁶ If the agency fails to meet the processing-time requirements, or if the FOIA request is denied⁴⁷ or redacted pursuant to the withholding exemptions articulated in the FOIA,⁴⁸ the requester may file a complaint in federal district court, to include the district where the requester lives, the requester's principle place of business, where the federal agency records reside, or in the District of Columbia.⁴⁹ Moreover, "[T]he court shall determine the matter *de novo*,⁵⁰ and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) . . . and the burden is on the agency to sustain its action."⁵¹

V. JUDICIAL STANDARD OF REVIEW UNDER THE FOIA

FOIA cases are routinely decided on motions for summary judgment,⁵² which are appropriate "when the pleadings, the discovery

⁴⁵ 5 U.S.C. § 552(a)(3)(A) (2015).

⁴⁶ *Id.* §§ 552(a)(6)(A), (B).

⁴⁷ *See id.* § 552(a)(4) (for other reasons stated within the statute, e.g., denial of request to waive fees, a finding of no records, etc.).

⁴⁸ *Id.* § 552(b)(2) to (b)(9).

⁴⁹ *Id.* § 552(a)(4)(B).

⁵⁰ "*De novo* is from Latin, meaning 'from the new.'" When a court hears a case *de novo*, it is deciding the issues without reference to the legal conclusions or assumptions made by the previous court to hear the case. An appeals court hearing a case *de novo* may refer to the trial court's record to determine the facts, but will rule on the evidence and matters of law without giving deference to that court's findings." WEX LEGAL DICTIONARY, CORNELL UNIV. LAW SCH., http://www.law.cornell.edu/wex/de_novo (last visited Sept. 9, 2016).

⁵¹ 5 U.S.C. § 552(a)(4)(B) (2015).

⁵² *Defenders of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 87 (D.C. Cir. 2009).

materials on file, and any affidavits or declarations ‘show [] that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.’”⁵³ In most FOIA cases, once the documents are properly identified, the FOIA requester and the federal agency (simply) have different interpretations as to the application of the exemptions, based upon the law, to the redacted information/record.⁵⁴ Thus, the court determines whether the agency sustained its burden that the requested records are exempt from release under the FOIA.⁵⁵

Since the FOIA’s enactment, courts have consistently recognized Congress’ intent to favor release over the withholding (or non-release) of government records by specifically acknowledging in numerous opinions that the FOIA mandate is one of release, and a federal agency may only deny a request (or portion thereof) when the records fall within one or more of the enumerated nine withholding exemptions, which are to be narrowly construed. If the federal agency decides to withhold the records (or a portion thereof), the federal agency bears the burden of proof for withholding the records, and such determination is reviewed by the court *de novo*.⁵⁶

To determine whether the federal agency met its burden that the requested records are exempt from release, courts consider the underlying purpose of the FOIA, and some of those cited purposes include the following:

- a. “[T]o pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny.”⁵⁷
- b. “[T]o ‘contribut[e] significantly to public understanding of the operations or activities of the government.’”⁵⁸ FOIA’s fundamental policy “focuses on the citizens’ right to be informed about ‘what their government is up to.’ Official information that sheds light on an agency’s performance of its statutory duties falls squarely within that statutory purpose.”⁵⁹
- c. “[T]o ensure an informed citizenry, vital to the

⁵³ *ACLU v. U.S. Dep’t of State*, 878 F. Supp. 2d 215, 220 (D.C. Cir. 2012) (citing *FED. R. CIV. PROC.* 56(a)).

⁵⁴ *See Jones-Edwards v. Appeal Bd. of the Nat’l Sec. Agency Cent. Sec. Agency*, 352 F. Supp. 2d 420, 423 (S.D.N.Y. 2005).

⁵⁵ *Assassination Archives & Research Ctr. v. CIA*, 334 F.3d 55, 58 (D.C. Cir. 2003).

⁵⁶ *See U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); *U.S. Dep’t of Air Force v. Rose*, 425 U.S. 352 (1976); *Wolf v. CIA*, 473 F.3d 370, (D.C. Cir. 2007).

⁵⁷ *U.S. Dep’t of the Air Force v. Rose*, 425 U.S. at 352, 361 (1976).

⁵⁸ *N.Y. Times Co. v. NASA*, 782 F. Supp. 628, 632 (D.C. Cir. 1991) (citing *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. at 749, 775) (1989)).

⁵⁹ *Id.* at 632.

functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”⁶⁰

- d. “[T]o permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands.”⁶¹
- e. “[T]o promote honest and open government and to assure the existence of an informed citizenry to hold the governors accountable to the governed.”⁶²

After recognizing the underlying release nature of the FOIA, courts have consistently addressed the narrow construction of the FOIA exemptions, the burden of full or partial redaction (to include the obligation to reasonably segregate the releasable portion from the non-releasable portion) is upon the federal agency, and the agency generally fulfills its obligations via affidavits (or declarations), usually with a Vaughn Index.⁶³ In addition, so long as the “agency’s affidavit describes the justifications for withholding the information with specific detail, demonstrates that the information withheld logically falls within the claimed exemption, and is not contradicted by contrary evidence in the record or by evidence of the agency’s bad faith, then affidavit alone warrants summary judgment.”⁶⁴ Exemption (b)(1), *Classified Information*, is not excluded from the narrow construction of the withholding exemptions under the FOIA.

VI. WHAT IS THE DIFFERENCE BETWEEN CLASSIFIED INFORMATION AND FOR OFFICIAL USE ONLY INFORMATION?

Before examining the withholding of records as classified information pursuant to exemption (b)(1), one must first understand the difference between *classified* information and *for official use only* information. And, in order to understand this difference, one must understand the USG’s terms and labels or markings. Unfortunately, there appears to be a lack of understanding regarding restrictive labels or markings on DoD records, especially if the label is *for official use only*

⁶⁰ NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) (citing STAFF OF S. COMM. ON THE JUDICIARY, FREEDOM OF INFORMATION ACT SOURCE BOOK: LEGISLATIVE MATERIALS, CASES, ARTICLES, at 38).

⁶¹ Mink v. EPA, 410 U.S. 73, 80 (1973), *superseded by statute* 5 U.S.C. §552(a)(4)(B)(1974).

⁶² Amnesty Int’l, U.S. v. CIA, 728 F. Supp. 2d 479, 500 (S.D.N.Y. 2010) (citing Grand Cent. P’ship, Inc. v. Cuomo, 166 F.3d 473, 478 (2d Cir. 1999)).

⁶³ See, e.g., Amnesty Int’l, U.S. v. CIA, 728 F. Supp. 2d 479, 500-506; (S.D.N.Y. 2010); Lesar v. U.S. Dep’t of Justice, 636 F.2d 472, 481 (D.C. Cir. 1980).

⁶⁴ ACLU v. U.S. Dep’t of Def., 628 F.3d 612, 619 (D.C. Cir. 2011).

(“FOUO”) or *unclassified//for official use only* (“U//FOUO”). In an August 2, 2013, *Christian Science Monitor* article entitled, *Too Many Classified Papers At Pentagon? Time For A Secrecy Audit*,⁶⁵ an anonymous congressional staffer questioned the United States Department of Army’s (“DA”) need to mark a Government Accountability Office (“GAO”) audit report U//FOUO. According to the journalist, again citing the anonymous congressional staffer, the GAO report was unfavorable of the “military’s Distributed Common Ground System, a computer program that US troops use to process intelligence in war zones.”⁶⁶ While the congressional staffer was not authorized to speak about the GAO report, the staffer stated:

The Army chose to classify that document in such a way that prevented the GAO from displaying it on its web site. It’s very easy to put a classification on a document to keep it out of public view. . . . There was nothing in that report that included national security secrets, but the Army used the classification process in that moment to keep that report off the web site and available for anyone to access.⁶⁷

Both the title of the *Christian Science Monitor’s* article and the congressional staffer’s reference to U//FOUO as a classification label reflects the lack of understanding of the term FOUO or U//FOUO, not only from a classification perspective, but also from the FOIA perspective.

A. *What Is for Official Use Only Information and How Does It Relate to the Classification Regulations and Releases Under the FOIA?*

First and foremost, FOUO is not a classification level and thus, it is not a classification label or classification marking. There are only three classification levels, and they are defined in Executive Order 13526, *Classified National Security Information* (“E.O. 13526”). Per E.O. 13526, section 1.2(a), information may only be classified at three levels and those classification levels shall be applied to information based upon an original classification authority’s (“OCA’s”) determination that the unauthorized release of the information could be expected to cause some level of national security harm.⁶⁸ The three classification levels are: (1) *Top Secret*, which applies to information which if released without authority could reasonably be expected to cause exceptionally grave

⁶⁵ Anna Mulrine, *Too Many Classified Papers at Pentagon? Time for a Secrecy Audit*, CHRISTIAN SCIENCE MONITOR (Aug. 2, 2013), <http://www.csmonitor.com/USA/2013/0802/Too-many-classified-papers-at-Pentagon-Time-for-a-secrecy-audit>.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Exec. Order No. 13526, pt. 1, §§ 1.1, 1.2; 75 Fed. Reg. 707 (Dec. 29, 2009).

damage to the national security; (2) *Secret*, which applies to information which if released without authority could reasonably be expected to cause serious damage to the national security; and (3) *Confidential*, which applies to information which if released without authority could reasonably be expected to cause damage to the national security.⁶⁹

Even if E.O. 13526, section 1.2(a) fails to clearly state that there are only three classification levels, E.O. 13526, section 1.2(b) asserts that, “[e]xcept as otherwise provided by statute, no other terms shall be used to identify United States classified information.”⁷⁰ The DoD further emphasized this point in implementing its regulations, again only recognizing three classification levels and labels,⁷¹ but also for FOUO information in that “by definition, information must be unclassified in order to be designated FOUO.”⁷²

Given that there are only three enumerated classification levels, it should be clear, or at least intuitive, that information labeled or marked either FOUO or U//FOUO is unclassified information. Thus, the million-dollar questions become what is FOUO information and how does it pertain to releases under the FOIA? Again, going to the regulation, FOUO is a dissemination control (label or mark) applied by the DoD to unclassified information when disclosure to the public of that particular record, or portion thereof, would reasonably be expected to cause foreseeable harm to an interest protected by one or more of FOIA exemptions (b)2 through (b)9.⁷³ The DoD is not authorized to withhold FOUO information under FOIA exemption (b)(1), *Classified Information*, as FOUO information is not classified information.⁷⁴

One may argue that the journalist and congressional staffer used the term *classifying* under a more generic definition of arranging the item (e.g., report) according to subject matter or assigning the report to a category,⁷⁵ in this case the category of information that falls within FOIA

⁶⁹ Exec. Order No. 13526, pt. 1, § 1.2; 75 Fed. Reg. 707 (Jan. 5, 2010).

⁷⁰ *Id.*

⁷¹ U.S. DEP’T OF DEF. MANUAL 5200.01, Vol. 1, DoD INFO. SEC. PROGRAM: OVERVIEW, CLASSIFICATION AND DECLASSIFICATION, enclosure 4, paras. 3, 34 (Feb. 24, 2012) [hereinafter “OVERVIEW, CLASSIFICATION AND DECLASSIFICATION”].

⁷² U.S. DEP’T OF DEF. MANUAL 5200.01, Vol. 4, DoD INFO. SEC. PROGRAM: CONTROLLED UNCLASSIFIED INFO, *supra* note 71, at enclosure 3, paras. 2b(2), 12. (Feb. 24, 2012) [hereinafter “CONTROLLED UNCLASSIFIED INFO”].

⁷³ *Id.* at para 2a, 11.

⁷⁴ One caveat as a federal agency does have the ability to classify a record after receipt of a FOIA request, if it meets all other requirements under the Executive Order 13526 for classification purposes. *See* Exec. Ord. No. 13526, pt. 1, § 1.7d, 75 Fed. Reg. 707 (Dec. 29, 2009).

⁷⁵ *Classifying*, WEBSTER’S NEW COLLEGIATE DICTIONARY (150th ed. 1981).

exemptions (b)(2) through (b)(9).⁷⁶ However, it is also important to understand that simply marking the information FOUO does not automatically qualify it for non-release under the FOIA.⁷⁷ If a FOIA request is received for a record that has been labeled FOUO or U//FOUO, it would be processed under the FOIA to determine if it truly qualifies for redaction under exemptions (b)(2) through (b)(9).⁷⁸

The journalist and anonymous congressional staffer also imply that, if the DA had not marked the report FOUO, the record is automatically fully releasable and immediately available to the public. However, this conclusion is also inaccurate. The fact that a DoD entity has not placed any label and/or dissemination control marking on a record does not in and of itself automatically mean the record is fully releasable and available to the public. As stated in DoD Manual 5200.01, Volume 4, “the absence of the FOUO marking does not automatically mean the information shall be released.”⁷⁹ In the case of the GAO report, even if the DA had not marked or labeled the report FOUO or U//FOUO, this would not mean that the GAO could place the report on its webpage. As required by DoD guidance, “[a]ll DoD unclassified information **MUST BE REVIEWED AND APPROVED FOR RELEASE** through standard DoD Component processes before it is provided to the public (including via posting to publicly accessible websites) in accordance with DoDD [Department of Defense Directive] 5230.09 . . . and other applicable regulations.”⁸⁰

In sum, by definition FOUO is unclassified information. The fact a document is labeled or has a dissemination control marking of FOUO does not mean that the record is not released to the public under the FOIA. Alternatively, the fact that a record does not have any label or control marking on the record does not mean that the record is automatically fully available to the public. The function of the FOUO label/mark is to place on notice or to inform a DoD employee that the record may contain

⁷⁶ Because the congressional staffer clearly states that there were no harm to national security interests (which pertain only to classified information and the level of national security harm), it is doubtful that the journalist and congressional staffers used the term “classify” in the generic sense to categorize the report based upon information that is protected by (b)(2) through (b)(9). In addition, the article quotes Steven Aftergood, Director of the Federation of the American Scientists’ Project on Government Secrecy, as saying: “Currently, there is ‘robust disagreement’ both within the intelligence community and within federal agencies about what should be classified.” However, for purposes of this article, this argument of a generic term of classification and categorizing the records as exempt from release under the FOIA pursuant to (b)(2) through (b)(9) will be considered.

⁷⁷ CONTROLLED UNCLASSIFIED INFO, *supra* note 72, at enclosure 3, paras. 2c(2), 13.

⁷⁸ CONTROLLED UNCLASSIFIED INFO, *supra* note 72, at enclosure 3, paras. 2c(2), 13.

⁷⁹ CONTROLLED UNCLASSIFIED INFO, *supra* note 72, at enclosure 3, paras. 2c(2), 13.

⁸⁰ CONTROLLED UNCLASSIFIED INFO, *supra* note 72, at enclosure 3, paras. 1f, 10.

2017]

THE FREEDOM OF INFORMATION ACT

257

special categories of information which require some level of special processing, handling and/or storing. The FOUO information contained in the document could be attorney-work product or attorney-client communications; unclassified but sensitive security protocols; or personally identifying information such as a social security number, date of birth, medical information; or other categories of information which fall within FOIA exemptions (b)(2) through (b)(9), and thus require some level of special processing, handling and/or storing of the information.

B. Will Executive Order 13556, Controlled Unclassified Information, Solve the Confusion Between a Restrictive, Unclassified Dissemination Control Label and Releases Under the FOIA?

Shortly after assuming office, President Barack Obama issued various memorandums concerning transparency of the federal government. In a January 21, 2009 memorandum, President Obama stated, “My Administration is committed to creating an unprecedented level of openness in Government. We will work together to ensure the public trust and establish a system of transparency, public participation, and collaboration. Openness will strengthen our democracy and promote efficiency and effectiveness in Government.”⁸¹ Part of the transparency process was the direction that a task force take to review executive agencies’ processes on controlled, unclassified information⁸² to include the procedures for marking, safeguarding, and disseminating sensitive but unclassified (“SBU”)⁸³ information. The Secretary of Homeland Security and the United States Attorney General co-chaired the task force⁸⁴ and on August 25, 2009, issued a report entitled *Report and*

⁸¹ Memorandum on Transparency and Open Government for the Heads of Executive Departments and Agencies, Administration of Barack H. Obama, 2009 DAILY COMP. PRES. DOC. 10 (Jan. 21, 2009), <https://www.archives.gov/files/cui/documents/2009-WH-memo-on-transparency-and-open-government.pdf>.

⁸² Memorandum on Classified Information and Controlled Unclassified Information for the Heads of Executive Departments and Agencies, The White House Office of the Press Secretary, 2009 DAILY COMP. PRES. DOC. 8 (May 27, 2009), <https://obamawhitehouse.archives.gov/the-press-office/presidential-memorandum-classified-information-and-controlled-unclassified-informat>.

⁸³ Sensitive But Unclassified (“SBU”) information is a generic term used to refer to 117 different types of designations used with the Executive Branch for documents/information that require some level of protection but do not meet the standards for national security classification. See U.S. DEP’T OF HOMELAND SEC. AND U.S. DEP’T OF JUSTICE, REP. AND RECOMMENDATIONS OF THE PRESIDENTIAL TASK FORCE ON CONTROLLED UNCLASSIFIED INFO (2009), http://www.dhs.gov/xlibrary/assets/cui_task_force_rpt.pdf (last visited Sept. 12, 2016) [hereinafter “REP. AND RECOMMENDATIONS”].

⁸⁴ Memorandum on Classified Information and Controlled Unclassified Information, *supra* note 82.

*Recommendations of the Presidential Task Force on Controlled Unclassified Information.*⁸⁵ Overall, the task force made forty recommendations adjusting or modifying current procedures for marking, safeguarding and disseminating SBU information. One of those recommendations was the establishment of one single, standardized program for identifying, marking, safeguarding, and disseminating information across the federal government as the task force had identified approximately 117 different SBU terms used by various federal agencies.⁸⁶ Based upon the task force's recommendations, President Obama directed his National Security Staff to draft an Executive Order supporting key elements of the task force's recommendations that would apply to the full spectrum of SBU information (and not be limited to terrorism records/information).⁸⁷

On November 4, 2010, E.O. 13556, *Controlled Unclassified Information*, was issued⁸⁸ and designated the National Archives and Records Administration ("NARA") as the Executive Agent ("EA") for its implementation.⁸⁹ Pursuant to E.O. 13556, the controlled unclassified information ("CUI") label "shall serve as exclusive designations for identifying unclassified information throughout the executive branch that requires safeguarding or dissemination controls, pursuant to and consistent with applicable law, regulations and Government-wide policies."⁹⁰

Pursuant to E.O. 13556, section 4(d), NARA was to establish and maintain a publicly available CUI registry that identifies each category and/or sub-category of records requiring limited distribution.⁹¹ As part of its implementation process, in June of 2011, NARA issued guidance to federal agencies requiring them to designate CUI records/information that required safeguarding or dissemination controls based upon existing

⁸⁵ REP. AND RECOMMENDATIONS, *supra* note 83.

⁸⁶ REP. AND RECOMMENDATIONS, *supra* note 83.

⁸⁷ See REP. AND RECOMMENDATIONS, *supra* note 83; see also *CUI Chronology and History*, NAT'L ARCHIVES AND RECORDS ADMIN., <http://www.archives.gov/cui/chronology.html> (last visited Sept. 16, 2016).

⁸⁸ Exec. Order No. 13556; 75 Fed. Reg. 68, 675 (Nov. 9, 2010).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ While Executive Order No. 13556 required that the CUI registry to be established within one year of the date of the Order, which would have been no later than November 9, 2010, as of January 26, 2015, the CUI registry list was not complete. And, while the CUI Registry webpage appears to be final, NARA has the following statement on its registry's webpage: "Existing agency policy for all sensitive unclassified information remains in effect until your agency implements the CUI program. Direct any questions to your agency's CUI program office." See NAT'L ARCHIVES AND RECORDS ADMIN. CUI REGISTRY, <https://www.archives.gov/cui/registry> (last visited Sept. 15, 2016).

law, regulation, or a Government-wide policy. In addition, federal agencies were to provide to NARA the underlying authority requiring the safeguarding or dissemination control of the record.⁹² Since NARA's initial guidance was issued, many categories or subcategories of records or information have been identified as CUI, and, per NARA, the CUI Registry "identifies all approved CUI categories and subcategories, provides general descriptions for each, identifies the basis for controls, establishes markings, and includes guidance on handling procedures."⁹³

E.O. 13556 attempted to clear up the potential confusion between the label of CUI on a record and the FOIA by directly addressing the relationship (or lack thereof) between the term CUI and release or non-release under the FOIA. E.O. 13556 specifically states: "The mere fact that information is designated as CUI shall not have a bearing on determinations pursuant to any law requiring the disclosure of information or permitting disclosure as a matter of discretion, including disclosures to the legislative or judicial branches."⁹⁴ However, in spite of E.O. 13556's attempt to clear up the confusion between records or information identified as CUI and the FOIA, shortly after its implementation, various federal agencies began to raise questions concerning the relationship between the FOIA and the Executive Order, thus requiring NARA and the DoJ to issue supplemental guidance on November 22, 2011.⁹⁵ In an updated 2014 joint, co-signed memorandum entitled *Guidance regarding Controlled Unclassified Information and the Freedom of Information Act*, the DoJ and NARA provided the following guidance:

The FOIA should not be cited as a safeguarding or dissemination control authority for CUI. The purpose of the FOIA is to open agency activities to the public.

The FOIA gives the public the right to request and receive federal agency records unless those records are protected from disclosure by one of the Act's exemptions.

⁹² NAT'L ARCHIVES AND RECORDS ADMIN., Controlled Unclassified Information (CUI) INFO. Office Notice 2011-01: Initial Implementation Guidance for Executive Order 13556, (June 9, 2011), <https://www.archives.gov/files/cui/registry/policy-guidance/registry-documents/2011-cuio-notice-2011-01-initial-guidance.pdf>.

⁹³ See *CUI Registry*, NAT'L ARCHIVES AND RECORDS ADMIN., <http://www.archives.gov/cui/registry/cui-glossary.html> (last visited Sept. 15, 2016).

⁹⁴ Exec. Order No. 13556 § 2b, 75 Fed. Reg. 68675 (Nov. 4, 2010).

⁹⁵ *Id.*, rescinded by Memorandum from John P. Fitzpatrick, Director, Information Security Oversight Office, to Melanie Ann Pustay, Director, Office of Information Policy, NAT'L ARCHIVES AND RECORDS ADMIN., Revised Guidance regarding Controlled Unclassified Information and the Freedom of Information Act (July 3, 2014), <http://www.archives.gov/files/cui/registry/policy-guidance/registry-documents/2014-doj-oip-cui-joint-issuance-on-foia.pdf>.

The FOIA exemptions are discretionary. As a result, FOIA exemptions should not be relied upon as an authority to create a CUI category or subcategory.

CUI markings are not dispositive of a FOIA reviewer's disclosure determination.

Decisions to disclose or withhold information must be made based on the applicability of the statutory exemptions contained in the *FOIA*, not on a CUI marking or designation.

When reviewing records, no markings of any kind, whether CUI or others that may appear in the same document shall be applied to require that unclassified information must be considered exempt from disclosure under the FOIA.

No marking or statement may be paired with a CUI marking to circumvent the provision of the Executive Order that designation as CUI does not control disclosure under the FOIA.

In sum, CUI markings and designations should not be associated with or paired to the FOIA exemptions and should not be used as a basis for applying a FOIA exemption.⁹⁶

Even though E.O. 13556 and the supplemental NARA-DoJ memorandum have attempted to clear up any relationship between the FOIA and the CUI label, the confusion between the FOIA and CUI label will continue to exist, and is actually unavoidable, for a number of reasons. The first reason is the fact that federal agencies had to provide NARA with the statute, regulation, or government-wide practice that justified the label or mark of CUI. Many of the statutes cited as authority for the dissemination control mark of CUI are statutes routinely cited by federal agencies for redacting information under the FOIA. Examples of the statutes include the following:

- a. Privacy of Military Personnel,⁹⁷ pursuant to 10 U.S.C. § 130b, Personnel Assigned to Overseas, Sensitive or Routinely Deployed Units, a statute that may be used by the DoD to redact specific, personal identifying information under 5 U.S.C. § 552(b)(3).
- b. International Agreements,⁹⁸ pursuant to 10 U.S.C. § 130c,

⁹⁶ Nat'l Archives and Records Admin., *Revised Guidance regarding Controlled Unclassified Info and the Freedom of Information Act*, (July 3, 2014), <http://www.archives.gov/cui/registry/policy-guidance/registry-documents/2014-doj-oip-cui-joint-issuance-on-foia.pdf>.

⁹⁷ See *CUI Registry: Privacy-Military*, NAT'L ARCHIVES AND RECORDS ADMIN., <http://www.archives.gov/cui/registry/category-detail/privacy-military.html> (last visited Sept. 15, 2016).

⁹⁸ See *CUI Registry: International Agreements*, NAT'L ARCHIVES AND RECORDS ADMIN., <http://www.archives.gov/cui/registry/categorydetail/internationalagreements>.

2017]

THE FREEDOM OF INFORMATION ACT

261

Unclassified, Sensitive Foreign Government, a statute that may be used by DoD to redact unclassified, sensitive foreign government information under 5 U.S.C. § 552(b)(3).

- c. Procurement and Acquisition-Source Selection,⁹⁹ pursuant to 41 U.S.C. § 2102, prohibitions on disclosing and obtaining procurement information.
- d. Geodetic Product Information,¹⁰⁰ pursuant to 10 U.S.C. § 455, a statute that may be used by the DoD to redact defined imagery and maps under 5 U.S.C. § 552(b)(3).
- e. Legal Privilege:¹⁰¹ Examples of records commonly redacted under the FOIA include the following identified category or sub-category of records: Attorney Work Product and/or Attorney Client Communications which are redacted under FOIA exemption (b)(5).

By referencing a statute (regulation or government practice), FOIA is automatically brought into consideration because the authority for dissemination control directly correlates to a FOIA exemption such as (b)(3), Statutory Basis for Withholding Records, (b)(5), Inter-Agency or Intra-Agency Memorandum, (b)(6), Personal Privacy Interests/Information, and/or (b)(7), Records Created for a Law Enforcement Purpose.

Another reason confusion is unavoidable and will continue to exist between the CUI label and FOI releases is the limiting language of the label itself. It does not matter whether the limiting label is CUI or FOUO. The current DoD regulations clearly state that the dissemination control label of U//FOUO or FOUO does not automatically mean the record is withheld under the FOIA. It also clearly states that the lack of any dissemination control label does not mean that the record is automatically released under the FOIA and available to the public. Understanding the dissemination control labels or terms requires understanding the implementing regulations and guidance pertaining to the label itself and understanding the process under FOIA, no matter what the label is or whether the document contains a label.

html (last visited Sept. 15, 2016).

⁹⁹ See *CUI Registry: Procurement and Acquisition-Source Selection*, NAT'L ARCHIVES AND RECORDS ADMIN., <https://www.archives.gov/cui/registry/category-detail/proprietary-source-selection.html> (last visited Sept. 15, 2016).

¹⁰⁰ See *CUI Registry: Geodetic Product Information*, NAT'L ARCHIVES AND RECORDS ADMIN., <https://www.archives.gov/cui/registry/category-detail/geodetic-product-info.html> (last visited Sept. 15, 2016).

¹⁰¹ See *CUI Registry: Legal Privilege*, NAT'L ARCHIVES AND RECORDS ADMIN., <https://www.archives.gov/cui/registry/category-detail/legal-privilege.html> (last visited Sept. 15, 2016).

The same *Christian Science Monitor* article could have been written with the term CUI on the GAO report rather than FOUO. Just as a federal agency has the ability to classify a record pursuant to E.O. 13526 at the time of a FOIA request,¹⁰² the government may need to identify a record as CUI at the time of a FOIA request since the document may not have been properly labeled (or not labeled) when it was initially drafted, regardless of meeting the CUI requirements as identified and listed on the NARA website. The fact that the agency failed to properly mark a record at the time it was drafted and signed as final should not automatically determine its release or non-release under the FOIA. For example, if a federal agency failed to mark medical records as CUI, this failure should not automatically require the federal agency to release the medical records at the time the FOIA request is received. In the alternative, just because a CUI label has been applied to a document, that CUI label should not automatically mean that the document is not released as it may have been mislabeled. The review of the CUI record would determine whether the record is released (or not) under the FOIA, just as the review of the record labeled FOUO (or not) is released (or not) under the FOIA. Finally, the confusion between the FOIA and the CUI label will continue to exist because the NARA website will become an additional resource to determine the underlying basis for withholding records under FOIA exemptions (b)(2) through (b)(9), again bringing FOIA into the mix and continuing the confusion between releases under the FOIA and a limiting label.

In the end, confusion between SBU or FOUO information and FOIA will more than likely continue as it is vital to understand the limiting terminology, be it CUI, FOUO or SBU. While E.O. 13556 and NARA's website has all the necessary information to understand the limiting label of CUI and the basis for the limited distribution, one must be proactive. FOIA requesters (reporters and congressional staffers) must still read the guidance, regulation, Executive Order, and information on NARA's website in order to educate themselves on why such records are controlled and have a limited distribution. This Article is skeptical that this will be achieved based upon the actions of prolific FOIA requesters and/or those who are skeptical or cynical of the USG's actions. These same parties will continue to request the CUI records and/or still question the USG's marking/labeling of a record as CUI and argue that the USG's true purpose was avoiding release of the record under the FOIA.

Finally, one may conclude that this Article's argument is against the CUI terminology or the registry. That is not the case. In fact, this Article

¹⁰² Mulrine, *supra* note 65.

2017]

THE FREEDOM OF INFORMATION ACT

263

does not recommend removing the limiting terminology of CUI on any executive agency's records as there must be some identification marking that informs those who process and/or work with the record/information that it must be safeguard in some manner. In addition, there will be, from a logical standpoint, a substantial benefit to the USG in using one government-wide term and program/process for safeguarding CUI. The establishment of one uniform program for identifying, marking, safeguarding, and/or disseminating CUI should lead to an effective and efficient understanding of CUI as having 117 different labels or dissemination control markings for SBU information is excessive. This Article is simply skeptical that the NARA registry will clear up the confusion between the CUI label and releases under the FOIA. The basis includes those reasons noted above; however, there will always be those individuals who are suspicious of the USG and ultimately believe that the federal agencies/individual services are more concerned with their reputations or are attempting to hide something. Ultimately, only time will tell whether the task force's goals will be achieved, at least from the perspective of release under the FOIA and having a dissemination control label.

VII. RECORDS CLASSIFIED PURSUANT TO EXECUTIVE ORDER 13526,
CLASSIFIED NATIONAL SECURITY INFORMATION, AND RELEASES
UNDER THE FOIA

Exemption (b)(1), of 5 U.S.C. § 552, authorizes a federal agency to exempt records or information from mandatory release if the information is "(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."¹⁰³ E.O. 13526 sets out the procedural and substantive requirements for classifying (and declassifying) records; however, E.O. 13526 also immediately recognizes the tension between release of information and protecting national security interests with the following statement:

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. 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

¹⁰³ 5 U.S.C. § 552(b)(1) (2015).

nations.¹⁰⁴

Even though E.O. 13526 provides specifics on procedural and substantive requirements on classifying and declassifying records, there is still a level of subjectivity in making these determinations, which intensifies the tension between release of information and the need to protect national security interests. However, understanding the procedural and substantive requirements articulated in E.O. 13526 hopefully decrease that tension.

A. Which Executive Order Applies to the Classified Information?

Ideally, the first question that should be asked when reviewing classified records for release under the FOIA is what Executive Order applies to information classified prior to December 29, 2009, the date of the current Executive Order, E.O. 13526. As held in *Lesar v. U.S. Dep't of Justice*,¹⁰⁵ “the Executive Order in effect at the time the classifying official acted states the relevant criteria for purposes of determining whether Exemption 1 properly was invoked. . . . Thus information once properly classified under a prior Executive Order will retain the protection afforded it under the former Order.”¹⁰⁶ This is not to say that a federal agency does not have the opportunity to reevaluate the continued need to classify the record under the current Executive Order or the need to reclassify the record at a higher classification level.¹⁰⁷ However, the federal agency may invoke exemption (b)(1) for the withholding of classified information “only if it complies with classification procedures established by the relevant executive order and withholds only such material as conforms to the order’s substantive criteria for classification.”¹⁰⁸

B. Procedural Requirements Pursuant to Executive Order 13526, Classified National Security Information

Some of E.O. 13526’s procedural requirements include who is authorized to classify a record/information, what record may be

¹⁰⁴ Exec. Order No. 13526, at 707.

¹⁰⁵ *Lesar*, 636 F.2d 472 (D.C. Cir. 1980).

¹⁰⁶ *Id.* at 480.

¹⁰⁷ *Id.* It should be noted that because a classification review would occur at the time the FOIA request is received/processed, in reality, the federal agency would review the need for continued classification under the E.O. in effect at the time the FOIA request was received. The *Lesar* Court was faced with somewhat unusual facts where the E.O. was updated after the district court issued its decision, and on appeal, the Appellant argued the classification review should occur under the updated E.O., thus presenting the court the issue of which E.O. applied to the records. See *Lesar*, 636 F.2d at 479-480.

¹⁰⁸ *Judicial Watch, Inc. v. U.S. Dep't of Defense*, 857 F. Supp. 2d. 44, 55 (D.C. Cir. 2012), *aff'd*, 715 F.3d 937 (D.C. Cir. 2013).

classified, how the record is classified (original classification authority versus derivative classification authority), identification and marking requirements, etc. The USG may only classify information that “is owned by, produced by, or is under the control of the United States Government.”¹⁰⁹ Information may be classified either by an original classification authority [hereinafter OCA] or via a derivative classification determination.¹¹⁰ OCAs are the President, the Vice President, agency heads and officials designated by the President, and those specifically delegated OCA in accordance with the procedures outlined in E.O. 13526.¹¹¹ President Obama delegated OCA to agency heads on December 29, 2009.¹¹² E.O. 13526 also requires that those that are delegated OCA (in accordance with E.O. 13526) are to be limited to the minimum number required to implement E.O. 13526.¹¹³ The DoD has further delegated OCAs by position, in accordance with the requirements outlined in E.O. 13526.¹¹⁴

Derivative classification of information is based upon either an individual’s reproduction, extraction, or summarization of classified information, the classification of source material or a security classification guide.¹¹⁵ As previously mentioned, E.O. 13526 requires the individual who is derivatively classifying the information to provide specific details as to how the information was derivatively classified including the source documents.¹¹⁶

As outlined in E.O. 13526, section 1.2(a), information may only be classified at three levels and those levels shall be applied to information based upon an OCA’s determination¹¹⁷ that the unauthorized release of the information could be expected to cause some level of harm to national security. As noted, there are only three classification levels and they are top secret, both secret and confidential.¹¹⁸ In addition to the above-referenced procedural requirements, a federal agency may classify a

¹⁰⁹ Exec. Order No. 13526 § 1.1(a)(2).

¹¹⁰ *Id.* pt. 1, § 1(a)(2).

¹¹¹ *Id.* pt. 1, § 1.3.

¹¹² Order: Original Classification Authority, 75 Fed. Reg. 735 (Jan. 5, 2010).

¹¹³ Exec. Order No. 13526, pt. 1, § 1.3(c)(1).

¹¹⁴ U.S. DEP’T OF DEFENSE, OFFICE OF SEC’Y OF DEFENSE 04545-11, DELEGATION OF TOP SECRET ORIGINAL CLASSIFICATION AUTHORITY (2011) and U.S. DEP’T OF DEFENSE, ASST. SEC’Y OF DEFENSE, DELEGATION OF SECRET ORIGINAL CLASSIFICATION AUTHORITY (1995), Supplemented in 2009.

¹¹⁵ Exec. Order No. 13526, pt. 2, § 2.1.

¹¹⁶ *Id.* pt. 2, § 2.

¹¹⁷ *Id.* pt. 1, § 1.2(a) requires an Original Classification Authority to be able to identify and describe that national security harm.

¹¹⁸ *Supra* note 68.

record at the time a FOIA request is received;¹¹⁹ however, E.O. 13526 requires a higher level of review of the information to be classified at the time of a FOIA request in that the federal agency must: (1) meet the E.O.'s overall requirements and (2) the agency head, the deputy agency head or the senior agency head (as defined by E.O. 13526, section 5.4) conducts a document-by-document review.¹²⁰

The DoD has its own implementing classification procedural requirements as outlined in DoD Manual 5200.01, Volume 2, *DoD Information Security Program: Marking of Classified Information*.¹²¹ In addition to the E.O. 13526 and DoD regulations,¹²² individual Services and other federal (defense) agencies may choose to supplement E.O. 13526 and the DoD manuals/regulations with their specific component classification regulations.¹²³

When courts review the classification of records, they examine whether the federal agency has met both the procedural requirements and substantive requirements of E.O. 13526. And while there may be defects in the procedural requirements of classified information at the time a FOIA request is received (and thus cured after a FOIA request is received), courts appear to be reluctant to order a federal agency to release a classified document that otherwise meets the substantive requirements for classification.¹²⁴ As noted by the *Lesar* Court, this result would not be sensible and “would only be perverse.”¹²⁵ However, the ability to cure procedural defects should not be interpreted to mean that courts have given federal agencies authority to ignore the procedural requirements mandated under both E.O. 13526 and any supplementing regulations. Again, as noted by the *Lesar* Court,

[W]e do not mean to imply that only the substantive standards of the governing Executive Order must be followed: the statute requires both procedural and substantive conformity

¹¹⁹ See Exec. Order No. 13526, pt. 1, §1.7(d); see also DoDR-5400.7-R, DEP'T OF DEFENSE FREEDOM OF INFO. ACT PROGRAM (2006) available at <http://www.dtic.mil/whs/directives/corres/pdf/540007r.pdf>; DoDR-5400.7-R, DEP'T OF DEF. FREEDOM OF INFO. ACT PROGRAM, 79 Fed. Reg. 52499 (proposed rule Sep. 3, 2014).

¹²⁰ Exec. Order No. 13526, pt. 1, § 1.7(d).

¹²¹ U.S. DEP'T OF DEF. MANUAL 5200.01, Vol. 2, DoD INFO. SEC. PROGRAM: MARKING OF CLASSIFIED INFO. (Feb. 24, 2012).

¹²² DoDM 5200.01 Vol 1, DoDM 5200.01 Vol 2, U.S. DEP'T OF DEF. MANUAL 5200.01, Vol. 3, DoD INFO. SEC. PROGRAM: PROT. OF CLASSIFIED INFO. (Feb. 24, 2012).

¹²³ See e.g., U.S. DEP'T OF THE AIR FORCE, INSTRU. 31-401, INFO. SEC. PROGRAM MGMT. (Nov. 1, 2005), as amended; U.S. DEP'T OF THE ARMY, REG. 380-5, DEP'T OF THE ARMY INFO. SEC. PROGRAM (Sep. 29, 2000).

¹²⁴ See *Judicial Watch, Inc. v. U.S. Dep't of Defense*, 857 F. Supp. 2d 44 (D.C. Cir. 2012), *aff'd*, 715 F.3d 937, D.C. Cir. (2013); see also *U.S. Dep't of Justice v. Lesar*, 636 F.2d at 478, 484 (1980).

¹²⁵ See *Lesar*, 636 F.2d at 484.

2017]

THE FREEDOM OF INFORMATION ACT

267

for proper classification. Rather we recognize that the consequences of particular violations may vary; some substantive violations may require either a remand to the district court for in camera inspection of the materials or the release of the documents. For procedural violations, some may be of such importance to reflect adversely on the agency's overall classification decision, requiring a remand to the district court for in camera inspection; while others may be insignificant, undermining not at all the agency's classification decision.¹²⁶

The *Lesar* Court also noted that the then existing E.O. [E.O. 12065] contained a provision that allowed classification of a document after the date of its origination (or at the time of the FOIA request),¹²⁷ which is consistent with the current E.O. It simply requires a higher level of review. Finally, E.O. 13526 has attempted to correct procedural defect arguments with the following statement: "information assigned a level of classification under this or predecessor orders shall be considered as classified at that level of classification despite the omission of other required markings."¹²⁸ While a federal agency should not rely upon this particular sentence as *carte blanche* to avoid procedural classification requirements, it is at least available for use by a federal agency in defending a procedural classification defect. And, even though one may cite E.O. 13526, section 1.6(f) when defending a procedural classification defect, the federal agency should correct the procedural error once the error is discovered.

*C. Substantive Requirements Pursuant to Executive Order 13526,
Classified National Security Information*

E.O. 13526 also outlines the substantive requirements for classifying records and/or information, and those substantive requirements include the category of information that can be classified and the level of harm to national security. First, the record or information that may be classified must fall within one (or more) of the eight (8) enumerated categories listed in the E.O.: (a) military plans, weapons systems, or operations; (b) foreign government information; (c) intelligence activities (including covert action), intelligence sources, or methods, or cryptology; (d) foreign relations or foreign activities of the

¹²⁶ *Id.* at 485.

¹²⁷ *Id.* at 484, Exec. Order No. 12065, 43 Fed. Reg. 28949 (1978), as amended. Exec. Order No. 12065 and Exec. Order No. 13526 authorize classification of a record/information after a FOIA request is received, although with a higher level review by the deciding official (e.g. agency head or deputy agency head for Exec. Order No. 12065 and agency head, deputy agency head, or the senior agency official designated under section 5.4 for Exec. Order No. 13526).

¹²⁸ Exec. Order No. 13526 pt., 1, § 1.6(f).

United States, including confidential sources; (e) scientific, technological, or economic matters relating to the national security; (f) United States Government programs for safeguarding nuclear materials or facilities; (g) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security; or (h) the development, production, or use of weapons of mass destruction.¹²⁹

The second substantive requirement is that federal agents must be able to articulate the harm to national security at one of the three classification levels of Confidential, Secret, or Top Secret. It is also important for one to be aware that national security is defined as “the national defense or foreign relations of the United States”¹³⁰ and the “defense against transnational terrorism.”¹³¹

While not identified as a substantive requirement, E.O. 13526 specifically prohibits the classification of information, continued classification or failure to declassify information in order to (a) conceal inefficiency, administrative error or violations of law; (b) avoid or prevent embarrassment to a person, organization or agency; (c) restrict competition; or (d) delay the information’s release when the information no longer requires the protection in the interest of the national security.¹³²

D. Judicial Standard of Review and Analysis for Classified Records Requested Under the FOIA

When a federal agency withholds records pursuant to exemption (b)(1), the FOIA requester’s avenue of redress of the agency’s decision is through the judicial system, with a court’s *de novo* review and the burden upon the federal agency to articulate the justification for withholding of the record.¹³³ Again, exemption (b)(1) cases are routinely adjudicated via summary judgment as:

[s]ummary judgment is warranted on the basis of agency affidavits when the affidavits describe the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.¹³⁴

Facially, exemption (b)(1) cases appear to be no different than

¹²⁹ *Id.* pt. 1, § 1.4.

¹³⁰ *Id.* pt. 6, § 6.1(cc).

¹³¹ *Id.* pt. 1, § 1.1(a)(4).

¹³² *Id.* pt. 1, § 1.7(a).

¹³³ 5 U.S.C. § 552(a)(4)(B).

¹³⁴ *Larsen v. U.S. Dep’t of State*, 565 F.3d 857, 862 (citing *Miller v. Casey*, 730 F.2d 773, 776 (D.C. Cir. 1984)).

litigation pertaining to the withholding of information and records under other FOIA exemptions (i.e. 5 U.S.C. Section 552(b)(2) through (b)(9)). However, the complexity of cases pertaining to classified information, national security, and protection of the United States is pronounced and best summarized by Judge Colleen McMahon, of the Washington D.C. District Court, when faced with the FOIA litigation involving *The New York Times*' and American Civil Liberties Union's FOIA requests for copies of legal opinions and memorandum that articulated the legal determination and analysis of targeted killing, and more specifically, the targeted killing of U.S. citizens.¹³⁵ Judge McMahon stated:

The FOIA requests here in issue implicate serious issues about the limits on the power of the Executive Branch under the Constitution and laws of the United States, and about whether we are indeed a nation of laws, not of men. The Administration has engaged in public discussion of the legality of targeted killing, even of citizens, but in cryptic and imprecise ways, generally without citing to any statute or court decision that justifies its conclusions. More fulsome disclosure of the legal reasoning on which the Administration relies to justify the targeted killing of individuals, including United States citizens, far from any recognizable "hot" field of battle, would allow for intelligent discussion and assessment of a tactic that (like torture before it) remains hotly debated. It might also help the public understand the scope of the ill-defined yet vast and seemingly ever-growing exercise in which we have engaged for well over a decade, at great cost in lives, treasure, and (at least in the minds of some) personal liberty.

However, this Court is constrained by law, and under the law, I can only conclude that the Government has not violated FOIA by refusing to turn over the documents sought in the FOIA requests, and so cannot be compelled by this court of law to explain in detail the reasons why its actions do not violate the Constitution and laws of the United States. The Alice-in-Wonderland nature of this pronouncement is not lost on me; but after careful and extensive consideration, I find myself stuck in a paradoxical situation in which I cannot solve a problem because of contradictory constraints and rules—a veritable Catch-22. I can find no way around the thicket of laws and precedents that effectively allow the Executive Branch of our Government to proclaim as perfectly lawful certain actions that seem on their face incompatible with our Constitution and laws, while keeping the reasons for its conclusions a secret. But under the law as I understand it to have developed, the Government's motion for summary judgment must be granted...¹³⁶

¹³⁵ See *N.Y. Times Co. v. U.S. Dep't of Justice*, 915 F. Supp. 2d 508 (S.D.N.Y. 2013), *aff'd in part, rev'd in part, remanded to 752 F.3d 123* (2d Cir. 2014).

¹³⁶ *Id.* at 515-16.

Another reason for the complexity of classified FOIA exemptions is the subject matter expertise associated with classified information and national security harm. Generally, courts accord substantial weight to a federal agency's decision, as articulated in declarations, to classify and/or withhold classified records.¹³⁷ While E.O. 13526, section 1.4, identifies, with a fair degree of certainty, what types of information may be classified, the agency's decision to classify specific information is not immune from litigation¹³⁸ as there is always some level of subjectivity to classification determinations because they are generally based upon a future event and a risk assessment of that event's impact to national security.¹³⁹ Classified exemption cases are complex because the subject matter expertise resides with the federal agency and not within the judiciary:

Because courts 'lack the expertise necessary to second-guess such agency opinions in the typical national security FOIA case,' we 'must accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record.' If any agency's affidavit describes the justifications for withholding the information with specific detail, demonstrates that the information withheld logically falls within the claimed exemption, and is not contradicted by contrary evidence in the record or by evidence of the agency's bad faith, then summary judgment is warranted on the basis of the affidavit alone. Moreover, a reviewing court 'must take into account . . . that any affidavit or other agency statement of threatened harm to national security will always be speculative to some extent, in the sense that it describes a potential future harm. 'Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or plausible.'¹⁴⁰

One may question why the courts have applied this standard of "logical and plausible" or why the courts have given such deference to the federal government concerning classified information; however, the courts have explained this deference in various ways, but ultimately, it appears to be that the courts simply do not have the required expertise and one could say, do not want to acquire the expertise.

a. "[I]n the FOIA context, we have consistently deferred to executive affidavits predicting harm to national security, and have found it unwise to undertake searching judicial review."¹⁴¹

¹³⁷ *Id.* at 551.

¹³⁸ *See, e.g.,* Judicial Watch, Inc. v. U.S. Dep't of Def., 857 F. Supp. 2d 44 (D.C. Cir. 2012), *aff'd*, 715 F.3d 937 (D.C. Cir. 2013), Amnesty Int'l USA v. CIA, 728 F. Supp. 2d 479 (S.D.N.Y. 2010) (citing *Larson v. U.S. Dep't of State*, 565 F.3d 857 (D.C. Cir. 2009)).

¹³⁹ *Larson*, 565 F.3d at 868.

¹⁴⁰ *ACLU v. U.S. Dep't of Defense*, 628 F.3d 612, 619 (D.C. Cir. 2011) (citations omitted).

¹⁴¹ *Id.* at 624 (citing *Ctr. For Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918,

2017]

THE FREEDOM OF INFORMATION ACT

271

- b. “The judiciary ‘is in an extremely poor position to second-guess the predictive judgments made by the government’s intelligence agencies regarding questions such as whether a country’s changed political climate has yet neutralized the risk of harm to national security. . . .’”¹⁴²
- c. “We ‘accord substantial weight to any agency’s affidavit concerning the details of the classified status of the disputed record because the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse effects [sic] might occur as a result of a particular classified record.’”¹⁴³
- d. If an agency’s statements are reasonably specific to show that the withheld information “logically falls within the claimed exemption and evidence in the record does not suggest otherwise . . . the court should not conduct a more detailed inquiry to test the agency’s judgment and expertise or to evaluate whether the court agrees with the agency’s opinions.”¹⁴⁴
- e. “[C]ourts are generally ill-equipped to second-guess the Executive’s opinion in the national security context. . . . [W]e have consistently deferred to executive affidavits predicting harm to national security and have found it unwise to undertake searching judicial review.”¹⁴⁵
- f. “It lies beyond the power of this Court to declassify a document that has been classified in accordance with proper procedures on the ground that the court does not think the information contained therein ought to be kept secret. ([T]he text of Exemption 1 suggests that little proof or explanation is required beyond a plausible assertion that information is properly classified.)”¹⁴⁶

In some cases, plaintiffs have requested that courts conduct an on-camera review of the redacted records based upon their questions, concerns, and/or allegations of the agency’s determination that the information remain classified. Some of the concerns include continued

927 (D.C. Cir. 2003)).

¹⁴² *Larsen*, 565 F.3d at 865.

¹⁴³ *Id.* at 864 (citing *Ctr. For Nat’l Sec. Studies v. U.S. Dep’t of Justice*, 331 F.3d 918, 927 (D.C. Cir. 2003)).

¹⁴⁴ *Gov’t Accountability Project v. U.S. Dep’t of State*, 699 F. Supp. 2d 97, 101 (2010) (citing *Larsen v. U.S. Dep’t of State*, 565 F.3d 857, 865 (D.C. Cir. 2009)).

¹⁴⁵ *ACLU v. U.S. Dep’t of State*, 878 F. Supp. 2d 215, 222 (D.C. Cir. 2012) (citations omitted).

¹⁴⁶ *N.Y. Times Co. v. U.S. Dep’t of Justice*, 915 F. Supp. 2d 508, 560 (S.D.N.Y.), *aff’d in part, rev’d in part, remanded to* 752 F.3d 123 (2d Cir. 2014).

classification given the passage of time, the reasons noted in the affidavits/declarations are often repetitive or similar to past declarations (in prior cases), and/or the federal agency uses similar arguments/statements concerning national security harm. In effect, this argues that the federal agency has failed to faithfully consider each FOIA case on its own particular facts¹⁴⁷ (i.e. a cookie-cutter approach by the federal agency), and thus the court is required to or should conduct a further or more detailed review of the redacted records.¹⁴⁸ Again, the *Larson* Court stated that such requests for:

further judicial inquiry [are] not required by—indeed is even contrary to—our precedent. ‘Once satisfied that proper procedures have been followed and that the information logically falls from into the exemption claimed, the courts need not go further to test the expertise of the agency, or to question its veracity when nothing appears to raise the issue of good faith.’ Not only have we counseled that courts not go further, we have held that ‘the court *is not to* conduct a detailed inquiry’ if the agency’s statements meet the preliminary standard. . . . Plaintiffs [have] suggested that . . . the agencies do not faithfully consider FOIA requests but issue boilerplate responses, which should spur the court to require more explanation. However, when the potential harm to national security in different cases is the same, it makes sense that the agency’s stated reasons for nondisclosure will be the same . . . the fact that similar exemption explanations . . . is not a cause for further judicial inquiry.¹⁴⁹

VIII. PROHIBITIONS ON CLASSIFYING SPECIFIC CATEGORIES OF INFORMATION

The Executive Order prohibits federal agencies from classifying, declassifying, or continuing the classification of records in any case in order to: conceal violations of law, inefficient, or administrative error; prevent embarrassment to a person, organization, or agency; restrain competition; or prevent or delay the release of information that does not require protection in the interest of the national security.¹⁵⁰ Given these prohibitions, some FOIA requesters have recently argued that federal agencies have classified various documents/records in violation of these prohibitions and thus the documents may not be classified by the federal agency.¹⁵¹

¹⁴⁷ *Larsen*, 565 F.3d at 868.

¹⁴⁸ *Id.* at 867.

¹⁴⁹ *Id.* at 869 (citations omitted).

¹⁵⁰ Exec. Order No. 13526, pt. 1, § 1.7.

¹⁵¹ See *ACLU v. U.S. Dep’t of Defense*, 664 F. Supp. 2d 72 (D.C. Cir. 2009), *aff’d*, 628 F.3d 612 (D.C. Cir. 2011). See also *Amnesty Int’l U.S. v. CIA*, 728 F. Supp. 2d 479 (S.D.N.Y. 2010).

The critical question about these prohibitions is what if the classified record or information itself reveals a violation of law or is embarrassing to the USG and the very nature of release of the record/information would lead to harm to national security, including threats of international terrorism or threats against the U.S. military. Does this mean that a federal agency cannot classify the record or maintain the classification of record? Since September 11, 2001, the USG has defended a number of FOIA cases in which the plaintiff argued that because the underlying activity is illegal or unauthorized or no longer authorized, federal agencies cannot classify the information or the record loses its protection of classification.¹⁵² However, the fact that the conduct itself is unlawful, does not (in and of itself) preclude the possibility that the materials/information/records may contain information of such a sensitive nature, the disclosure of which could (still) lead to national security harm.¹⁵³

One of the earlier court cases to address this issue was *Lesar v. U.S. Dep't of Justice*, where the FBI surveillance of Dr. Martin Luther King exceeded the lawful limits.¹⁵⁴ As noted by the *Lesar* Court, the FBI surveillance of Dr. King may have strayed beyond the bounds of its initial lawful security purpose. However, this did not preclude the possibility that the actual surveillance records and the task force materials (investigation of the FBI's surveillance) may nevertheless contain information of a sensitive nature. The disclosure of this information could compromise legitimate secrecy needs.¹⁵⁵

The issue of illegal conduct was addressed more recently in *Amnesty International, U.S. [hereinafter AI] v. CIA*.¹⁵⁶ President Obama (shortly after assuming office) had prohibited enhanced interrogation techniques [hereinafter EIT] (other than those that fell within the DA Field Manual) and directed the closure of Central Intelligence Agency [hereinafter CIA] detention facilities. In this case, AI argued that the CIA records pertaining to past EITs (authorized but now prohibited) were outside of the CIA's mandate and were not intelligence sources or methods. The CIA withheld the records under both Exemption (b)(3)¹⁵⁷ and (b)(1). The *AI* Court found that the CIA had met its burden for withholding the

¹⁵² See, e.g., *ACLU v. U.S. Dep't of Defense*, 628 F.3d 612 (D.C. Cir. 2011), *ACLU v. U.S. Dep't of Justice*, 752 F.3d 123 (2d Cir. 2013), *ACLU v. CIA*, 710 F.3d 422 (D.C. Cir. 2013), *ACLU v. CIA*, 892 F. Supp. 2d 234 (D.C. Cir. 2012), *Amnesty Int'l, U.S. v. CIA*, 728 F. Supp. 2d 479 (S.D.N.Y. 2010), *ACLU v. U.S. Dep't of Justice*, 2011 U.S. Dist. LEXIS 156267 (D.C. Cir. Feb. 14, 2011)).

¹⁵³ See *Lesar v. U.S. Dep't of Justice*, 636 F.2d 472 (1980).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 483.

¹⁵⁶ See *Amnesty Int'l, U.S. v. CIA*, 728 F. Supp. 2d 479 (S.D.N.Y. 2010).

¹⁵⁷ 5 U.S.C. § 552(b)(3), specifically exempted from disclosure by statute.

records under both exemptions and rejected the Plaintiff's arguments as to why the records were not or no longer classified and would not result in harm to the national security.¹⁵⁸ The *AI* Court first noted that “[i]f an agency’s statements supporting exemption contain reasonable specificity of detail as to demonstrate that the withheld information logically falls within the claimed exemption and evidence in the record does not suggest otherwise . . . the court should not conduct a more detailed inquiry to test the agency’s judgment and expertise or to evaluate whether the court agrees with the agency’s opinions.”¹⁵⁹ In regards to the now prohibited EITs and detention facilities, the *AI* Court noted that AI, in effect, argued “that because some of the CIA’s techniques are illegal, the CIA therefore classified the documents to conceal the alleged illegality.”¹⁶⁰ The court concluded that AI has only made this allegation or argument, and did not provide any support for its theory, stating:

A finding of bad faith must be grounded in ‘evidence suggesting bad faith on the part of the [agency]. Ultimately, an agency’s justification for invoking a FOIA exemption is sufficient if it appears logical or plausible.’ . . . [T]he fact that the interrogation methods may now be considered illegal does not mean that the information cannot be withheld pursuant to Exemption 1.¹⁶¹

In the end, the *AI* Court found that the federal government had met its burden for withholding the classified records.¹⁶²

The Washington D.C. Federal Courts have also adjudicated the issue of prohibited interrogation techniques in the case of *ACLU v. U.S. Dep’t of Defense*.¹⁶³ In this case, the DoD partially denied the ACLU’s request for various records pertaining to fourteen high-value detainees held at Guantanamo Bay, Cuba. In this case, the ACLU also argued that because President Obama had prohibited the EITs and closed the detention facility (at Guantanamo Bay, Cuba), the DoD (and CIA) could no longer continue to classify the records. The *ACLU* Court, like the *AI* Court, found that “[t]o the extent that the ACLU’s claim rests on the ACLU’s belief that enhanced interrogation techniques were illegal, there is no legal support for the conclusion that illegal activities cannot produce classified documents. In fact, history teaches the opposite. Documents concerning surveillance activities later deemed illegal may still produce information that may be properly withheld under exemption 1.”¹⁶⁴

¹⁵⁸ *Amnesty Int’l, U.S. v. CIA*, 728 F. Supp. 2d 479, 505 (S.D.N.Y. 2010).

¹⁵⁹ *Id.* at 507-508.

¹⁶⁰ *Id.* at 510-511.

¹⁶¹ *Id.* at 511.

¹⁶² *Id.* at 530.

¹⁶³ *See ACLU v. Dep’t of Def.*, 628 F.3d 612 (D.C. Cir. 2011).

¹⁶⁴ *Id.* at 622 (citing *Lesar v. U.S. Dep’t of Justice*, 636 F.2d 472, 483 (D.C. Cir. 1980)).

In this particular case, the DoD (and CIA) articulated five harms to national security; the first four harms pertained to CIA techniques, priorities and foreign governments. The fifth harm to national security was al Qaeda's use of the information as propaganda. It is interesting to note that the ACLU challenged the fifth basis as to whether one could use the records as propaganda and whether this propaganda use would (actually) harm national security. The ACLU argued that the real reason the CIA had not released the records was because they would be embarrassing to the United States, and possibly reveal violations of law. And, because the Executive Order expressly prohibits the classification of records that would be embarrassing or reveal violations of law, the records cannot be withheld under the FOIA as classified records.¹⁶⁵ The court chose not to decide the issue as to whether the information could be used as propaganda and whether the information could harm national security. The court concluded the government's four other reasons of national security harm were sufficient for non-release of the records as "[i]n the FOIA context, we have consistently deferred to executive affidavits predicting harm to national security, and have found it unwise to undertake searching judicial review."¹⁶⁶

In another attempt to obtain information pertaining to EITs, the ACLU requested documents from the DoJ's Office of Professional Responsibility as to whether any DoJ attorneys had "breached professional or ethical obligations in authorizing the use of enhanced interrogation techniques."¹⁶⁷ In this case, the ACLU did not argue that the EITs records could not be classified based upon President Obama's prohibition of their use (although authorized at one time). Instead, the ACLU argued that the EITs were "unlawful [from their first use] and therefore fall outside the protection of 'intelligence sources and methods' granted by those exemptions [(b)(1) and (b)(3)]."¹⁶⁸ However, the court again concluded in favor of the USG and stated "[t]o the extent that the ACLU's claim rests on the ACLU's belief that the EIT were illegal, there is no legal support for the conclusion that illegal activities cannot produce classified documents. In fact, history teaches the opposite."¹⁶⁹ The court noted that "[w]hile some of the documents shed light on the legality or

¹⁶⁵ *Id.* at 624 (citing Exec. Order No. 12958, pt. 1, § 1.7, 60 Fed. Reg. 19825, (Apr. 20, 1995)).

¹⁶⁶ *ACLU v. U.S. Dep't of Def.*, 628 F.3d 612, 624 (D.C. Cir. 2011) (citing *Ctr. For Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918, 927 (D.C. Cir. 2003)).

¹⁶⁷ *ACLU v. U.S. Dep't of Justice*, 2011 U.S. Dist. LEXIS 156267, at *3 (D.C. Cir. 2011). The ACLU submitted its FOIA request on December 4, 2009.

¹⁶⁸ *Id.* at *15.

¹⁶⁹ *Id.* (citing *ACLU v. U.S. DoD*, 628 F.3d 612 (D.C. Cir. 2011)); *ACLU v. Dep't of Defense*, 723 F. Supp. 2d 621, 628-629 (S.D.N.Y. 2010).

illegality of the CIA's conduct, the (b)(1) or (b)(3) claims are not pre-textual. Any possibility of illegal conduct on the part of the CIA does not defeat the validity of the exemptions claimed."¹⁷⁰ In other words, the Court found that the USG had provided a logical and plausible rationale for the redaction of the records as classified, and whether the actions were legal or illegal at the time and/or authorized or unauthorized at the time of classification was not in and of itself dispositive.¹⁷¹

In yet another attempt to obtain records pertaining to EITs, the ACLU submitted a FOIA request for eleven reports from the CIA's Office of Inspector General ("OIG") that pertained to the "detention, interrogation, or treatment of individuals apprehended after September 11, 2001, and held at detention facilities outside the United States."¹⁷² The ACLU subsequently modified its FOIA request to "only 'descriptions in the OIG reports of the use of unauthorized interrogation methods.'"¹⁷³ The CIA withheld the records under both Exemption (b)(1) and Exemption (b)(3)¹⁷⁴ and the court (again) found that the CIA had met its burden for withholding the records under both exemptions.¹⁷⁵ In this particular case, the ACLU again attempted to distinguish the FOIA request for the OIG records from the other cases by stating that the interrogation techniques were (both) illegal and unauthorized at the time of use (as opposed to illegal but authorized) and outside of the CIA's mandate.¹⁷⁶ The court rejects this argument, based upon *Sims v. CIA*,¹⁷⁷ and notes that "what matters is that the activity was conducted for intelligence purposes, not that it was illegal or unauthorized."¹⁷⁸ In addition, the fact that the activities are outside the charter of the CIA is "immaterial to the determination of whether they [the activities] fell under 'intelligence sources or methods.'"¹⁷⁹

Classified information cases will never be easy as they pertain to "important issues arising at the intersection of the public's opportunity to obtain information about their government's activities and the legitimate

¹⁷⁰ *Id.* (citing *Agee v. C.I.A.*, 524 F. Supp. 1290, 1292 (D.C. Cir.1981)).

¹⁷¹ *Id.*

¹⁷² *ACLU v. CIA*, 892 F. Supp. 2d 234, 238 (D.C. Cir. 2012). The ACLU submitted its FOIA request on April 25, 2011.

¹⁷³ *ACLU v. CIA*, 892 F. Supp. 2d 234, 241-240 (D.C. Cir. 2012).

¹⁷⁴ As noted by the court, the analysis of "intelligence sources and methods" under exemption (b)(1) and (b)(3), statutory exemptions, are routinely the same. *ACLU v. CIA*, 892 F. Supp. 2d 234, 246 (D.C. Cir. 2012) (citing *Project v. Casey*, 656 F.2d 724, 736-737, n.39 (D.C. Cir. 1981)).

¹⁷⁵ *Id.* at 245.

¹⁷⁶ *Id.*

¹⁷⁷ *See Sims v. CIA*, 471 U.S. 1159 (1985).

¹⁷⁸ *ACLU v. CIA*, 892 F. Supp. 2d 234, 244 (citing *Sims v. CIA*, 471 U.S. 1159 (1985)).

¹⁷⁹ *Id.* at 245 (citing *Navasky v. CIA*, 499 F. Supp. 269, 273-274 (S.D.N.Y. 1980)).

interests of the Executive Branch in maintaining secrecy about matters of national security.”¹⁸⁰

However, what is clear is that FOIA requesters appear to think that just because the information reveals an illegal action (or the action is or was prohibited and/or unauthorized) or is embarrassing to the USG, that fact in and of itself prohibits the government from classifying records. This narrow construction or interpretation of E.O. 13526 is simply not logical. The logical interpretation of E.O. 13526 is that the information cannot be classified based only upon or for the sole purpose of concealing violations of law, inefficiencies or administrative error; preventing embarrassment to a person, organization or agency; restraining competition; or preventing or delaying the release of information that does not require protection in the interest of the national security.¹⁸¹ This is the only conclusion that makes sense, at least from a national security perspective.

It is interesting to note that there is one recent FOIA litigation case where records were not classified and withheld under exemption (b)(1) but rather withheld only under (b)(6) and (b)(7). This case involved an ACLU FOIA request, submitted to the DoD on October 7, 2003, for various photographs of detainee abuses.¹⁸² The ACLU subsequently filed suit against the DoD and other federal agencies on June 2, 2004, and the litigation continued for over ten years.¹⁸³ It is unclear why DoD only claimed exemption (b)(6), personal privacy interests, and (b)(7)(C), law enforcement records and personal privacy interests, as authority for withholding the photographs and did not claim exemption (b)(1), use as propaganda and harm to national security.¹⁸⁴ While some may disagree, a strong argument exists that such photographs could be classified pursuant to exemption (b)(1) based upon national security harm to the United States, its citizens and residents, to the DoD, and more specifically to military members and/or units or installations. Given the recent attacks (or threats of attacks) against military service members and their families, military installations and/or recruiting stations, etc. both in the United States and in United States Central Command’s [hereinafter CENTCOM’s] area of responsibility [hereinafter AoR], the harm to national security is real. Examples of attacks or threats of attacks include

¹⁸⁰ N.Y. Times Co. v. U.S. Dep’t of Justice, 752 F.3d 123, 126 (2d Cir. 2014).

¹⁸¹ Exec. Order No. 13526, pt. 1, § 1.7.

¹⁸² See ACLU v. U.S. Dep’t of Def., 339 F. Supp. 2d 501 (S.D.N.Y. 2004), *aff’d in part, rev’d in part*, ACLU v. DoJ, 681 F.3d 61 (2d Cir. 2012).

¹⁸³ See ACLU v. U.S. Dep’t of Def., 40 F. Supp. 3d 377 (S.D.N.Y. 2014).

¹⁸⁴ The Dep’t of Defense also argued (b)(7)(F) as a basis for withholding the photographs; however, the court also rejected exemption (b)(7)(F) as a basis for withholding the photographs. See, ACLU v. U.S. Dep’t of Defense, 389 F. Supp. 2d. 547, 568-579 (2005).

the following:

- a. Two American service members were killed by an Afghanistan soldier in a series of deaths based upon anti-Americanism as a result of the burning of Korans by U.S. soldiers.¹⁸⁵
- b. An Afghanistan police officer opened fire on U.S. and Afghanistan forces, killing two U.S. service members and three Afghanistan police officers.¹⁸⁶
- c. As noted by Representative Peter King of New York, “People in uniform are symbols of the United States. They’re symbols of American might . . . And if they (military personnel) can be killed, that is a great propaganda victory for Al Qaeda.”¹⁸⁷
- d. The Cyber Caliphate, an Islamic State in Iraq and Syria (ISIS) affiliated hacker group, hijacked the Twitter Account of Military Spouses of Strength¹⁸⁸ to post “Creepy threats against members of the group.”¹⁸⁹
- e. The CENTCOM’s Twitter account was also recently hacked by supporters of ISIS or the Islamic State in Iraq and Levant (ISIL), and the hackers posted the following messages: “AMERICAN SOLDIERS, WE ARE COMING, WATCH YOU BACK. You’ll see no mercy infidels. ISIS is already here, we are in your PCs, in each military base. With Allah’s permission we are in CENTCOM now. We won’t stop! We know everything about your wives and children. U.S. Soldiers! We’re watching you!”¹⁹⁰

The propaganda value by extremists concerning successful attacks

¹⁸⁵ 2 US Troops Killed in Afghanistan Following Koran Burning, ASSOCIATED PRESS (Mar. 1, 2012), available at <http://www.foxnews.com/world/2012/03/01/2-troops-killed-by-afghan-soldier-civilian/>.

¹⁸⁶ Afghan Police Officer Reportedly Kills 2 US Troops, 3 Afghans in ‘Insider’ Attack, ASSOCIATED PRESS (Mar. 11, 2013), <http://www.foxnews.com/world/2013/03/11/afghan-police-officer-allegedly-kills-2-us-troops>. This attack occurred two days after a deadline set by President Karzai for U.S. Special Forces to withdraw from the area following allegations of abuse.

¹⁸⁷ Catherine Herridge, *Military a Growing Terrorist Target, Lawmakers Warn*, FOX NEWS (Dec. 6, 2011), <http://www.foxnews.com/politics/2011/12/06/military-growing-terrorist-target-lawmakers-warn/>.

¹⁸⁸ A group that “aims to improve mental health awareness by providing resources and knowledge through tangible programing.” See John Hayward, *ISIS-Aligned ‘Cyber Caliphate’ Hacker Go After Military Spouses of Strength*, ABQ JOURNAL (Feb. 11, 2015), <http://www.breitbart.com/national-security/2015/02/11/isis-aligned-cybercaliphate-hackers-go-after-military-spouses-of-strength/>.

¹⁸⁹ *Id.*

¹⁹⁰ Caitlin Dickson, *U.S. Military Command’s Twitter Account Hacked*, YAHOO NEWS (Jan. 12, 2015, 1:17 P.M.), <http://news.yahoo.com/u-s—military-command-s-twitter-account-apparently-hacked-by-isis-181757697.html>.

against the United States, DoD, and U.S. military members and/or their families (whether the misconduct is substantiated or not) is real. While the articles cited above originated a number of years after the 2004 ACLU FOIA litigation for the release of the photographs (and could explain why DoD did not assert exemption (b)(1)), the harm to military members and their families, installations, U.S. citizens, and the United States is real and not simply speculative. This harm and risk of harm must be considered in future litigations from the perspective of national security harm, as defined by E.O. 13526.

IX. WAIVER OF CLASSIFICATION EXEMPTION – OTHERWISE KNOWN AS THE WIKILEAKS ARGUMENTS

A FOIA requester may compel a federal agency to release otherwise classified information or records if the federal agency has “officially acknowledged” the information/record and thus has waived its ability to claim the exemption.¹⁹¹ In some cases, FOIA requesters will argue that because the record or information is already publicly available (sometimes citing various internet sites or news reports), the federal agency cannot now claim that the information is classified.¹⁹²

For waiver cases, FOIA requesters have the burden of establishing that the federal agency has “officially acknowledged” the information/record.¹⁹³ In addition, E.O. 13526 clearly states, “[c]lassified information shall not be automatically declassified as a result of any unauthorized disclosure of identical or similar information . . .”¹⁹⁴ Courts have examined the issue of official release and have articulated the following three-prong test:

Classified information ‘is deemed to have been officially disclosed only if it (1) “[is] as specific as the information previously released,” (2) “match[es] the information previously disclosed,” and (3) was “made public through an official and documented disclosure.” As to the last factor, “the law will not infer official disclosure of information classified by the CIA from (1) widespread public discussion of a classified matter, (2) statements made by a person not authorized to speak for the Agency, or (3) release of information by another agency, or even by Congress.” . . . Indeed, “the fact that the government disclosed general information on its interrogation program does not require full

¹⁹¹ See *ACLU v. U.S. Dep’t of Def.*, 628 F.3d 612 (D.C. Cir. 2011).

¹⁹² See e.g., *ACLU v. U.S. Dep’t of Def.*, 628 F.3d 612 (D.C. Cir. 2011), *Amnesty Int’l, U.S. v. CIA*, 728 F. Supp. 2d 479 (S.D.N.Y. 2010).

¹⁹³ See e.g., *ACLU v. U.S. Dep’t of Def.*, 628 F.3d 612 (D.C. Cir. 2011), *Billington v. U.S. Dep’t of Justice*, 11 F. Supp. 2d 45 (D.C. Cir. 1998), *aff’d in part, vacated in part* by 233 F.3d 581 (D.C. Cir. 2000), *Amnesty Int’l, U.S. v. CIA*, 728 F. Supp. 2d 479 (S.D.N.Y. 2010).

¹⁹⁴ Exec. Order No. 13526, pt. 1, § 1.1(b)(2)b.

disclosure of aspects of the program that remain classified.”¹⁹⁵

The court further noted that “[a]n agency’s official acknowledgment of information . . . cannot be based on mere public speculation, no matter how widespread.”¹⁹⁶ Another court phrased it as follows: There is “‘a critical difference between official and unofficial disclosures,’ and the mere ‘fact that information exists in some form in the public domain does not necessarily mean that official disclosure will not cause [cognizable] harm.’”¹⁹⁷ In the case of documents available because of a WikiLeaks disclosure, this particular court went on to say that it was simply no substitute for an “official acknowledgement.”¹⁹⁸

It should be clear that case law is consistent with E.O. 13526’s statement that “[c]lassified information shall not be declassified automatically as a result of any unauthorized disclosure of identical or similar information.”¹⁹⁹ Will this clear language within case law and in the current Executive Order stop those from arguing before a court that the information is already available to the public and does not require the continued classification by the federal agency? As with the new E.O. 13556²⁰⁰ and the premise that it will clear up confusion between CUI and releases under the FOIA, this author is skeptical that FOIA requesters will cease citing WikiLeaks (and now Edward Snowden) as a basis for discontinued classification of information or records. This skepticism is based upon the fact that the ACLU argued a leaked report by the International Red Cross as the basis for declassification of records and/or questioned the continued need for the classification of records pertaining to fourteen high value detainees.²⁰¹

X. SUMMARY

As noted in the beginning of this article, Congress believed it had achieved a workable solution or balance between the public’s right to know and/or right of access to government records and the USG’s need to protect itself and its citizens. However, on September 11, 2001, the United States was attacked on its own soil and this had not happened since December 7, 1941, the day Pearl Harbor was attacked. The tension

¹⁹⁵ *Amnesty Int’l U.S.*, 728 F. Supp. 2d at 508-509 (citing *ACLU v. U.S. Dep’t of Def.*, 664 F. Supp. 2d 72 (D.C. Cir. 2009)).

¹⁹⁶ *Id.* at 512 (citing *Wolf v. CIA* 473 F.3d 370, 378 (D.C. Cir. 2007)).

¹⁹⁷ *ACLU v. U.S. Dep’t of State*, 878 F. Supp. 2d 215, 223-224, (D.C. Cir. 2012) (citations omitted).

¹⁹⁸ *Id.* at 223-24 (citing *Wolf v. CIA*, 473 F.3d 370, 473 (D.C. Cir. 2007)).

¹⁹⁹ Exec. Order No. 13526, pt. 1, § 1.1(c).

²⁰⁰ 75 Fed. Reg. 68,675 (Nov. 9, 2010).

²⁰¹ *ACLU v. U.S. Dep’t of Def.*, 664 F. Supp. 2d 72, 76 (D.C. Cir. 2009).

that existed between access to government records and national security interests (whether they are classified or sensitive but unclassified information) is even more apparent since that fateful day of September 11, 2001. National security concerns are somewhat speculative (as they are based upon a future event as noted by the *Larsen* Court²⁰²); however, they are also real. As it has been said (in terms of protecting the United States), we, the United States, have to be right all the time, while those that wish to harm the United States only need to be right once. It is reasonable to conclude that FOIA litigation pertaining to national security interests will continue now and into the future. When writing this Article, the author was drawn to a statement made by Judge Alvin K. Hellerstein in the early stages of the FOIA litigation involving various records related to the detainees under the custody of the United States (discussed above).²⁰³ Judge Hellerstein wrote the following:

My inquiry with respect to the documents in issue is particularly acute. Our nation has been at war with terrorists since their September 11, 2001 suicide crashes into the World Trade Center, the Pentagon, and a field in Shanksville, Pennsylvania, killing thousands and wounding our nation in ways that we still cannot fully recount – indeed, we were at war with terrorists since well before that event. American soldiers are fighting and dying daily in Afghanistan and Iraq. The morale of our nation is a vital concern and directly affects the welfare of our soldiers. How then to deal with the commands of FOIA and the strong policy it reflects ‘to promote honest and open government,’ to assure the existence of an informed citizenry,’ and ‘to hold the governors accountable to the governed’? Of course, national security and the safety and integrity of our soldiers, military and intelligence operations are not to be compromised, but is our nation better preserved by trying to squelch relevant documents that otherwise would be produced for fear of retaliation by an enemy that needs no pretext to attack? FOIA places a heavy responsibility on the judge to determine ‘*de novo*’ if documents withheld by an agency are properly withheld under an exemption and, if necessary, to examine the withheld documents ‘*in camera*’²⁰⁴

Most individuals would agree with Judge Hellerstein’s comment that the FOIA has placed a heavy responsibility upon judges who have to determine, *de novo*, whether classified records should be released over a federal agency’s objections. In addition and to a certain extent, Judge Hellerstein’s comment is that the USG’s enemy, since September 11, 2001, does not need a pretext to attack. However, this author would go one step further and ask one additional question: Do we need to give the

²⁰² *Larson*, 565 F.3d at 857.

²⁰³ See *ACLU v. U.S. Dep’t of Def.*, 389 F. Supp. 2d 547 (S.D.N.Y. 2005).

²⁰⁴ *Id.* at 550.

enemy an excuse to attack the United States or use government information/records as propaganda to encourage those to attack the United States, be it from within the United States or outside of the United States? In other words, how many U.S. service members' lives (or U.S. citizens or residents) are worth release of this information? In his discussion on the need for openness versus secrecy and national security, Judge Hellerstein wrote "[h]istorians will evaluate, and legislators debate, how wise it is for a society to give such regard to secrecy."²⁰⁵ However, in the end, this Article concludes that it will be historians, legislators, theologians and philosophers who will debate how wise it is for a society to give such regard to openness and whether that value is greater or was greater than the lives lost as a result of that release or openness.

²⁰⁵ *Id.* at 562.