

[FOIA-CUI Panel]

Patrick:

Hello, my name is Dr. Patrick Viscuso, I'm the Associate Director of the Information Security Oversight Office for the Controlled Unclassified Information Program. Today, our subject is FOIA, the Freedom of Information Act, and how it relates to the Controlled Unclassified Information Program. Naturally, many questions arise when we have marked information. How does that affect a request for public release? Today, we have several experts with us who can answer these questions. We have Kimberly Keravouri, National Archives Regulatory Officer and ISOO's lead for CUI policy and an attorney with many years of FOIA experience. We have Bryan Oklin, who is ISOO's attorney-advisor, with many years of FOIA policy experience, as well. And we have Devin Casey, Program Analyst with ISOO and a member of the CUI Oversight and Outreach Team, who has been receiving many questions from the public on this very issue. So, let's begin our discussion.

Kimberly, how do you see the connection between the Freedom of Information Act and the CUI Program?

Kimberly:

The Freedom of Information Act and the CUI Program have different origins. The Freedom of Information Act is a statute that allows for the release of information from the federal government to the public. And the CUI Program is established by an Executive Order, and the basis of it is to allow for the controlling of information that is unclassified but that needs types of protection or limited dissemination. So they have opposing purposes and the CUI Regulation carries out the requirements from the Executive Order, which include the requirement that the CUI Program is supposed to not interfere with decision-making processes that occur under release statutes like the FOIA.

Patrick:

Does the fact that information is controlled and marked as CUI mean that it's automatically protected?

Bryan:

No, just because information is marked in a certain way, that is not sufficient to exempt information from disclosure in response to a FOIA request. The Freedom of Information Act is very specific as to the requirement for that information to be disclosed – all information to be disclosed – when requested from our government, unless it falls under some specific exemptions that are named in that statute – for classified National Security Information, is one – for certain types of Law Enforcement Information, is another – Personal Privacy matters, is another – and if

information falls under those exemptions, then it doesn't have to be disclosed in response to a FOIA request. However, the mere fact that information is controlled or marked as CUI, it is a separate standard from the exemptions under the Freedom of Information Act. So independent determination has to be made in response to each and every FOIA request that comes in, as to whether one of those specific FOIA exemptions applies, or not.

Devin:

So, a question that I get a lot is: Does CUI change what I can request in a FOIA request?

Kimberly:

No.

Bryan:

No. Not in any way. You can still submit your FOIA request for any information that you're looking for, that you feel like the government may handle or possess, and if it falls under an exemption, that could be a valid legal reason for the government not to disclose that information to you, whether or not the information is CUI.

Kimberly:

That means that not only can you request as you would have without CUI, but the agency makes decisions about whether to release the information as it would have without CUI. So the CUI Program allows for the agency to protect information as it needs to do so, but it doesn't affect requests for information to be released under FOIA, or decisions about what to release.

Patrick:

So let me ask a question. What happens if a decision is made to release CUI pursuant to a FOIA request? Does an agency still have the obligation to protect the information?

Kimberly:

Yes, and No, it depends. Generally speaking, if the information qualifies as CUI, it qualifies as CUI because of a law, a regulation, or Government-wide policy that says that you have to protect that information or limit its dissemination to somebody. That means that the agency has an obligation to comply with the law, regulation, or Government-wide policy, and protect the information. However, the FOIA is an access statute and the law says that an agency has to release information under certain circumstances as much as possible. So these two things can sometimes seem like they're in conflict. But it doesn't change the agency's obligation to protect the information that it has in its possession. So, for example, there's a FOIA request for a certain piece of information that's protected under the Privacy Act, for example – a FOIA request can be made for that. If the person making the request is allowed to receive the information according to the Privacy Act, the agency can release it to them, but the agency still has to protect that

information while it's still holding it. So it's releasing a copy of the information to the requester, but it can't then say, OK, I'm going to give this Personal Information, of this person that's contained in this file, out to everybody in the public. It still has an obligation to protect it even though it has now gone to a person, and of course in the case of Privacy Information generally it would be going to the person about whom the information is involved. But, that FOIA decision doesn't change the fact that the agency still has a duty to protect the information. And that's one of the reasons why we, generally speaking, we say, even if you're releasing the information under a FOIA request, you should still mark it as CUI. In fact, especially because you are releasing it outside, you should mark it as CUI. The CUI Regulation requires that information, that's CUI that goes outside of an agency, needs to be marked. And that would hold true even if its released under a FOIA request, unless the agency de-controls it, or takes some other kind of public release action in that regard. But the mere releasing of something in response to a FOIA request, doesn't change the fact that it's still CUI.

Patrick:

Bryan, this raises a question in my mind, and it goes back to the very beginnings of CUI, when we were establishing the Registry, we had a number of agencies that submitted the FOIA as a basis for defining something as CUI. Can we do that? What do you think of that?

Bryan:

Sure, so fundamentally, the Freedom of Information Act is a public release, or disclosure statute. It is not a statute that authorizes information to be controlled. That being said, there are exemptions that allow for agencies to withhold that information in response to individual FOIA requests. Something that we had to do, and did do at the beginning of our program, was to reach out to the Department of Justice's Office of Information Policy that oversees FOIA policy for the government, and work some of these intricate issues out. And we issued in 2014 a joint memorandum with DOJ OIP that specifically spells out some of these issues, one of which is that the Freedom of Information Act itself is not an authority to control as CUI, but some CUI may be withheld or controlled in response to individual FOIA requests because it falls under a valid FOIA exemption. Unlike for classified National Security Information where Exemption 1 explicitly exists in the Freedom of Information Act – if a request comes into an agency for classified National Security Information that request is likely to be denied unless the information has been declassified, because of Exemption 1. There is no similar exemption that covers all CUI, because CUI is protected pursuant to federal law, regulation, and Government-wide policy. A number of federal statutes qualify as Exemption B3 statutes, or Exemption 3 under the Freedom of Information Act, and in response to a FOIA request, CUI that is protected, or required to be controlled pursuant to that B3 statute, then would not have to be disclosed in response to a FOIA request. However, information that there is no B3 statute for, and that does not fall under one of the other exemptions, such as Law Enforcement Information or Personal

Privacy could still have to be disclosed in response to a FOIA request. And it creates an awkward question in lots of people's minds where this information clearly warrants a certain level of protect by virtue of its meeting the standard to be CUI, but those standards by which information is CUI or not do not align neatly with the FOIA exemptions. So, a lot of CUI ends up being covered under a number of the FOIA exemptions, and other types of CUI that don't fall under one of those exemptions, and is not protected by a statute, may fall under a federal regulation or Government-wide policy, still could have to be disclosed in response to a FOIA request, but that doesn't obviate the government's requirement to control that information while it handles it within its possession.

Kimberly:

Right, and to some extent, you know, the government – we get this question a lot, too – the government can't control whether or not the person they're giving the information to protects it or not. And we can't require that of them, but agencies can recommend it, suggest it, request it, and have the information marked as CUI so that whoever sees it and has it in their hands understands that there are requirements with regard to CUI to the extent that its possible and so we can do things to increase the chances that it will be protected, but we can't require that it gets protected once it moves into someone else's hands. But that doesn't automatically mean that the agency's duty to protect information that it holds in its possession disappears because we had to release the information. Nor does it automatically mean that the agency can do things like post that information on its electronic reading room and things like that, which would make it public automatically. Many agencies have affirmative public release decision-making processes, where even if something is released as FOIA, it's not necessarily, officially released publically, and they have to make that decision and they have to go through that process, or they have to make decisions to decontrol the information, if that's appropriate. But what it ultimately comes down to – does the information still need to be protected, in the government's hands, whether its protected in the third party's hands or not?

Patrick:

Devin, I know you give a lot of presentations to a lot of industries, a lot of government agencies, and you have to deal with a lot of misunderstandings, particularly dealing with markings. What are some of the questions, what are some of the misunderstandings that you are able to correct in these presentations?

Devin:

So, one of the questions I get a lot is, when a record is marked as CUI the entire record will be marked as CUI and protected as such, so I get asked: In light of FOIA, there's a idea for partial release, or the ability to release information that is part of the protected record, but the parts of it that aren't exempted, to separate that information out, and will CUI affect that, since the whole record is controlled as CUI? And the answer, similar to many others, is: No. The agency will still have the responsibility to look through that information and release what information they can that can be separated out from the CUI, as feasible, as a report. Now they're not required to create a new record that's not CUI, or anything like that, but when possible, if there's

attachments that aren't covered by the exemption, or things of that nature, they can still release that. It's not viewed as one static report that's controlled all at the same level.

Patrick:

Are there any other questions that come up, particularly with regard to the present systems that are used for SBU, Sensitive But Unclassified, and that are confused with CUI? For example, the stamping of information For Official Use Only, FOUO, are there some confusions with regard to FOIA there?

Devin:

So, there are some confusions at agencies that have gotten into a practice of marking information, especially FOUO-like information as FOIA exempt upon the creation of this information. And we've talked with the agencies, we've also talked with individuals in charge of FOIA, and that is generally considered a not-allowed practice. Um, the reason is because, like we mentioned earlier, any record can be requested through FOIA. And the ability to withhold it is based off an exemption. So it's not exempted from the FOIA process, it can still be requested by any individual. The information then has to be reviewed to see whether or not an exemption can apply. Some of these exemptions are situationally based. They're based on how old the information is, how current it is, whether or not there is a current investigation on it. And so the full knowledge of whether or not it can be exempted, isn't really applicable upon the creation of the document. Now, some of the CUI Categories have exemption statutes in law, and the CUI marking that references or lets the FOIA releaser or reviewer understand what type of information that is, may inform their decision as to whether or not an exemption applies, but won't automatically apply that exemption. It will still be looked at as a FOIA reviewer's view of that information. So it's important to note that CUI doesn't pre-exempt anything, in fact it's replacing things that were frequently used inappropriately either to imply or to in practice pre-exempt information that should have been reviewed.

Kimberly:

I mean, for example, Law Enforcement information, there can be some law enforcement information that protects the information because it's part of an ongoing, currently active investigation that can be protected as CUI and if a FOIA request is done for it and at that stage, while its actively being investigated, that information could be denied under a FOIA exemption as well. But later, when the investigation is done, it may still be marked as CUI for a number of reasons related to the authority that allows protection, but if the investigation is no longer ongoing then it's possible that under a FOIA request that same information could be released under a FOIA request. So, it can't be pre-marked, as Devin was saying, because there are factors that can change at different time periods as well as situational, but the information, the fact that its marked as CUI can in many cases serve as an alert so to speak to the FOIA decision maker, that OK, I need to look at whether this information falls under an exemption or not because there are a number of FOIA exemptions that also are information that's protected under CUI, and so the two work together to make it so that something wouldn't -- you know, they correlate, but it's

not a one-for-one correlation, it's not an automatic correlation, it's not that anything that's CUI has a parallel exemption under the FOIA. And so all of those things have to be looked at, at the time. It gets a little more complicated because CUI should be marked up front, and throughout its lifetime, but there are waivers that are permitted, so that some CUI, while it's within the agency, doesn't have to be marked as CUI. And then the question – but, so, it might go to the FOIA decision-maker marked as CUI, or it might go not marked as CUI, but still be CUI. And, but, the FOIA decision-maker makes their decision appropriately, and then based on the FOIA requirements, and then may decide that that information needs to be released, and it needs to be released marked as CUI. So an agency has to sort out when they're going to do that marking. We've had a number of discussions with the Privacy Council and other people about how that works.

Patrick:

Bryan, I know that you were one of the architects of the memorandum that was concluded between the Information Security Oversight Office and the Office of Information Policy and issued in 2014, and I know it had something to say about markings, could you elaborate a little bit about what that memorandum had to say about markings and FOIA?

Bryan:

Sure, so, one of the central points in that memorandum, something that had to be worked out with DOJ OIP as well as will federal agencies, is there's a long-time, long-standing practice by agencies to mark information to indicate that a FOIA exemption applies or may apply. But the difference in "apply" or "may apply" is really crucial because that marking could be informative to a FOIA reviewer that an exemption might apply -that that type of CUI or that piece of information might be able to be exempted in response to a FOIA request, and seeing that marking while that FOIA reviewer is doing a review – they're kind of on notice that that information may appear in that document, might be exempt, but in no way is that marking determinative in advance, prior to that FOIA decision-making process, meant to pre-determine whether that information has to be disclosed or is able to be withheld. So, the idea is, a marking may serve to inform, but in no way is determinative, so in no way does it alter or change the FOIA process and how those decisions are ultimately made, which are done completely in accordance with the Freedom of Information Act.

Patrick:

Devin, I know you are very much involved in the outreach effort, in the creation of products, in the availability of guidance, where can our viewers go in order to learn more about FOIA and CUI?

Devin:

So, both the CUI office and the FOIA offices have websites online that are publically available. They have excellent training videos on both of those websites, Frequently Asked Questions, as well as other guidance about CUI and FOIA – the memorandum that Bryan mentioned is available online on our website for viewing and download as well. So, we do our best to

proactively provide this information to the public in multiple formats, all of which are 508 compliant.

Patrick:

I also would like to add that we also have a very active blog, and in fact, we have a posting that deals with FOIA, and answers many questions that are raised with regard to the relationship of CUI and FOIA.

Well, as you can see, this is a complex issue, but, nevertheless, an important one. I thank you for your attention throughout this video, in exploring the dimensions of this important question.

And please explore the resources that are made available online to you, and if you have any further questions the CUI Executive Agent is available for them. You can contact us through our blog, through our general mailbox, and we would be more than happy to elaborate on any points that are necessary.