

**FOIA Advisory Committee, 2020-22 Term
Classification Subcommittee
Recommendations Regarding Classification Harmonization (Draft)**

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Summary of Report

The classification and withholding of documents containing certain sensitive information is essential to national security, and it requires adherence to a set of rules laid out in federal statutes and executive orders. These include a requirement for the information to be appropriately marked as classified. However, in some cases, these procedures are not appropriately followed and information is not properly marked, including with a future declassification date and other required information.

When such information becomes the subject of a Freedom of Information Act (FOIA) request, courts generally allow agencies to withhold it pursuant to FOIA Exemption (b)(1), 5 U.S.C. § 552(b)(1), even if all the required procedures for classifying the requested information have not been followed. This report makes a set of recommendations to modify the FOIA statute and/or Executive Order (E.O.) 13526 to ensure that agencies verify that the information they withhold satisfy all of the procedural requirements of the governing Executive Order. And if the requested information fails to satisfy any procedural requirements, the Committee recommends that the FOIA statute and/or E.O. 13526 be amended to clearly require that the agency must bring the information into compliance with the procedural requirements and may not withhold it from a FOIA requester pursuant to Exemption (b)(1) until it does so.

Overview of Recommendations

1. We recommend that either the FOIA statute or E.O. 13526, or both, be amended to clarify that information which does not comport with all of the requirements of the Executive Order is not properly classified for purposes of Exemption (b)(1).
2. We recommend that either the FOIA statute or E.O. 13526, or both, be amended to clarify that information may not be withheld under Exemption (b)(1) if it does not contain complete declassification instructions.
3. We recommend that either the FOIA statute or E.O. 13526, or both, be amended to clarify that information may not be withheld under Exemption (b)(1) if the markings specified in the governing Executive Order are not present in a manner that is immediately apparent.
4. We recommend that E.O. 13526 be amended to require that in cases where information withheld under the Freedom of Information Act or other requests or reviews does not contain the markings specified in the governing Executive Order, agencies must add these markings.

5. We recommend that the Archivist request that the Inspector General for the Intelligence Community conduct a review of agencies' compliance with E.O. 13526, Sections 1.6 and 2.1, particularly as it relates to initial marking of classified information and also to how agencies handle classified information responsive to FOIA or other disclosure requests where markings are omitted.

Current Disparities

National security is among the most sensitive subjects within the remit of the government. Information is classified because “throughout our [Nation’s] 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 nations.”¹ While the FOIA applies to all executive branch agencies, agencies must balance their twin obligations to protect national security and facilitate transparency. Governing this is a complex web of federal statutes, regulations, executive orders, and judicial case law that set out obligations of agencies and the procedures they must follow. In the section below, we explore the connection between these sources of rules to understand what happens when one strand of this web – for perhaps understandable reasons – is deemed to take priority over others.

FOIA requires government agencies to withhold information when “unauthorized disclosure of the information could reasonably be expected to damage the national security,”² as long as that information has been properly classified as such. The current Executive order governing such national security classification is E.O. 13526. FOIA Exemption (b)(1) covers matters which are “(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.”³

Under a plain language reading of Exemption (b)(1), a piece of information which does not satisfy *any* part of E.O. 13526 would not be “in fact properly classified pursuant to such Executive order.” This is, in fact, how the U.S. Court of Appeals for the D.C. Circuit originally viewed this issue, stating that “[t]he trial court must conduct a *de novo* review of the agency's classification decision, with the burden on the agency of demonstrating proper classification under both the procedural and substantive criteria contained in the governing Executive Order,” then adding in a footnote, “This is a clear statutory requirement.”⁴ However, courts in recent years have consistently interpreted this criterion significantly more narrowly, stating that “an

¹ Executive Order 13526, *Classified National Security Information*, available at <https://www.archives.gov/isoo/policy-documents/cnsi-eo.html>.

² *Id.* § 1.1(a)(4).

³ 5 U.S.C. § 552(b)(1).

⁴ *Lesar v. DOJ*, 636 F.2d 472, 481 (D.C. Cir. 1980). The D.C. Circuit later confirmed that “the statute requires both procedural and substantive conformity for proper classification,” *id.* at 485, and other courts critically evaluated agencies' compliance with the procedural requirements. *See, e.g., Wash. Post v. DOD*, 766 F. Supp. 1, 7-8 (D.D.C. 1991). In fact, in that last case the Department of Defense actually “concede[d] that many documents were not properly marked and ... undert[ook] to correct the markings on all 2,000 documents” after a Special Master noted the absence of numerous required markings. *Id.*

agency need only satisfy the requirements of Executive Order § 1.1(a) to classify information properly for purposes of FOIA Exemption 1.”⁵ Section 1.1(a) states:

(a) Information may be originally classified under the terms of this order only if all of the following conditions are met:

- (1) an original classification authority is classifying the information;
- (2) the information is owned by, produced by or for, or is under the control of the United States Government;
- (3) the information falls within one or more of the categories of information listed in section 1.4 of this order; and
- (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe the damage.

However, Sec. 1.1(a) is but the first paragraph in the first subsection; there are numerous other requirements peppered throughout the full E.O.. For example, Sec. 1.3 governs who is authorized to properly classify information. Sec. 1.5 governs how long information is allowed to remain classified, stating that “[n]o information may remain classified indefinitely.”⁶ Secs 1.6 and 2.1 govern the information which must be “indicated in a manner that is immediately apparent” when information is classified. Sec. 1.7 explicitly prohibits the classification of certain types of information and establishes rules for when other information can be classified (such as after receipt of a FOIA request). However, courts that have addressed this issue in the last decade have consistently held that even if the agency violates other provisions of E.O. 13526, it is still allowed to withhold information under Exemption (b)(1), so long as it has satisfied Sec. 1.1(a) of E.O. 13526.

In effect, courts have transformed the clear statutory language “are in fact properly classified pursuant to such Executive order” into “are in fact properly classified pursuant to the first paragraph of such Executive order.” Put another way, an agency can violate literally every other provision of Sec. 1 of the Executive Order, but a court could decide that it can still be withheld under Exemption (b)(1) as long as the agency’s declarant states that: (a) the information was ever classified by an original classification authority (Sec. 1.1(a)(1)); (b) the information belonged to the agency (Sec. 1.1(a)(2)); (c) the information had anything to do with national security or foreign affairs (Sec. 1.1(a)(3)); and (d) the original classification authority decided that its release could cause damage (Sec. 1.1(a)(4)). Simply put, according to the current case law, classification misconduct that could get an agency employee fired is still considered “proper classification” for the purposes of FOIA.

On the surface, it might seem logical to require all of these procedures to be followed for a document to be properly classified. However, courts have consistently interpreted this more

⁵ *Nat’l Sec. Counselors v. CIA*, 960 F. Supp. 2d 101, 167 (D.D.C. 2013) (quoting *Mobley v. CIA*, 924 F. Supp. 2d 24, 50 (D.D.C. 2013)). See also *ACLU v. DOJ*, 808 F. Supp. 2d 280, 298 (D.D.C. 2011).

⁶ E.O. 13526 § 1.5(d).

narrowly, stating that “an agency need only satisfy the requirements of Executive Order § 1.1(a) to classify information properly for purposes of FOIA Exemption 1.”⁷ Indeed, one ruling referred to other aspects of the Executive Order as “certain requirements for the administrative handling of information once it is classified.”⁸ This seems to downplay the significance of other provisions of the Executive Order to mere “administrative requirements,” subordinate to the ostensibly more fundamental requirements outlined in Sec. 1.1(a).

This disconnect between the strict requirements for what an agency must do to properly classify information and the loose requirements for what an agency must do to withhold information from a FOIA request as “currently and properly classified” pursuant to Exemption (b)(1) has real-life consequences, especially when marking requirements are involved.⁹ Correctly marking classified information ensures, among other things, that the information is identifiable and handled as classified, thus preventing the very thing that it was classified to prevent—unauthorized disclosure that could reasonably be expected to harm national security. Omitting classification markings creates significant risk that classified information will not be properly handled and protected. However, under the current system there is no additional benefit conveyed by correctly marking improperly or incompletely marked classified documents once a problem is discovered, because the lack of markings does not have any practical effect on the agency’s ability to withhold the information or otherwise treat it as classified. Anecdotally, this Subcommittee has learned that some agencies claim to have a standard practice of correctly marking any inadequately marked documents they discover during the FOIA process, but even crediting these claims fully, this practice is not universal, and when it is not followed, it can cause several problems:

- Failure to indicate the identity of the classification authority (Sec. 1.6(a)(2)) and the agency and office of origin (Sec. 1.6(a)(3)): these make it difficult to understand who made the original determination, preventing any corrective action if the person was not authorized to classify the information.
- Failure to indicate the date or event for declassification (Sec. 1.6(a)(4)): this makes it difficult to know when the information is required to be declassified—or even when it was *classified*—which can lead to the information continuing to be withheld even after its declassification date or event has passed.
- Failure to indicate the reason for classification (Sec. 1.6(a)(5)): this makes it difficult to understand why the information was classified in the first place, which does not allow a future reviewer—or judge—to intelligently decide whether that determination was correct.

⁷ *Mobley*, 924 F. Supp. 2d at 28,

⁸ *Id.* at 48 n.17.

⁹ While the main topic of discussion is the marking requirements for original classification, the rules for derivative classification are no less applicable in the case of derivatively classified information—which, statistically speaking, is the vast majority of classified information. Those rules, set forth in Sec. 2.1, in part require original classification markings to be copied to derivatively classified information, meaning that if the originally classified information is improperly marked, then its derivatively classified information will be too. And, as noted above, even if the originally classified information is properly marked, there are *no consequences* for not copying the markings, since the derivatively classified information can still be withheld under Exemption (b)(1).

- Failure to include proper portion markings (Sec. 1.6(a)(5)(c)): this leads to the withholding of documents in full when segregable portions do not meet the standards for classification.

In fact, the Executive Order itself contemplates the harm that can arise from improper marking, stating, “When [previously classified but improperly marked] information is used in the derivative classification process or is reviewed for possible declassification, holders of such information shall coordinate with an appropriate classification authority for the application of omitted markings.”¹⁰ However, this provision has some significant restrictions. It does not apply to the FOIA process, since agencies do not consider a FOIA review to be a “review[] for possible declassification.” And most importantly, as noted above, due to the relevant court rulings, if an agency outright fails to follow this rule, it is still allowed to withhold the information under Exemption (b)(1).

While the above examples demonstrate why allowing agencies to continue to withhold inadequately marked information is bad for transparency, it is also bad for security. The main purpose of the marking requirements is to allow other government officials who were not involved in the classification decision to understand it, so that, among other things, they can decide whether the information should continue to be protected. If the information is not properly marked, a future reviewer may make erroneous classification determinations and release information which should have been withheld.

In closing, there are far more reasons to harmonize these two authorities than to maintain the status quo, yet each time a requester argues in litigation that the agency must follow all of the above terms of the relevant Executive Order before it can withhold information under Exemption (b)(1), the agency strongly resists the notion and argues—with the Department of Justice’s assistance—that the claim is meritless. Such cases were the genesis of this line of case law in the first place. Moreover, the fact that so many documents are withheld in their entirety under Exemption (b)(1) means that it is impossible for an outside viewer to know exactly how prevalent this issue is, and we are left with the question, if all—or even most—agencies are properly following all the provisions in the Executive Order, why does the DOJ fight so much to preserve their right not to?

In furtherance of bringing FOIA in harmony with the governing Executive orders, the Subcommittee hereby recommends that the Archivist make the following recommendations to harmonize FOIA and the governing Executive Order.

Recommendations

In order to crystallize the issues, the Subcommittee is making one general recommendation followed by two specific recommendations tied to specific parts of the Executive Order which are most often applicable and two final recommendations for administrative solutions.

1. Harmonization in General

¹⁰ E.O. 13526 § 1.6(f).

We recommend that either the FOIA statute or Executive Order 13526, or both, be amended to clarify that information which does not comport with all of the requirements of the Executive Order is not properly classified for purposes of Exemption (b)(1).

There are two potential options for correcting this disparity in general. Either the FOIA statute can be amended to specify that information which does not satisfy all of the requirements of the governing Executive Order is not to be treated as properly classified for purposes of Exemption (b)(1), or a new Executive Order can state as much.

Implementing this recommendation would create a meaningful change in the status quo. It would expressly authorize courts to consider whether the other requirements of the governing Executive Order were followed, and if they were not, to find that the information in question was not properly withheld pursuant to FOIA Exemption (b)(1).

To be clear, this recommendation is *not* that any improperly marked information must be released; it is simply that it may not be *withheld*. While the two ideas may sound the same, they are materially distinct. The former would require that an agency release any information which was not properly marked when it was located during the FOIA process,¹¹ while the latter simply requires that the agency must bring the information into compliance with the Executive Order—by properly marking it and confirming that it was properly classified according to the other criteria—before it may issue a response claiming that it is exempt under Exemption (b)(1). This approach affords agencies a chance to correct mistakes and only compels disclosure if the agency outright refuses to do so.¹²

2. Prohibition on Withholding Indefinitely Classified Information

We recommend that either the FOIA statute or Executive Order 13526, or both, be amended to clarify that information may not be withheld under Exemption (b)(1) if it does not contain complete declassification instructions.

According to Sec. 1.5(d), “No information may remain classified indefinitely. Information marked for an indefinite duration of classification under predecessor orders, for example, marked as ‘Originating Agency’s Determination Required,’ or classified information that contains incomplete declassification instructions or lacks declassification instructions shall be declassified in accordance with part 3 of this order.” According to the plain language of this paragraph, if an agency does not “establish a specific date or event for declassification based on the duration of the national security sensitivity of the information” at the time of classification,¹³ it must be declassified.

¹¹ This is what the requester argued in *DiBacco v. Dep’t of the Army*, 234 F. Supp. 3d 255, 274 (D.D.C. 2017), which the district court rejected.

¹² In doing so, it clarifies that, for the purpose of the D.C. Circuit’s test regarding the severity of the procedural violation, *Lesar v. DOJ*, 636 F.2d 472, 485 (D.C. Cir. 1980), an agency’s refusal to correct a classification problem after being given a chance to do so warrants a denial of the agency’s withholding claim, at least with respect to the assertion of Exemption (b)(1).

¹³ E.O. 13526 § 1.5(a).

However, “it must be declassified” is not necessarily the same as “it is not classified” for the purposes of FOIA. Anecdotally, the Subcommittee learned that there has historically been a sincerely-held difference of opinion in the Executive Branch regarding whether an agency can continue to withhold information pursuant to Exemption (b)(1) even if it meets the standard for automatic declassification under Sec. 3.3 of the governing Executive Order if it has not yet processed the information for declassification, with some senior classification officials maintaining that it cannot and some cabinet-level officials maintaining that it can. In practical terms, this means that even if an agency follows this rule, it does not necessarily have to actually *release* the information in question until some indeterminate future date when it gets around to processing it for declassification, and it may even continue to withhold it from FOIA requesters up until that date.

Accordingly, this disparity should be clarified and either Sec. 1.5(d) should be amended to add “and shall not be withheld from a FOIA request as properly classified information” after “this order,” or FOIA should be amended to clarify that information for which insufficient declassification instructions is available shall not be withheld pursuant to Exemption (b)(1).

3. Prohibition on Withholding Inadequately Marked Information

We recommend that either the FOIA statute or Executive Order 13526, or both, be amended to clarify that information may not be withheld under Exemption (b)(1) if the markings specified in the governing Executive Order are not present in a manner that is immediately apparent.

According to Sec. 1.6(a), several pieces of information are required to be “indicated in a manner that is immediately apparent” at the time of original classification, including the classification level, the identity of the original classification authority, the agency and office of origin, declassification instructions, and a concise reason for classification. Sec. 1.6(c) requires the application of portion markings during original classification to delineate the classified and unclassified portions of documents. According to Sec. 2.1, these markings must be carried over during derivative classification, and the identity of the derivative classifier must also be indicated in a manner that is immediately apparent.

However, as noted above, there are no consequences for agencies that do not satisfy the requirements of this subsection for the purposes of FOIA. They are allowed to withhold entire documents in full based solely on a declaration that they satisfied Sec. 1.1(a) of the Executive Order, even if those documents do not bear a single marking or are actually marked Unclassified in whole or in part.¹⁴ For example, in one case where the plaintiff actually provided evidence of agency FOIA analysts complaining about the withholding of unclassified information and the judge observed that there was no actual evidence that the agency had reclassified any information, the court still granted summary judgment to the agency based on the “substantial weight” it was required to afford agency declarations, stating simply:

The Williams Declaration provides that a classification authority “properly classified the information withheld by DIA under Exemption 1.” There is

¹⁴ Withholding documents marked “Unclassified” under Exemption (b)(1) is, while uncommon, not unprecedented. *See, e.g., Dunaway v. Webster*, 519 F. Supp. 1059, 1070-71 (N.D. Cal. 1981).

insufficient evidence of contradictory evidence because, whether DIA reclassified or declined to declassify the information identified by the FOIA analyst, DIA has stated that the withholdings include information which some classification authority has designated as classified at some point.¹⁵

Accordingly, this disparity should be clarified and either the FOIA statute should be amended to specify that information for which the specified markings are not present in a manner that is immediately apparent may not be withheld pursuant to Exemption (b)(1), or a new Executive Order should make clear that information for which the specified markings are not present in a manner that is immediately apparent may not be withheld pursuant to Exemption (b)(1).

4. Prohibition on Withholding Inadequately Marked Information

We recommend that Executive Order 13526 be amended to require that in cases where information withheld under the Freedom of Information Act or other requests or reviews do not contain the markings specified in the governing Executive Order, agencies must add these markings.

As a corollary to the recommendations above, agencies should be required to ensure that any information withheld in response to a request under the Freedom of Information Act contains the proper markings. Requiring this will ensure that all documents are properly marked, including electronic records.¹⁶

We recommend that this be added to E.O. 13526, Sec. 1.6(f), which would be amended as follows [additions in bold font]:

(f) 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. Whenever such information is used in the derivative classification process or is reviewed for possible declassification **or release under the Freedom of Information Act, Presidential Records Act, or Privacy Act**, holders of such information shall coordinate with an appropriate classification authority for the application of omitted markings.

5. Review by the Inspector General for the Intelligence Community

We recommend that the Archivist request that the Inspector General for the Intelligence Community conduct a review of agencies' compliance with E.O. 13526, Sections 1.6 and 2.1, particularly as it relates to initial marking of classified information and also to how agencies handle classified information responsive to FOIA or other disclosure requests where markings are omitted.

Some in the requester community perceive that at least some agencies routinely omit markings and/or do not correct those omissions when discovered in processing records in response to

¹⁵ *Khatchadourian v. DIA*, 453 F. Supp. 3d 54, 81 (D.D.C. 2020) (citation omitted).

¹⁶ The marking of electronic records is covered in 32 C.F.R. § 2001.23.

FOIA requests or otherwise. It is unclear whether this perception is accurate or how widespread it is. Nevertheless, marking classified information is important and omitting markings or failing to correct omissions risks improper handling, which in turn creates a risk to national security, in addition to any transparency concerns. Thus, it is critical to know if and to what extent this issue exists. To that end, we recommend a review by the Inspector General for the Intelligence Community (ICIG), which falls under the Office of the Director of National Intelligence. The ICIG is well-situated to perform such an audit across the Intelligence Community and has a reputation as the Intelligence Community's "honest broker." A review by the ICIG would additionally provide an opportunity for the experts in classification across the Intelligence Community to provide their expertise and perspective on this complicated topic.

Additionally, given the transparency ramifications of this issue, we encourage the ICIG to publicly release the results of this review to the greatest extent possible without compromising classified information, to facilitate an informed debate regarding the matter.