



United States Department of State

Washington, D.C. 20520

MAY 02 2016

The Honorable
Patrick J. Leahy
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Leahy:

Thank you for your March 18, 2016, letter requesting information about the Department's procedures for classifying information previously not marked classified during the review of documents pursuant to a Freedom of Information Act (FOIA) request, commonly known as "upgrading".

The Department has a process in place to "upgrade" information that is requested under the FOIA, consistent with Executive Order 13526 on Classified National Security Information, which provides that "[i]nformation that has not previously been disclosed to the public under proper authority may be classified or reclassified after an agency has received a request for it under the [FOIA]"¹ By "upgrading" previously unmarked information, the Department is permitted to withhold the information from release under the FOIA.² This is an important process: absent the ability to "upgrade" information, the Department might be required in some instances to publicly release information that could negatively impact the national security including the foreign relations of the United States.

The identification of information requiring "upgrading" occurs during the normal FOIA review process. After records that are potentially responsive to a FOIA request are collected, reviewers within the Department's FOIA office in the Bureau of Administration — frequently in consultation with relevant Department bureaus or relevant agencies—identify information that is exempt from release under the nine FOIA exemptions. Accordingly, if information is exempted from disclosure for privacy reasons, reviewers mark it for redaction under Exemption 6 ("B6") of the FOIA. Likewise, for classified information, reviewers mark it for redaction under Exemption 1 ("B1") of the FOIA. Reviewers receive training on

¹ Executive Order 13526 § 1.7(d).

² 5 U.S.C. § 552(b)(1) (2006).

how to identify information that is appropriate for redaction, including on the standards for classification under Executive Order 13526. The Executive Order expressly states that “[i]f there is significant doubt about the need to classify information, it shall not be classified.”³

During a FOIA review, any previously-unmarked information that is designated for a B1 redaction undergoes an additional review on a document-by-document basis and requires approval by the Department’s FOIA leadership.⁴ This additional procedure is required by Section 1.7(d) of E.O. 13526.

FOIA reviews are conducted to determine whether information can be released at the time it is requested. Accordingly, reviewers assess whether the release of information to the public today reasonably could be expected to result in damage to an interest protected by a FOIA exemption—in the case of Exemption 1, national security. Similarly, reviewers consider whether the release of information that was previously marked classified can now be declassified and released through the FOIA.⁵ In both cases, reviewers judge the impact of the release of information today, not whether information was improperly handled in the past.

The nature of diplomacy and the way foreign policy among nations is conducted can make a conclusion regarding whether information was improperly handled in the past challenging. An example of this complexity is foreign government information (FGI), which is defined, *inter alia*, as information provided to the United States Government by a foreign government . . . with the expectation that the information, the source of the information, or both, are to be held in confidence.”⁶ Although the unauthorized release of FGI is presumed to cause harm to the national security—thereby qualifying as Confidential classified information⁷—Department officials of necessity routinely receive such information through unclassified channels. For example, diplomats engage in meetings with counterparts in open settings, have phone calls with foreign contacts over unsecure lines, and email with and about foreign counterparts via unclassified systems.

Diplomats could not conduct diplomacy if doing so violated the law. Accordingly, both the Executive Order and the Foreign Affairs Manual

³ Executive Order 13526 § 1.1(b); *see also id.* §§ 1.2(c), 1.7(a).

⁴ The specific process by which the Department “upgrades” information during the processing of a FOIA request is set forth in our Foreign Affairs Manual, 5 FAM 483.3-2.

⁵ *See generally* Executive Order 13526 § 3.1.

⁶ Executive Order 13526 § 6.1(s)

⁷ Executive Order 13526 § 1.1(d).

acknowledge that FGI often can be maintained on systems that otherwise would be inappropriate for safeguarding Confidential information.⁸ In other words, maintaining FGI on unclassified systems often does not amount to mishandling the information. It is not until FGI could be subject to public release that a determination needs to be made as to whether the release would result in damage to national security, thereby making a B1 FOIA redaction necessary.

For certain agencies, Congress has specifically exempted sensitive FGI from public disclosure in FOIA regardless of its classification status, and such information may be withheld without classifying it using Exemption 3 of the FOIA.⁹ The Department is not among those agencies, although it has been seeking to be included for a number of years (including this year). Accordingly, the Department must classify and use Exemption 1 to protect FGI (as other classified information) from public release.¹⁰

The Department takes its responsibilities under the FOIA seriously. However, the Department does not rely on the FOIA process to assess whether information was mishandled. The Department has a well-established process for determining whether violations have occurred.¹¹ Those questions are handled by our Bureau of Diplomatic Security, not the office that processes FOIA requests.

Sincerely,



Julia Frifield
Assistant Secretary
Legislative Affairs

cc: The Honorable Charles Grassley, Chairman

⁸ Executive Order 13526 §1.6(e); 5 FAM 482.6d.

⁹ 10 U.S.C. § 130(c).

¹⁰ For several years, the Department has been seeking a statutory exemption that would permit it to protect FGI information from FOIA release without the need to "upgrade" it.

¹¹ The Department's security violation program is set forth in 12 FAM 550.