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SECURITY & GOVERNMENT BULLETIN

To Challenge Excessive Government Secrecy and
To Promote Public Oversight and Free Exchange
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Protecting Government Against the Public

Rep. Howard Wolpe's Science Subcommittee on Investigations uncovered an amazing NASA document entitled "Suggestions for Anticipating Requests under Freedom of Information Act." The two page memorandum is a guide for subverting public requests for information under the FOIA. Here are a few helpful hints, including "suggestions for enhancing the utility" of the FOIA exemptions, offered to government employees:

- Avoid retaining drafts of documents. Each draft constitutes a separate document potentially subject to disclosure.
- Wherever possible try to record only factual information and avoid prematurely documenting your opinions.
- Make sure that any documents to be protected as classified have in fact been processed... [by the] agency with the strongest connection to the national defense.
- Clearly identify and draft documents as recommendations rather than decisions [to make them "predecisional" and thus exempt under the FOIA].
- If you must document a decision, make sure that it is consistent with the decision that you ultimately intend to make public. [!]
- Counsel's participation in the preparation of particular documents may serve as an additional basis for asserting that they are exempt from FOIA based on a claim of attorney work product privilege.

"The document and the culture it represents is an affront to openness and honesty in government," Wolpe wrote to NASA's Admiral Truly on February 26. Truly subsequently repudiated the document.

Generally, our impression has been that most classification abuses are not willful acts, but rather the result of more or less unconscious bureaucratic imperatives that promote the withholding of information. In contrast, what makes this document remarkable is its calculated, deliberate character and its evident contempt for the public. Unfortunately, it would not exist if it did not reflect a widespread attitude within many sectors of the government.

At the same time, the memorandum contains an element of absurdity, since it violates most of its own recommendations. Clearly, the NASA authors are novices at public deception. For more sophisticated efforts, you still have to go to defense and intelligence.

Copies of the memorandum and Rep. Wolpe's letter are available from our office.

What Do You Want? Information.

A CIA officer contacted us recently, explaining that he was a liaison for "certain defense agencies," one of

which wanted to speak to us about nuclear rocket propulsion efforts in the former Soviet Union. If we would agree to a meeting, it would, he assured us, be kept confidential.

Out of curiosity, and since we are not ordinarily in the business of withholding public information, we agreed. So a friendly collection officer came by, who turned out to be from Naval Intelligence. We gave her some general answers to some general questions about the history, status, and funding of Russian nuclear rocket programs, and provided copies of some technical papers presented at U.S. conferences over the last year. By virtue of this encounter, we became a "one-time source." (You can be a one-time source, she explained with a straight face, three times. After that you need to be registered with the Defense Intelligence Agency.)

Meanwhile, we attempted to elicit some intelligence of our own. Doesn't she find it incongruous that there is more technical information in the public domain about Russian nuclear rocket programs than about U.S. Defense Department programs in the same field? (Not particularly.) May we infer from her questions that the U.S. Navy has an active interest in nuclear rocket propulsion? (No.) Well, then why is Naval Intelligence pursuing this issue? (To beat the Air Force.)

Classification Guides

What are the precise criteria by which information is determined to be classified? That's classified too.

The classification system is based on the vague assertion that information may be withheld from the public if its disclosure could cause some degree of "damage to the national security." This standard is so elastic that it could permit classification of almost anything, subject to the classifier's discretion.

On a practical level, most classification offices use classification guides that identify particular categories of information that may be withheld. However, in most cases, the classification guides themselves are exempt from public disclosure. In this way, the classification process is largely shielded from public scrutiny and debate.

We recently obtained a 1990 classification guide for an Air Force Anti-Satellite (ASAT) program, which sheds some light on the standards by which information is judged to be classifiable. Several insights emerge from a review of this document.

It is remarkable, on the one hand, that if causing "damage to national security" were literally the standard for classifying information, it would seem that very little about ASATs should be classified, particularly in an era when few U.S. adversaries have satellites, much less anti-satellite weapons. On the other hand, the irreducible subjective element in what constitutes such damage

accounts for the fact that much information, like this classification guide itself, is withheld from the public.

The guide, which contains no sensitive information, does include at least one obvious violation of official classification policy and common sense. It states that ASAT program-related information is "classifiable" if it would "provide foreign interests with propaganda capable of damaging the U.S. national security."

If U.S. national security can be damaged by foreign propaganda (which is, moreover, factual), then the nation is much weaker than most people would have supposed. Alternatively, the term "damage to national security" is being used in such an arbitrary way as to be useless for establishing meaningful classification criteria.

A copy of the Air Force ASAT classification guide is available from our office.

A Different Reaction

Steven Garfinkel, Director of the Information Security Oversight Office (ISOO), graciously granted us an interview at his office on February 20. Excerpts follow. A full transcript is available from our office. ISOO, established by Executive Order, is responsible for implementing and monitoring the government classification system.

S&GB: I have the impression that you believe that there is room for improvement in the classification system.

Garfinkel: I think we've been pretty clear that the system is ultimately going to have to change as the world is changing. I think I've also been fairly clear that right now we are confronted by so much uncertainty that changes that we might recommend in the very near term are not fundamental changes-- there are not going to be changes in the near term that are going to restructure the way we deal with national security information, although we certainly hope to improve in both the declassification area and in preventing overclassification.

S&GB: Do you expect your office to be initiating or proposing or advancing even these incremental changes over the next few years?

Garfinkel: I think it's going to come from the top of the Administration. I think there is already the recognition that change needs to come at the top management levels of your bureaucracies at the Department of Defense. I think Cheney, General Powell, other people who work directly for them, Bob Gates, I think they recognize this change is inevitable. That's going to be necessary. The direction comes from the top. I hear all of this stuff about the bottom up in the bureaucracy, but I've never seen the bureaucracy work that way.

S&GB: What about special access programs? Why do we have a special access system in the first place?

Garfinkel: Well, I guess we have special access programs out of the recognition that "need to know" is not enforced as well as it should be, and that by calling something a special access program you're in a better position to enforce need to know.

S&GB: And is it a fact that need to know is not enforced as well as it should be?

Garfinkel: Yeah, that's a definite fact. And if we were able to get it enforced as it should be, I don't think we'd need special access programs. And I think that's going to be the direction we're heading in. I think we've come to realize that special access programs are not a cure-all by any means and sometimes they're worse than...

S&GB: The cure is worse than the disease.

Garfinkel: Exactly. So I think we'll get away from special access programs. They kind of became overused. And everybody looked to them as an easy solution. And they weren't always a solution.

S&GB: I'm wondering if there aren't any magic bullets or simple, grand solutions that will drastically simplify the declassification review problem.

Garfinkel: We're looking at the idea of a 'drop dead' date -- anything that is x number of years old is declassified

unless an agency specifically looks at a particular document and says, this one can't be but the rest can. But if we look at a drop dead date, it's going to be a lot longer than twenty years.

S&GB: Why?

Garfinkel: Because we're going to come up with intelligence information and sources that are still alive. And we're going to have to correspond the drop dead date in some degree to other areas in the government. For example, census data is closed for 72 years.

S&GB: Not for national security reasons.

Garfinkel: For privacy reasons. So there are other sensitivity factors that are believed to warrant a much greater period of closure. Whatever our system is going to be, we're going to be hard pressed to come up with a system that's radically different. Already, our system is radically different from that of our allies. They view our system as incredibly more open than theirs. If we're going to go a lot farther, we're going to have that problem of sharing information. I've had lots of people in your position tell me that's not true. But I've had lots of people who work for those governments tell me it is true. And if our government hears that, they're going to believe the people from the foreign government...

S&GB: It would be a shame to let the influence of those more closed systems dominate or determine...

Garfinkel: I'm not suggesting we're going to let our system-- and we haven't-- our system is not based on any foreign system. But in coming up with what I'm referring to as a drop dead date, where everything is open simply because of its age, because of the assumption that anything that old is no longer sensitive, from the policy makers that I know, it's not going to be at the twenty year level and it's not going to be at the thirty year level. I've had a lot of historians tell me that's what it should be, thirty years, but that's just going to be too soon.

S&GB: I think it has to be much sooner.

Garfinkel: There's nothing that prevents someone from asking for anything that's classified at any age. One month, one day old, you can get it reviewed for declassification at any age.

S&GB: What role, if any, do you see for individuals or outside groups like mine in promoting open government?

Garfinkel: Here I differ from most of my colleagues. I believe that you folks play a constructive role. I would be hard pressed to find two or three other people who would agree. My colleagues, when they hear your name-- their reaction is different than mine. As a matter of fact, you personally are a throwback in the sense that when I first took this job twelve years ago there were several individuals who were very active doing what you're doing now, which is propagandizing for openness in government, in trying to portray horror stories and that sort of stuff, and I think that kind of stuff keeps us on our toes. A lot of times it angers us and frustrates us and we're very disturbed that what we're reading is slanted. But I think in the overall picture it's a positive. And the reason I say you're a throwback is that these people all disappeared. Everybody became a moderate.

S&GB: The system wore them down.

Garfinkel: I don't know what it was, but everybody became a moderate. For example, when we would do seminars and things like that and I would want somebody like you to get up there and get the audience really angry and curious, all they kept saying were very moderate and modest things. It was hardly exciting at all. So I think you serve a positive purpose now. We need to have people pressing us for greater openness. ...I think your conclusions [about the CIA openness initiative] are wrong. My indications are that something is going to come of this, and that [CIA Director] Gates is determined that something is going to come of this.

S&GB: I'll be the happiest if I'm proven wrong and they greatly relax their criteria for what's withheld. But so far, they're as bad if not worse than ever.