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June 16, 2008  
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Hon. Anna G. Eshoo  
Chairman  
Subcommittee on Intelligence Community Management  
Permanent Select Committee on Intelligence  
U.S. House of Representatives

Dear Chairman Eshoo:

Thank you for your June 11 letter inviting me to comment on the new White House policy regarding "Controlled Unclassified Information" (CUI) and its implications for information sharing.

In summary, I believe that the impulse behind the new policy is sound and that it is a matter of some urgency to bring greater uniformity and consistency to the handling of unclassified information.

However, to my disappointment, the new CUI Framework fails to fulfill the promise previously expressed that the volume of unclassified information subject to official controls would decline. Instead, it runs the risk of turning CUI into what amounts to a fourth classification level (i.e., after Top Secret, Secret, and Confidential). Furthermore, it is uncertain that the new Framework will succeed even on its own limited terms, since it faces both logistical and "cultural" obstacles.

I believe Congress could assist by articulating performance goals, by nurturing continued policy development with appropriate resources along with regular oversight, and by mandating disclosure of unclassified records that are not or should not be controlled.

Some more detailed observations follow.

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## **1. The new CUI Framework is Far From Mature.**

The CUI Framework is a work in progress. Two and a half years after President Bush ordered development of a streamlined policy for CUI, many of the most difficult policy challenges involved have not yet been resolved: What exactly is CUI? Does everything that was formerly marked "Sensitive But Unclassified" potentially qualify as CUI? If not, what is excluded?

The implementing guidance for CUI has not yet been written, and the infrastructure for overseeing compliance with the CUI Framework does not exist.

In other words, we are still near the beginning of the policy development process, not the end.

## **2. The CUI Office Lacks Independent Funding.**

The CUI Office at the National Archives has been assigned primary responsibility for developing and issuing CUI policy standards and implementation guidance, among other things. But the Office does not have its own staff or resources. The CUI Office Director, the very capable William J. Bosanko, already has another full-time job as Director of the Information Security Oversight Office.

Funding for the CUI Office is precarious, as well. It has no independent funding for the current fiscal year, and has apparently missed the opportunity to request funding for FY 2009. Instead, I understand that it is receiving indirect funding support from the ODNI Information Sharing Environment.

This is not a configuration that is likely to command the respect and compliance needed to advance the CUI process.

## **3. The CUI Framework Faces Profound "Cultural" Obstacles.**

The new CUI policy requires agencies to compromise their autonomy and to function collaboratively across jurisdictional boundaries. That is easier said than done.

In this respect, I believe the CUI Framework may resemble the issue of security clearance reciprocity (i.e. the mutual acceptance by agencies of security clearances granted by other agencies). Both policies require agencies to subordinate their particular interests to a greater government-wide goal.

Reciprocity has been a declared policy for decades. And yet even today, as you know, it is only imperfectly implemented. I think that CUI raises a similar set of challenges to agency "self-determination" and like reciprocity it seeks to compel interagency cooperation that would never arise spontaneously. Indeed, that is the purpose of the policy.

This is not an objection to CUI, but merely an observation that the success of the policy is not assured, and if it comes, it may take more than a few years.

#### 4. The CUI Framework Does Not Remove Unnecessary Controls.

In 2006 testimony before Congress, Amb. Thomas E. McNamara held out the promise of massive de-control of unclassified government records through the adoption of a single new CUI category:

"The great majority of the information which is now controlled can be put in a simple unclassified, uncontrolled category, it seems to me. And that is the system that we are trying to put together, a rational limited set of categories that, like the system that we have for classified national security information, can be applied to controllable information, but leave most of it as fully unclassified," he said.<sup>1</sup>

This promise has not been fulfilled. So far, the new CUI policy does not exclude any information that has been controlled.<sup>2</sup>

It is true that, in a May 21, 2008 memorandum, the Archivist of the United States affirmed that "only that information which truly requires the protections afforded by the President's memorandum [shall] be introduced into the CUI Framework."<sup>3</sup>

This suggests that officials will be required to distinguish between information requiring protection and that which does not. But no criteria for making such distinctions have been presented.

Meanwhile, unfortunately, there are indications that the CUI Framework may be used to expand, not to contract, the volume of government information that is subject to formal controls. Thus, an official Background Paper suggests that CUI markings could even be applied to "embargoed press releases."<sup>4</sup> This implies that almost anything that an agency may wish to withhold for any reason could conceivably qualify as CUI.

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<sup>1</sup> "Building the Information Sharing Environment: Addressing the Challenges of Implementation," hearing before the House Committee on Homeland Security Subcommittee on Intelligence, May 10, 2006, Serial No. 109-75, at page 17 (pdf page 21) (emphasis added). Copy available at: [http://www.fas.org/irp/congress/2006\\_hr/ise.pdf](http://www.fas.org/irp/congress/2006_hr/ise.pdf) .

<sup>2</sup> The President's May 7 memorandum states that its purpose is "not to classify or declassify new or additional information" (at paragraph 1).

<sup>3</sup> Memorandum to Executive Departments and Agencies from Allen Weinstein, Archivist of the United States, "Establishment of the Controlled Unclassified Information Office," May 21, 2008. Copy available at: <http://www.fas.org/sgp/cui/nara052108.pdf> .

<sup>4</sup> Background on the Controlled Unclassified Information Framework, May 20, 2008, at page 5. Copy available at: <http://www.fas.org/sgp/cui/background.pdf> .

## **5. The CUI Policy Imposes an Undue Burden on the Freedom of Information Act**

The CUI Policy proposes that the Freedom of Information Act should serve as the principal channel for members of the public to seek access to information marked CUI.

The FOIA process will provide a straightforward way for anyone to seek public release of CUI and ensure that all CUI for which there is a demand will be carefully reviewed for release.<sup>5</sup>

But if every document marked CUI must go through a formal FOIA review process prior to release – as opposed to informal requests and discretionary release by responsible agency officials – then the FOIA process will be increasingly overwhelmed, and most CUI will never reach the public domain.

## **6. The FOIA Process is Ineffective at Overcoming Controls on Unclassified Information**

One example may serve to illustrate how agencies tend to over-control unclassified information, and how the FOIA is ineffective at overcoming such controls.

In February 2008, I submitted a FOIA request to the ODNI for a copy of an unclassified document published by Open Source Center called “Recent Worldwide Research on Animal Pox Viruses.” The request was forwarded by ODNI to CIA for response (since CIA manages the Open Source Center). I also submitted a new request for the document directly to CIA.

As of June 2008, CIA has still not provided the requested document. The request has neither been granted nor denied. There has simply been no response. In the interim, however, I was able to obtain a copy of the document through informal, “unauthorized” channels.<sup>6</sup>

If it were necessary to rely on FOIA, this unclassified document would still be unavailable. Adding new demands on FOIA is unlikely to improve the situation.

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<sup>5</sup> Background on the Controlled Unclassified Information Framework, at page 6.

<sup>6</sup> See “Recent Worldwide Research on Animal Pox Viruses,” January 2008. Copy available at: <http://www.fas.org/irp/dni/osc/pox.pdf>.

## 7. What Should Congress Do?

I could be mistaken, but my instinct is that Congress should not attempt to enact into statute detailed information security policies. Statutes are too inflexible, when flexibility and the freedom to respond to new contingencies or mishaps are what is needed. Instead, Congress should articulate performance objectives and then intervene to correct problems if and when they arise.

With respect to CUI, I would suggest the following:

- a. Assuming (as I do) that the CUI process deserves a chance to prove itself, Congress should allocate dedicated funding for the CUI Office this year, and certainly next year.
- b. In appropriating such funds, Congress should specify performance goals including both (1) government-wide uniformity of controls on CUI to promote information sharing; and (2) minimization of controls on unclassified information to promote public access to government information. Congress should also require regular reporting on how these objectives are being accomplished. Based on such reporting, further legislative action may be considered in the future.
- c. In parallel with the CUI process, I believe Congress should mandate affirmative new disclosure requirements that will directly counteract the tendency to control information unnecessarily. Specifically, for example, I would urge legislation requiring the DNI Open Source Center to publish all or most unclassified analytical products.<sup>7</sup>

I hope these reflections are useful to you in clarifying your own thoughts on this important subject. I would be pleased to consult with you or your staff further as needed.

Respectfully yours,

Steven Aftergood  
Project on Government Secrecy  
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<sup>7</sup> An exception would have to be made for Open Source Center materials that are subject to third-party copyright claims that could not be published without permission of the copyright holder. Still, I believe there are many OSC analytical products that would be eligible for publication, and that should be published.

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June 11, 2008

Mr. Steven Aftergood  
Federation of American Scientists  
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Dear Mr. Aftergood:

As you know, the White House recently released a memorandum outlining a new policy for the designation and sharing of "Controlled Unclassified Information" (CUI). The CUI framework is intended to replace the numerous "Sensitive but Unclassified" markings with a single set of designations. While the details of the CUI implementation are still being finalized, the policy would require the designation of CUI information into one of three groups, determining the information safeguards required and the audience with which the information may be shared

The classification and over-classification of government information has been a matter of interest to this Committee for some time. Members are concerned that too many documents are classified and controlled, inhibiting the free flow of information within the government as well as between the government and the American people. Therefore, I am very interested in hearing your views on the new CUI policy and its effects on information sharing. In addition, I am interested in hearing your thoughts on whether any legislation is required to advance the implementation of the CUI framework, and, if so, what provisions you would recommend.

I look forward to hearing from you. Thank you for your continued assistance and input. If you have any questions, please contact Ms. Mieke Eoyang, Subcommittee Staff Director, at (202) 225-7690.

Sincerely, *and gratefully,*



Anna G. Eshoo  
Chairman

Subcommittee on Intelligence Community Management