



May 30, 2014

Major James W. Weirick, USMC
108 Gibbon Street
Alexandria, VA 22314

Major Weirick,

I am writing to respond to your letter of November 14, 2013 in which you initiated a complaint concerning the use of the classification system. I accepted and reviewed your complaint under the authority conferred upon me by Executive Order 13526 (the Order). Section 5.5 of the Order gives me the authority to make a report to the head of an agency, or to the designated senior agency official for classified national security information, if any members of the agency knowingly, willfully, or negligently classify or continue the classification of information in violation of the Order. I have completed my review of this matter and my conclusion is that there is no reason to make such a report.

I realize that you have strong convictions with regard to this matter and you have devoted significant time and energy in the pursuit of this matter. I also realize that having people such as yourself who are interested in the proper application of classification is critical to the successful operation of the security classification system. In due consideration of your efforts, and this entire matter, I believe that a detailed explanation of why I reached this conclusion is appropriate.

In your complaint, you asked me to ascertain if members of the United States Marine Corps (USMC) have willfully classified and/or continued the classification of information in violation of the Order and its implementing directive and are thus subject to appropriate sanctions in accordance with section 5.5(b)(2) of the Order. In the course of this review, I have met with all USMC officials directly involved in the decision to classify certain materials associated with your complaint. As you know, I also met with you on January 22, 2014 and we discussed this matter at length.

In your complaint you specifically mentioned the video showing Marines in Afghanistan urinating on human remains. My review determined that although there were other materials that were classified in connection with the investigation into the conduct of this particular Marine unit, the actual video depicting the act of urination on corpses was specifically listed as excluded from the classification decision that occurred on February 29, 2012. Even though your complaint is focused on this video, I will nevertheless address all the other points you raised since that video was not the only evidence used to evaluate the conduct of the Marine unit.

You believe the videos should not have been classified in the first instance because they were never owned by, produced by or for, or under the control of the Government as the videos were recorded with personally owned video equipment. Section 1.1(a)(2) of the Order does not require that all three of those conditions must exist; the presence of one of these conditions permits a classification action as long as all the other requirements for classification are met. In this case, once Government officials confiscated the materials for the purpose of investigating the conduct of the unit, they were, at that point, under the control of the Government and subject to the Government's protection measures. Even though they may not have been produced by or for the Government, the Government had a right to these materials since Marines produced the materials during the course of operations and they depict equipment, tactics, techniques, and procedures of vital interest to national security. In fact, prior to the actions of the unit involved, U.S. Central Command General Order Number 1B (GO-1B) and MARADMIN 065/08 prohibited the use of these devices to capture such images precisely for these reasons.

In your complaint, you assert that the intent of the classification action was to conceal violations of law, prevent embarrassment, and delay the release of information. The classification action did not prevent anyone in the Department of the Navy who was in a position to enforce good order and discipline from becoming aware that members of the unit possibly violated the law. It did not prevent the commencement of investigations and other legal proceedings against the members of the unit, nor awareness that such actions had been initiated. The fact that investigations and disciplinary actions did occur is evidence of this. I spoke at length with the original classification authority (OCA) who made the classification decision. I am convinced that the primary motivation for the classification decision was the safety of U.S. military personnel in Afghanistan and the protection of specific tactics, techniques, procedures, and equipment. The OCA indicated that, at the time of classification, the nature of this decision was urgent and that he would refer the classification decision to other original classification authorities for further review as soon as time permitted. This referral, in fact, did occur only four weeks after the initial classification decision. I interpret this deliberation as a display of due diligence with respect to the classification system and not a willful or negligent attempt to continue classification in violation of the Order.

The materials you provided show that some officials in the USMC advised against classification in this case. Some of them also pointed out that existing classification guides did not cover this particular situation. There was also the suggestion that the classification might be improper because there was no reasonable possibility that the information could be protected from unauthorized disclosure. Even if an OCA receives advice concerning a classification decision, the final decision rests with the OCA and he/she is under no obligation to follow that advice as long as the original classification action meets the requirements of the Order. An OCA has the authority to make original classification decisions and these decisions do not need to appear in classification guides prior to making the decision. The Order only requires that agencies incorporate these decisions into classification guides on a timely basis. The ability to protect the information is a legitimate concern, but this is not a prerequisite to classification in the Order. On the matter of protection, I wish to reiterate that none of the material the OCA classified appeared, at the time of the decision, to have been outside Government control, while the one video excluded from classification is the one which had been posted to the Internet.

You stated that since the interim investigation was initially designated as “For Official Use Only,” it should have remained so as the investigators are in the best position to determine the necessity to classify the information. The foundation of the classification process rests with those individuals with original classification authority due to their very particular subject matter expertise. In the case of these materials, I believe that the criminal investigators would not have known more about that particular threat environment, infantry tactics, techniques and procedures, and the associated field equipment than a general officer with decades of command and operational experience and knowledge of the dangers of that operating environment.

You made the point that only the words “national security” were used as justification for the classification action. At the time of classification, the Order requires an OCA only to make a judgment that unauthorized disclosure of the information could reasonably be expected to cause either damage, serious damage, or exceptionally grave damage to national security. Along with that is an expectation to cite one of the eight reasons listed in section 1.4(a). Although a reason for classification did not appear on the February 29, 2012 action memorandum, the April 5, 2012 letter to U.S. Central Command articulated a reason for classification, and the OCA articulated that reason to me in great detail when I met with him. I will also note that the February 29, 2012 action memorandum itself is not a classified document; therefore no classification markings were necessary.

Your complaint also asserts that the intent of the classification decision was to hinder the legal defense of the members of the unit. The Federal Government very frequently introduces classified information as evidence in legal proceedings. The Classified Information Procedures Act (CIPA) has put a very thorough system in place for accomplishing this. Any reading of CIPA will clearly show that none of the rules for protecting classified information are relaxed in a court environment. We can anticipate and expect, therefore, that proceedings will be more complicated and take longer under this umbrella of protection. Regrettable though that might be, there is nothing unusual or inappropriate about it.

I want you to know that I reviewed your complaint thoroughly and in good faith. I consider the reporting of perceived wrongdoing or poor performance by those trusted with implementing the Order as being critical to the underpinning of the classification system. Without new information that contradicts my above findings, I will consider this issue now closed.

Sincerely,


JOHN P. FITZPATRICK
Director

CC:

The Honorable Walter B. Jones
United States House of Representatives

The Honorable Michael G. Vickers
Under Secretary of Defense for Intelligence

Mr. Thomas W. Hicks
Deputy Under Secretary of the Navy/Deputy Chief Management Officer

Ms. Jodi Greene
Acting Deputy Under Secretary of the Navy
Plans, Policy, Oversight and Integration (DUSN PPOI)/Security Directorate
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Mr. Mark Gorenflo
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General James F. Amos, USMC
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Mr. Carl Shelton
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