

AMERICAN BAR ASSOCIATION**ADOPTED BY THE HOUSE OF DELEGATES****February 13, 2006****RECOMMENDATION**

RESOLVED, That the American Bar Association urges the Attorney General of the United States to issue a memorandum to Freedom of Information Act (FOIA) officials at federal agencies clarifying that the designation of agency records as "sensitive but unclassified" cannot be a basis for withholding agency documents from release. The memorandum should also establish a standard policy for 1.) designating information as "sensitive but unclassified;" 2.) the internal handling of such information; 3.) taking into account the sensitive nature of such information; and 4.) ensuring the release of such information unless exempt under FOIA.

Report

I. Introduction

This Recommendation proposes a consistent federal policy on the designation and treatment of federal agency records as “sensitive but unclassified” (SBU) information. This report briefly summarizes the current state of confusion that is likely to have detrimental effects on the openness and transparency of federal decision making.

The Recommendation urges the U.S. Attorney General to give guidance to federal agencies clarifying that designating a document as SBU does not constitute an independent legal basis for exempting information from public disclosure under the Freedom of Information Act (“FOIA”). Federal agencies have been increasingly using this term within the last four years, due to concerns over terrorists gaining access to federal agency records. There have been no clear standards for when and by whom the term may be applied. The SBU designation has been used to signal that certain records, while not being classified as national security information, need to be handled more cautiously or safeguarded, pending a decision on any future FOIA request for disclosure. But SBU status alone does not signify that the records can be lawfully withheld from requests made under FOIA.¹ This Recommendation builds on existing ABA policy supporting open government. It proposes to lessen the confusion between government safeguarding of sensitive files, some of which may be accessible under the Freedom of Information Act (FOIA), and agency withholding of information that is exempt from FOIA.

II. Need to Reduce Inconsistencies Among Agencies

Since 9/11, the federal government’s FOIA policy has supported lessened disclosure of records that contain sensitive information. In October 2001, the Attorney General issued a memorandum promising DOJ protection to agencies’ assertions of FOIA exemptions “unless they lack a sound legal basis,” reversing DOJ’s previous pro-disclosure position.² That memorandum was followed in March 2002 by a memorandum from White House Chief of Staff Andrew Card using the phrase “sensitive but unclassified information.”³ The Card memorandum urged agencies to withhold from disclosure information that is “sensitive” and related to homeland security, but would not meet the criteria for classification and thus not be exempt from disclosure under FOIA Exemption 1.⁴ The only further guidance provided in the memorandum describes sensitive

¹ Only documents that fall under one of the FOIA exemptions, 5 U.S.C. § 552(b)(1)-(9), can be withheld from disclosure. Besides SBU, other designations that similarly do not necessarily correlate with any FOIA exemption include “For Official Use Only” (FOUO), “Official Use Only” (OUO), “Sensitive Homeland Security Information” (SHSI), “Limited Official Use” (LOU), and “restricted data.” James W. Conrad, Jr., *Protecting Private Security-Related Information from Disclosure by Government Agencies*, 57 ADMIN. L. REV. 715, 734-735 (2005).

² John Ashcroft, U.S. Attorney General, Memorandum for Heads of All Federal Department and Agencies, Subject: The Freedom of Information Act (Oct. 12, 2001) (reversing prior presumption supporting release of federal agency records).

³ Andrew H. Card, Jr, Assistant to the President and Chief of Staff, Memorandum for the Heads of Executive Departments and Agencies; Subject: Action to Safeguard Information Regarding Weapons of Mass Destruction and Other Sensitive Documents Related to Homeland Security (Mar. 19, 2002).

⁴ Exemption 1 applies to records that are “specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and... in fact properly classified pursuant to such Executive Order.” 5 U.S.C. § 552 (b)(1).

information as that which “could be misused to harm the security of our nation or threaten public safety.” The Card memorandum also forwarded a memorandum from Laura Kimberly, Acting Director of the Information Security Oversight Office, calling for agencies to give “full and careful consideration to all applicable FOIA exemptions” in safeguarding “sensitive but unclassified” information.⁵ The Card and Kimberly memoranda, which encouraged agency heads to safeguard SBU information, provided little guidance to agencies regarding the appropriate scope of the term.

The agencies have adopted vastly different definitions of the term SBU.⁶ The Department of Energy, for example, defines the SBU term very broadly to include “information, for which disclosure, loss, misuse, alteration or destruction could adversely affect national security or government interests,” including economic, human, financial, industrial, agricultural, economic, law enforcement, confidential, and commercial proprietary information.⁷ The Department of Homeland Security (“DHS”) adopted a definition just as broad in its May 2004 directive.⁸ The Defense Department defines SBU to include “information, the loss, misuse, or unauthorized access to or modification of which could adversely affect the national interest or the conduct of federal programs, or the privacy to which individuals are entitled under 5 U.S.C. 552a (the Privacy Act).” The Centers for Disease Control and Prevention (CDC) has issued guidance that encompasses 13 types of SBU. The CDC guidance appears to be limited to information that “may be” exempt under FOIA.⁹

Thus, agencies allow the marking of many types of records as SBU. This patchwork of definitions for safeguarding such records contributes to confusion regarding whether information should be withheld under FOIA. Such confusion is exacerbated by the fact that the term SBU is not derived from an existing FOIA exemption. Instead, it is meant to identify information that must be safeguarded while in the government’s control, but it does not indicate that information is automatically exempt from FOIA.¹⁰ Nevertheless, many agencies have used the term “SBU information” to imply that agency officials should not disclose such information.¹¹ Such

⁵ Laura S. Kimberly, Acting Director of the Information Security Oversight Office, Memorandum for Departments and Agencies (Mar. 19, 2002).

⁶ OpentheGovernment.org identified 50 different types of “sensitive but unclassified” categories used by the federal agencies. “Secrecy Report Card 2005: Quantitative Indicators of Secrecy in the Federal Government,” at 9-10, A Report by OpenTheGovernment.Org .

⁷ See 10 C.F.R. 1704.4-1704.5. See also Genevieve Knezo, “Sensitive But Unclassified” and other Federal Security Controls on Scientific Information: History and Current Controversy 20-21 (2003) (quoting Department of Energy Definition).

⁸ Department of Homeland Security, Safeguarding Sensitive But Unclassified Information, § 4 (May 11, 2004) (defines “sensitive but unclassified” information as that which is “not otherwise categorized by statute or regulation, the unauthorized disclosure of which could adversely impact a person’s privacy or welfare, the conduct of Federal programs, or other programs or operations essential to the national interest”).

⁹ Centers for Disease Control and Prevention, Sensitive But Unclassified, Manual Code-Information Security-CDC-02 (July 22, 2005).

¹⁰ Department of Justice, FREEDOM OF INFORMATION ACT GUIDE AND PRIVACY ACT OVERVIEW 191 (2004) (“Terms such as ‘SHSI’ and ‘SBU’ describe broad types of potentially sensitive information that might not even fall within any of the FOIA exemptions.”)

¹¹ See, e.g., Centers for Disease Control and Prevention, *supra* note 9..

treatment is likely to lead to excessive withholding of information that should be disclosed under FOIA.

Criticism of the overly generous use of the SBU category has intensified. A federal commission studying government classification of information in 1997, well before the September 11, 2001 terrorist attacks, found that confusion and lack of oversight surrounding SBU information led to excessive secrecy with respect to that information.¹² Little has changed to suggest that this problem has improved. In fact, under the rubric of SBU, the present administration has taken steps to remove thousands of declassified documents pertaining to biological and chemical studies from public access.¹³ In another example, a study by the Rand Corporation found that the U.S. government has closed 36 sites and over 600 public databases containing much information that was not critical for terrorists and could have been obtained from other non-governmental sources.¹⁴ Also, DHS has even proposed an ambiguous directive that can be read to provide that “SBU” categorization can serve as a basis for not releasing Environmental Impact Statements to the public as required by the National Environmental Policy Act.¹⁵

In response to the proliferation of the use of SBU designations, Rep. Henry Waxman included a provision in his “Restore Open Government Act of 2005” that would call for a report on the extent to which agencies are utilizing such “pseudo-classifications” to withhold from public disclosure information that is not authorized to be withheld.¹⁶ In an analogous situation, Congress recently directed DHS to tighten and clarify its procedures for designating its information as “sensitive security information” (SSI), a statutory FOIA exemption that has similarly been employed broadly and without specific guidance.¹⁷ The congressional conferees included a provision in the 2006 Homeland Security Appropriations Act requiring the DHS Secretary to “ensure that each appropriate office has an official with clear authority to designate documents as SSI and to provide clear guidance as to what is SSI material and what is not.”¹⁸ DHS is also required to provide Congress with an annual report of the titles of all of the documents that have been designated as SSI.

Our Recommendation seeks the issuance of public guidance from the U.S. Attorney General, clarifying that the SBU classification does not constitute grounds for withholding information that would otherwise be disclosed under FOIA. The decision to make a FOIA disclosure of a record containing SBU could be left only with a higher level official, but the criteria for disclosure are the FOIA exemptions. Such a policy directive would help to reduce instances of excessive withholding caused by the confusion and lack of oversight concerning this

¹² Report of the Commission on Protecting and Reducing Government Secrecy, S. Doc. No. 105-2, at 29 (1997).

¹³ American Association for the Advancement of Science, Science & National Security in the Post-9/11 Environment, “Sensitive But Unclassified” Information, <http://www.aaas.org/spp/post911/sbu>.

¹⁴ Baker, John, et al., “Mapping the Risks: Assessing the Homeland Security Implications of Publicly Available Geospatial Information” (Rand Corporation, 2004).

¹⁵ 69 Fed. Reg. 33043, 33063 (June 14, 2004).

¹⁶ H.R. 2331, Sec. 5(2)(G) (introduced May 12, 2005).

¹⁷ H.R. 2360, 109th Cong. § 537 (Sept. 29, 2005).

¹⁸ H.R. Conf. Rep. No. 109-241 (Sept. 29, 2005).

designation. However, the SBU marking could remain useful in preventing the casual or routine dissemination on websites or to the public of information that is legitimately considered to be sensitive information. In order to promote the cautious handling of sensitive information, the U.S. Attorney General should issue guidance on properly labeling information as “sensitive but unclassified.” Such guidance would also provide needed direction regarding the use of SBU designations by agencies beyond DHS.

III. Proposed Language

Agencies’ inconsistent policies on designating information as “sensitive but unclassified” and withholding such information has led to confusion among the public. It has also allowed some agencies to establish policies that could lead to the withholding of information that does not fall under any of the FOIA exemptions. The Recommendation calls for a memorandum from the Attorney General that would clearly state to agencies that the “sensitive but unclassified” designation of information does not protect such information from disclosure under a FOIA request, unless that information falls under any of the exemptions already allowed under FOIA.¹⁹ An agency may still choose to mark a record as SBU, and it may opt not to post such records on its website, even after the records have been released in response to the FOIA request. Though a wide dissemination of that record is possible once it is released to a private requester, the agency has no affirmative duty to post the sensitive data on the agency’s website.

The U.S. Attorney General’s memorandum should also set guidelines for designating information as “sensitive but unclassified.” Such information should not be freely disseminated on the web or handed to casual requesters who have not used FOIA requests. Such a designation does have value in providing an extra layer of protection against disclosure for potentially sensitive information. Therefore, the agency responding to a FOIA request should carefully consider whether a document marked as SBU falls under any of the FOIA exemptions and should be withheld. In some cases it may be appropriate to designate a higher level agency official to respond to a request seeking a disclosure of SBU records.

The adoption of this Recommendation does not preclude ABA support of future decisions of the Congress to incorporate other categories of information into new exemptions under the Freedom of Information Act.

Respectfully submitted,

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Chair,
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February 2006

¹⁹ FOIA’s exemptions are set out in 5 U.S.C. § 552(b).

GENERAL INFORMATION FORM

To Be Appended to Reports with Recommendations
(Please refer to instructions for completing this form.)

Submitting Entity: Section of Administrative Law and Regulatory Practice

Submitted By: Eleanor D. Kinney, Section Chair

1. Summary of Recommendation(s).

This Recommendation proposes a consistent federal policy on the designation and treatment of federal agency records as “sensitive but unclassified” (SBU) information. The Recommendation urges the U.S. Attorney General to give guidance to federal agencies clarifying that designating a document as SBU does not constitute an independent legal basis for exempting information from public disclosure under the Freedom of Information Act (“FOIA”). Federal agencies have been increasingly using this term within the last four years, due to concerns over terrorists gaining access to federal agency records. There have been no clear standards for when and by whom the term may be applied.

2. Approval by Submitting Entity.

The Recommendation and Report was approved by the Section Council at their Fall meeting on November 19, 2005.

3. Has this or a similar recommendation been submitted to the House or Board previously?
No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

This recommendation simply builds on ABA policy supporting open government under FOIA.

5. What urgency exists which requires action at this meeting of the House?

There is no specific deadline requiring action at this upcoming meeting. However, it would be beneficial to both agency FOIA officials and the general public to receive the clarification on FOIA procedures called for by the recommendation sooner rather than later.

6. Status of Legislation. (If applicable.)

7. Cost to the Association. (Both direct and indirect costs.)

There are no costs to the Association.

8. Disclosure of Interest. (If applicable.)

Steve Vieux, the chair of the committee advancing this recommendation is a federal employee.

9. Referrals.

None.

10. Contact Person.

Tom Susman, Section Delegate, 202-508-4620, email: tsusman@ropesgray.com

11. Contact Person.

Tom Susman, Section Delegate (as above)