No. 98-1904

In the Supreme Court of the United States

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF JUSTICE; AND UNITED STATES DEPARTMENT OF STATE, PETITIONERS

v.

LESLIE R. WEATHERHEAD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

PATRICIA A. MILLETT
Assistant to the Solicitor General

LEONARD SCHAITMAN
JOHN P. SCHNITKER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

DAVID R. ANDREWS
Legal Adviser
Department of State
Washington, D.C. 20520

TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-36260
D.C. No. CV-95-00519-FVS

LES WEATHERHEAD, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA; DEPARTMENT OF JUSTICE; UNITED STATES DEPARTMENT OF STATE, DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the Eastern District of Washington
Fred L. Van Sickle, District Judge, Presiding

Argued and Submitted
April 8, 1998—Seattle, Washington
Filed October 6, 1998

OPINION

Before: PROCTER HUG, JR., Chief Judge, STEPHEN REINHARDT and BARRY G. SILVERMAN, Circuit Judges.

Opinion by Chief Judge HUG; Dissent by Judge SILVERMAN

HUG, Chief Judge:

Appellant Leslie R. Weatherhead ("Weatherhead") appeals under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. The request sought a letter from the British Foreign Office to the United States Department of Justice ("Justice") related to the extradition of Sally Croft and Susan Hagan. The United States Department of State ("State Department") withheld the letter under FOIA Exemption 1, which protects classified information from disclosure. 5 U.S.C. § 552(b)(1). The district court initially ordered the letter's disclosure. The government sought reconsideration of that decision, which the district court granted after conducting *in camera* review and concluding that the letter contained "highly sensitive and injurious material." We have jurisdiction under 28 U.S.C. § 1291, and we reverse.

BACKGROUND

On November 29, 1994, Weatherhead sent identical requests under FOIA to Justice and the State Department seeking a letter dated July 28, 1994 from the British Foreign Office to George Proctor, Director of the Office of International Affairs, Criminal Division, Justice. The letter was related to the extradition of two women, Sally Croft and Susan Hagan, from the United Kingdom to the United States to stand trial for conspiracy to murder the United States Attorney for Oregon. Croft and Hagan were members of the controversial Rajneeshpuram commune in Central Oregon in the 1980's. Believing that the letter contained an official British request that Justice take measures to

avoid prejudice to Croft and Hagan in the district where the *Croft* case was pending, Weatherhead, the lawyer who represented Croft, intended to provide the letter to the district judge presiding over the *Croft* case.

On May 4, 1995, the State Department wrote to say that it had been unable to locate the letter. Two weeks later, Justice reported that it had found the letter, but since it had been created by a foreign government, the letter was forwarded to the State Department's FOIA office for review and response. Weatherhead administratively appealed Justice's failure to produce the letter to Justice's Office of Information and Privacy, which remanded the matter so that the Criminal Division, in consultation with the State Department, could determine if the letter should be released. On August 4, 1995, the State Department sent a letter to the British government which stated that it had received a request for the letter, but "[b]efore complying with this request, [it] would appreciate the concurrence of [the British] government in the release of the document" and to know if it wanted any portions of the letter withheld.

On October 18, 1995, the British government responded that it was "unable to agree" to the letter's release because "the normal line in cases like this is that all correspondence between Governments is confidential unless papers have been formally requisitioned by the defence." It continued, "In this particular case, requests from representatives of the defendants for sight of the letter have already been refused on grounds of confidentiality." The State Department classified the letter on October 27, 1995. On December 11, 1995, the State Department advised Weatherhead that it had concluded that the letter contained confidential infor-

mation that was properly classified in the interest of foreign relations and therefore would be withheld under FOIA Exemption 1.

PROCEDURAL HISTORY

Weatherhead initiated a suit to compel production of the letter on November 17, 1995 and moved for summary judgment on February 16, 1996. The district court granted Weatherhead's motion for summary judgment, holding that the government failed to demonstrate that the letter was properly classified under Executive Order 12958. The government moved to set aside the judgment under Fed. R. Civ. P. 59(e). Even though it rejected most of the government's arguments for withholding the letter, the district court granted the government's motion for reconsideration.

The court chose to review the letter *in camera* out of concern that "highly sensitive and injurious material might be released only because defendants were unable to articulate a factual basis for their concerns without giving away the information itself." The court went on:

> That proved to be the case. When the Court read the letter, it knew without hesitation or reservation that the letter could not be released. The Court is unable to say why for the same reason defendants were unable to say why. The letter is two pages long, tightly written, and there is no portion of it which could be disclosed without simultaneously disclosing injurious materials.

Thus, the district court concluded that the letter should be withheld and that Weatherhead would have to be satisfied with "the solace of knowing that not only do two high ranking [Department of State] officers believe

disclosure of the subject material injurious to the national interest, but so does an independent federal judge."

On October 16, 1996, Weatherhead filed a motion to set aside the September 9, 1996 decision under Fed. R. Civ. P. 60(b)(6). With this motion, he submitted an affidavit in which he claimed an acquaintance had spoken to a person "employed by the English government" who had disclosed the letter's contents to the acquaintance over the phone. Weatherhead included the information he learned from the acquaintance about the letter's contents in his affidavit. Plaintiff then claimed that the contents of the letter were in the public domain and must be disclosed. The district court denied Weatherhead's 60(b) motion and he did not file an appeal from that ruling to this court. Instead, he directly appeals the district court's grant of the government's motion for reconsideration.

STANDARD OF REVIEW

We apply a two-step standard of review in an appeal from the grant of summary judgment in a FOIA case. *See Schiffer v. FBI*, 78 F.3d 1405, 1409 (9th Cir. 1996). We first determine whether the district court had an adequate factual basis for its decision. *See id.* Where the parties do not dispute that the court had an adequate factual basis for its decision, as is the case here since the district court had the actual letter, we review the district court's factual findings underlying its decision for clear error. *See id.* We review *de novo* the district court's determination that a requested document is exempt from disclosure under FOIA. *See id.*

DISCUSSION

"The Freedom of Information Act, 5 U.S.C. § 552, mandates a policy of broad disclosure of government documents." *Maricopa Audubon Soc. v. United States Forest Serv.*, 108 F.3d 1082, 1085 (9th Cir. 1997) (quoting *Church of Scientology v. Department of the Army*, 611 F.2d 738, 741 (9th Cir. 1980)). When a request is made, an agency may withhold a document, or portions thereof, only if the information at issue falls within one of the nine statutory exemptions contained in § 552(b). *Maricopa Audubon Soc.*, 108 F.3d at 1085; *Kamman v. IRS*, 56 F.3d 46, 48 (9th Cir. 1995). These exemptions are to be narrowly construed. *Id.* The burden is on the government to prove that a particular document is exempt from disclosure. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989); *Maricopa Audubon Soc.*, 108 F.3d at 1085; *Kamman*, 56 F.3d at 48.

The government relies on Exemption 1, 5 U.S.C. § 552(b)(1), which exempts from FOIA disclosure "matters that are . . . (1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order."

Executive Order No. 12958 ("EO 12958"), 60 Fed. Reg. 19825 (April 20, 1995), is at issue in this case. EO 12958 requires four conditions for classification: (1) the information must be classified by an "original classification authority"; (2) the information must be "under the control of" the government; (3) the information must fall within one of the authorized withholding categories under this order; and (4) the original classification

authority must "determine[ ] that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security" and must be "able to identify or describe the damage." § 1.2(a).

The first three conditions for classification are not at issue here. Weatherhead never contested that the State Department is an "original classification authority" or that the requested letter is "under the control" of the government. Weatherhead initially contested the third condition, whether the letter fell within an authorized withholding category, but on appeal has not challenged the district court's conclusion that the letter is information concerning "foreign relations or foreign activities of the United States," § 1.5(d).[1]

Weatherhead does argue that the government has not shown that the withheld letter satisfies the fourth condition required for classification. Pursuant to EO 12958, § 1.2(a)(4), the original classification authority must "determine[ ] that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security" and must be "able to identify or describe the damage."[2] "[D]amage to the

---

[1] The district court assumed that the letter involved foreign relations and fell within classification category § 1.5(d) because "the fundamental function of the [State Department] is to oversee foreign relations." Because Weatherhead did not contest this finding in his appellate briefs, he has waived this point on appeal. *See Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n*, 997 F.2d 581, 584 n.4 (9th Cir. 1993); *Taag Linhas Aereas de Angola v. Transamerica Airlines*, Inc., 915 F.2d 1351, 1353 n.1 (9th Cir. 1990).

[2] Under the prior Executive Order, such a showing was not required since the "[u]nauthorized disclosure of foreign government information is presumed to cause damage to national security."

national security" is "harm to the national defense or foreign relations of the United States from the unauthorized disclosure of information, to include the sensitivity, value, and utility of that information." EO 12958 § 1.1(1).

The government bears the burden of showing that the withheld letter meets the exemption requirements of EO 12958 § 1.2(a)(4). 5 U.S.C. § 552(a)(4)(B); *John Doe Agency*, 493 U.S. at 152. The government must give a "particularized explanation of how disclosure of the particular document would damage the interest protected by the claimed exemption." *Wiener v. FBI*, 943 F.2d 972, 977 (9th Cir. 1991). To meet its burden, the government must offer oral testimony or affidavits that are "detailed enough for the district court to make a *de novo* assessment of the government's claim of exemption." *Maricopa Audubon Soc. v. United States Forest Serv.*, 108 F.3d 1089, 1092 (9th Cir. 1997) (quoting *Doyle v. FBI*, 722 F.2d 554, 555-56 (9th Cir. 1983)). The purposes of requiring this showing are to "restore the adversary process to some extent, and to permit more effective judicial review of the agency's decision." *Id.* at 977-78. The first purpose is still subject to serious obstacles. A plaintiff seeking production of a document under FOIA is handicapped in this endeavor by the fact that only the agency truly knows

---

EO 12356 § 1.3(c). The district court pointed out that if the government had not delayed for so long in processing this FOIA request, the request would have been analyzed under the prior Order. The governing executive order is the one in effect when the classification decision is made. *See Lesar v. United States Dept. of Justice*, 636 F.2d 472, 479-80 (D.C. Cir. 1980). In this case, the letter was classified on October 27, 1995. Therefore, EO 12958 applies.

the content of the withheld material. "Effective advocacy is possible only if the requester knows the precise basis for the nondisclosure." *Id.* at 979. The second purpose is, however, easier to accomplish—through *in camera* review. *In camera* review by the district court is appropriate in certain cases, where the government's public description of a document may reveal the very information that the government claims is exempt from disclosure. *Doyle*, 722 F.2d at 556. *Ex parte in camera* review is, of course, a last resort, given that it furthers judicial review but abrogates the adversary process to a significant extent.[3] *See National Wildlife Fed'n v. United States Forest Serv.*, 861 F.2d 1114, 1116 (9th Cir. 1988) (*in camera* review, as a last resort, can also provide an adequate basis for decision). Still, in certain FOIA cases that form of inquiry may be essential if the courts are to fulfill their proper role. *See Pollard v. F.B.I.*, 705 F.2d 1151, 1153-54 (9th Cir. 1983) ("[*I*]*n camera*, ex parte review remains appropriate in certain FOIA cases, provided the preferred alternative to *in camera* review—government testimony and detailed affidavits—has first failed to provide a sufficient basis for decision.").

Weatherhead argues that the government never met its burden of identifying or describing any damage to national security that will result from release of the letter. We agree. In support of its decision to classify the withheld letter, the government submitted three decla-

---

[3] *In camera* review may or may not be *ex parte*. *In camera* proceedings in FOIA cases involving classified documents are usually *ex parte* with even the counsel for the party seeking the documents denied the opportunity to be present. Hence courts' hesitancy to conduct *in camera* review in such cases. *See Pollard v. FBI*, 705 F.2d 1151, 1153 (9th Cir. 1983).

rations: that of Marshall R. Williams, which we will not discuss here, as it simply outlined the classification process; that of Peter M. Sheils, Acting Director of the State Department's Office of Freedom of Information, Privacy, and Classification Review; and that of Patrick Kennedy, Assistant Secretary for the Administration of the State Department. Mr. Sheils and Mr. Kennedy focus on two potential causes of damage to the national security: damage caused by the act of disclosing a letter between foreign governments, regardless of its particular contents, and damage caused because the letter concerns international extradition proceedings.

In his declaration, Mr. Sheils states, in pertinent part:

> Disclosure of foreign government information in violation of an understood or, as in this case, clearly stated expectation of confidentiality would cause foreign officials, not only of the government providing the information, but of other governments as well, to conclude that U.S. officials are unable and/or unwilling to preserve the confidentiality expected in exchanges between governments; thus foreign governments and their representatives would be less willing in the future to furnish information important to the conduct of U.S. foreign relations and other governmental functions, and in general less disposed to cooperate in foreign relations matters of common interest. Disclosure of the document at issue in the circumstances of this case would clearly result in damage to relations between the United States and the United Kingdom and, therefore, to the national security in a clearly identifiable way.

. . . .

> The one document withheld in this case clearly concerns the foreign relations or activities of the United States inasmuch as it is a communication from a British Home Office official to an official of the U.S. Department of Justice concerning the extradition from the U.K. to the U.S. of two individuals, apparently British nationals, to stand trial in the United States in a highly publicized case. Disclosure of the document by the Government of the United States, particularly in light of the refusal of the British Government to agree to its release, would inevitably result in damage to relations between the U.K. and the U.S.
>
> The withheld document is a two-page letter dated July 28, 1994 from an official of the British Home Office to an official of the U.S. Department of Justice. Originally unclassified. Classified on October 27, 1995. Withheld in full. Exemption (b)(1).
>
> The letter comments on certain aspects of the extradition of two women, apparently British citizens, to face charges in the United States. The letter conveys certain concerns of the U.K. Government regarding the case which apparently was the subject of considerable attention in the British Parliament and otherwise in the U.K. with particular reference to the U.S.-U.K. extradition agreement.

The district court concluded that Mr. Sheils' statements were of a general and conclusory nature and that his declaration failed to provide a particularized explanation of how disclosure of the letter would damage the relations between the United States and the United

Kingdom and therefore harm national security. We agree with the district court. Mr. Sheils merely confirms that the letter concerns extradition matters; he does not address how or why the letter's disclosure of extradition matters in particular will damage United States-United Kingdom relations. Mr. Sheils instead focuses on how disclosing a letter containing foreign government information will damage foreign relations, and, thus, national security, regardless of the letter's specific contents. We conclude that Mr. Sheils' explanation lacks the particularity "to afford the requester an opportunity to intelligently advocate release of the withheld documents and to afford the court an opportunity to intelligently judge the contest." *Wiener*, 943 F.2d at 977.

Although Mr. Kennedy's declaration is slightly more informative than Mr. Sheils' declaration, he still fails to explain how disclosure of the material in the withheld letter will harm national security:

> [i]t is a longstanding custom and accepted practice in international relations to treat as confidential and not subject to public disclosure information and documents exchanged between governments and their officials. . . . Diplomatic confidentiality obtains . . . even with respect to information that may appear to be innocuous.
>
> . . . .
>
> Disclosure by the U.S. of information furnished by another government in violation of the confidentiality normally accorded such information may also make other governments hesitant to cooperate in matters of interest to the U.S. This includes U.S. law enforcement interests such as those involved in

> the extradition case that is the subject of the document at issue in this litigation. Cooperation between the U.S. and the U.K. in international extradition of fugitives is a matter of substantial national interest to both governments. It can also be a matter of political sensitivity in the extraditing country, as has been the case with regard to fugitives extradited by the U.S. to the U.K. charged with crimes in Northern Ireland and extradition of the two women by the U.K. to the U.S. in the case discussed in the British document at issue here. Because of the sensitivity I cannot be more specific on the contents of the document and urge the court to conduct an *in camera* review.

Mr. Kennedy also points out that the British embassy stated that "U.K. authorities had already refused, 'on grounds of confidentiality,' to disclose the contents of the document." He concludes that:

> In view of the expectation of the confidentiality of foreign government information and the explicit confirmation of that expectation by the British Embassy letter . . . , I have no doubt disclosure of the document by the U.S. government would harm the U.S. foreign relations and thereby damage national security.

Like Sheils, Kennedy focuses on how disclosure by the U.S. of foreign government information causes harm to U.S. foreign relations, and, thus, to national security even if the content "appear[s] to be innocuous." According to Kennedy, this harm occurs because all information exchanged between the U.S. and foreign governments is confidential. Mr. Kennedy also implies that disclosure would reduce international cooperation because of the sensitivity of the *category* of information

within which this letter belongs, namely "international extradition of fugitives."

In this appeal, the government presses the argument that Sheils and Kennedy primarily rely on in their declarations, that even if the letter's contents are not injurious, damage resulting solely from disclosing foreign government information meets the standards of the Executive Order. However, it is clear that *all* information exchanged between foreign governments is not exempt from FOIA disclosure, not even all information that another government prefers to keep confidential—otherwise the inquiry would end after the first three conditions for classification are satisfied. Congress could have exempted all information exchanged between the U.S. and foreign governments from FOIA requests, but chose instead to defer to the Executive Branch. Likewise, the Executive Branch could have shielded all documents involving foreign governments from FOIA disclosure in EO 12958. Instead, when it enacted EO 12958 in 1995, it chose to make it easier for the public to view materials from foreign governments by eliminating the presumption of harm found in the prior Executive Order, EO 12356 § 1.3(c), and requiring the U.S. government to identify the particular damage that would result from releasing the information.

The government next argues that if all foreign government information is not shielded from FOIA disclosure, then all foreign government information relating to international extradition is protected by the exemption, because its sensitive nature makes its release inherently damaging to the national security. While we do not preclude the possibility that the government might be able in some circumstance to

establish an inherently damaging category of information, we need not decide that question now, because the government did not meet its burden of establishing the justification for such a category in this case. Rather, it merely bandied about generalized fears of 'political sensitivity' relating to international extradition. In short, it failed to show that all documents falling within the category of international extraditions could reasonably be expected to result in damage to the national security if released. *Compare Armstrong v. Executive Office of the President*, 97 F.3d 575, 582 (D.C. Cir. 1996) (invalidating categorical rule forbidding disclosure of the names of lower-level FBI agents in all activities and requiring more particularized showing of damage). Furthermore, the government's conduct—seeking agreement from the British Government to release the letter, rather than assuming that the letter must be confidential—raises serious questions regarding the existence of such a category of withholdable information. Similarly, the response of the British Government to the State Department's request for concurrence in the release of the letter shows that all international extradition information is *not* confidential—the British Embassy in Washington wrote the State Department that "[t]he Home Office have advised that the normal line in cases like this is that all correspondence between governments is confidential unless papers have been formally requisitioned by the defence." Weatherhead, Croft's defense lawyer, formally "requisitioned" the letter, in common parlance, by making a formal FOIA request, and thereby doing exactly what the British Government required in order to overcome its restrictions regarding disclosure. Moreover, the British Embassy's response raises further issues. Given that exceptions to the confiden-

tiality of international extradition information do exist, it cannot be argued that the mere fact of disclosure of *any* such information is harmful, but only that (1) a disclosure of any such information under circumstances that do not qualify as an exception would cause injury, or (2) the disclosure of specific information would be injurious in all circumstances. This, in turn, calls into question the appropriate scope and nature of such exceptions and whether categories subject to exceptions can ever qualify for blanket exemptions.

Because the government has failed to establish either that the broad category of all foreign government information or the narrower category of international extradition information is confidential, we must next look to the individual document itself. Neither the government's briefs nor the declarations submitted in support of withholding the letter sufficiently explain the harm to national security that could result from its disclosure.

The government argues that its decision to classify the document should be given deference based on its affidavits and memoranda. Classification decisions are not given deference, however, until the government makes "an initial showing which would justify deference by the district court." *Rosenfeld v. United States Dept. of Justice*, 57 F.3d 803, 807 (9th Cir. 1995). As we have explained above, the government made no such showing in the documents it initially presented to the district court. Accordingly, the district court correctly held that the government failed to prove the withheld letter was exempt from FOIA disclosure prior to conducting its *in camera ex parte* review of the document.

Deference was given, however, to the government's perspective of the document when the district court (and later this court) reviewed the letter *in camera*. We recognize that "[i]n certain FOIA cases . . ., the government's public description of a document and the reasons for exemption may reveal the very information that the government claims is exempt from disclosure." *Doyle*, 722 F.2d at 556. Here, after it found the government failed to provide a sufficient basis for withholding the document in its briefs and declarations, the district court properly exercised its discretion to view the withheld letter *in camera*. After conducting *in camera* review of the letter, the district court stated that:

> it knew without hesitation or reservation that the letter could not be released. The court is unable to say why for the same reason defendants were unable to say why. . . . [T]here is no portion of it which could be disclosed without simultaneously disclosing injurious materials.

We disagree with the district court's conclusions. We have reviewed the letter *in camera*, and carefully considered its contents, including the "sensitivity, value, and utility" of the information contained therein. Having done so, we fail to comprehend how disclosing the letter at this time could cause "harm to the national defense or foreign relations of the United States." The letter is, to use Mr. Kennedy's term, "innocuous." Even after giving the act of classification the deference to which it is entitled, we are compelled to conclude that disclosure of the letter pursuant to Weatherhead's FOIA request could not reasonably "be expected to result in damage to the national security."

For the foregoing reasons, we reverse the district court's September 9, 1996 Order granting the government's motion for reconsideration and we reinstate its March 29, 1996 grant of summary judgment for Weatherhead.

REVERSED AND REMANDED.

SILVERMAN, Circuit Judge, Dissenting:

The uncontradicted evidence before the district court established that the Home Office letter was sent by the British government to the U.S. Justice Department with an expectation of confidentiality and that damage to American national security would result from breaching that expectation. Those facts were proved by the uncontroverted declarations of two State Department officials, Patrick F. Kennedy and Peter M. Sheils, both of which were furnished in connection with the motion for summary judgment. Plaintiff offered no evidence to the contrary.

The Kennedy declaration is the most significant. Kennedy, an assistant Secretary of State, attested that it is longstanding custom and accepted practice in international relations to extend "diplomatic confidentiality" to information exchanged between governments such as the information involved here. Kennedy stated that upon receipt of plaintiff's FOIA request, the American government consulted the British Embassy to seek its views on the possible disclosure of the letter. The British Embassy responded that its government did, indeed, expect the letter to remain confidential. In fact, the Embassy stated that British authorities, on confidentiality grounds, previously refused a separate request for release of the letter made directly to the

British government. Thus, Kennedy's declaration not only was uncontroverted; it was corroborated.

Kennedy's declaration also stated that disclosure of the information in violation of accepted diplomatic confidentiality reasonably could be expected to damage relations between the U.S. and Britain, and between the U.S. and other governments, and he explained how: If the letter is released, Britain and other countries could well conclude that the U.S. cannot be trusted to protect confidential information. He stated that if diplomatic confidentiality is violated, it is likely that other nations will be less inclined to provide sensitive information or to cooperate in the international extradition of fugitives and in other matters of substantial interest to the United States. Kennedy attested that extraditions can be the subject of political sensitivity in the extraditing country. Such, he stated, was the case involving the two British women whose extraditions were the subject of the very document in question. Kennedy stated that he had "no doubt" but that disclosure of the letter would damage our foreign relations and national security.

Plaintiff offered no evidence to rebut any of this. He did not produce an affidavit from a diplomat, political scientist, academic, student of foreign relations, lawyer, journalist—anyone—to refute Kennedy's declaration. Nor am I aware of any other reason to treat Kennedy's sobering assessment with so little regard. The proper inquiry is not whether Kennedy's declaration could have contained more, but only whether it contained enough. In my view, it did.

Having examined the letter *in camera* and having considered its contents "including the 'sensitivity, value, and utility' of the information contained therein,"

the majority says that it "fail[s] to comprehend how disclosing the letter at this time could cause harm to the national defense or foreign relations of the United States." The district judge, on the other hand, "knew without hesitation or reservation that the letter could not be released" when he saw it *in camera*. Either way, we judges are outside of our area of expertise here. It's one thing to examine a document *in camera* for the existence of facts—to see, for example, whether it deals with attorney-client communications or other privileged matter. *See Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1089 (9th Cir. 1997). It's a whole different kettle of fish to do what the majority has presumed to do here, to make its own evaluation of both the sensitivity of a classified document and the damage to national security that might be caused by disclosure. With all due respect, I suggest that in matters of national defense and foreign policy, the court should be very leery of substituting its own geopolitical judgment for that of career diplomats whose assessments have not been refuted in any way.

There is no basis in the record to conclude otherwise than that the letter is "foreign government information" as defined by Section 1.1(d) of the Executive Order, that its release would cause damage to the national security in the manner described by Kennedy, and that therefore it is exempt from disclosure. I would affirm the district court's grant of summary judgment for the government and therefore, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. CS-95-519-FVS

LESLIE R. WEATHERHEAD, PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

[FILED: Sept. 9, 1996]

ORDER

BEFORE THE COURT are defendants' Motion for Reconsideration or in the alternative to File Document In Camera, or in the alternative to Stay Pending Appeal. Plaintiff is represented by Gregory J. Workland; defendants by Sanjay Bhambhani and Assistant United States Attorney James R. Shively. The matter was argued on June 3, 1996. This Order will memorialize the Court's ruling.

Background

By Order entered March 29, 1996, the Court granted plaintiff's motion for summary judgment in this FOIA action. A timely motion for reconsideration followed. The factual background which gave rise to this litigation is set out in the Order under reconsideration and need not be repeated here. By way of supplementation, defendants' motion seeks in the alternative to submit

nonpublic affidavits or the requested material itself for in camera review. During oral argument heard telephonically on June 3, 1996, the Court declined to conduct in camera review. During a subsequent conference held on June 24, 1996, the Court reluctantly granted the second prong of this alternative relief and has now reviewed the requested document.

Analysis

Reconsideration pursuant to FRCP 59(e) is appropriate when a court:

> (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law. There may also be other, highly unusual, circumstances warranting reconsideration.

School Dist. No. 1J, Multnomah County v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993) (citations omitted), *cert. denied*, ____ U.S. ___, 114 S. Ct. 2742 (1994).

(1) Newly discovered evidence: Patrick F. Kennedy, whose declaration is appended to defendants' brief, is the Assistant Secretary for Administration for DOS. Attached to his declaration is the letter of inquiry sent by DOS to the British Embassy and the Embassy's response. This is new evidence so far as plaintiff and the Court are concerned, but not newly discovered evidence from defendants' perspective. The Kennedy Declaration is slightly more informative than is the Sheils Declaration, but still reflects a "trust me" aura. The letter of inquiry cuts against defendants' position. It suggests that DOS intended to comply with the FOIA request and would have but for U.K.'s opposition

("Before complying with this request, we would appreciate the concurrence of your government in the release of the document"). This in turn suggests that as late as August 4, 1995 when the letter was drafted, DOS did not envision disclosure as adversely affecting the national interest.

(2) Clear error: Defendants are not critical of the Court's analytical framework and appear to agree that the sequential assessment made was a proper inquiry. They do contend that: (a) the agency determination of harm was given inadequate deference; (b) the letter should have been found to be foreign government information; (c) when the Court rejected plaintiff's contentions that protracted delay in the administrative process and the failure to cite the executive order relied upon constituted a basis for directing disclosure, the inquiry should have ended; (d) if *Vaughn* materials are found deficient, the proper remedy is to allow the agency to supplement; and (e) former EO 12356 should govern because that was the executive order in effect when the letter was written.

(a) Deference: The older case law relied upon by defendants emanating from the cold war era tends to accord great deference to agency determinations involving national security. *Taylor v. Dept. of Army*, 684 F.2d 99, 109 (D.C. Cir 1982) ("utmost deference"); *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980) ("substantial weight"). In the Ninth Circuit, classification decisions are given deference (*Wiener v. F.B.I.*, 943 F.2d 972, 980 (9th Cir. 1991), *cert. denied*, 505 U.S. 1212, 112 S. Ct. 3013 (1992)), but not until the agency makes "an initial showing which would justify deference by the district court." *Rosenfeld v. U.S. Dept. of Justice*,

57 F.3d 803, 807 (9th Cir. 1995), *cert. dism'd*, ___ U.S. ___, 116 S. Ct. 833 (1996). This is not a case such as *Taylor* which involved disclosure of "military secrets [and] military planning," nor a case such as *Halperin* which involved disclosure of the identity of CIA operatives. The *Vaughn* materials submitted here fail to communicate the significance of the letter's content other than to note it involves extradition matters "with particular reference to the U.S.-U.K. extradition agreement."

Moreover, deference is given only because of the agency's knowledge and experience. *Taylor*, *supra*, 684 F.2d at 109. There is a distinction to be drawn between the situation where an agency sets out its views on factual matters and where, as does the Sheils Declaration in large measure, it construes the law as applied to the facts. The interpretation of an executive order is a judicial function. Deferring to an agency in this context would be an abdication of that function.

As will appear further in Section 4, however, the Court has accorded defendants' declarations deference; enough to warrant granting the motion for reconsideration

(b) Foreign government information: This is a red herring. Even if the letter qualified as foreign government information, it would not help defendants. The Court assumed for purposes of disposition that § 1.2(a)(3) of Executive Order [EO] 12958 was met under the foreign relations prong defined at § 1.5(d) ("Based on the assumption that §1.5(d) applies, § 1.2(a)(3) has been satisfied and so has § 552(b)(1)(A)"). It does not matter which of the seven § 1.5 prongs is satisfied so long as one of them is. Disposition did not

rest on a failure to meet § 1.2(a)(3), but rather the harm prong set out in § 1.2(a)(4).

Even if it mattered, defendants' current argument highlights its fallacy. According to the defense, all materials generated by a foreign government are confidential unless "an understanding exists between the governments involved that the information may be disclosed." (Ct. Rec. 17, Kennedy Declaration at ¶ 4). Also according to the defense, the release of any confidential material always causes harm because (confirming suspicions articulated in the Order under reconsideration), it is the act of producing rather than the content of production which causes harm. According to Mr. Kennedy, this is true even if the content "appear[s] to be innocuous," a term which by definition means "harmless." (Ct. Rec. 18, Kennedy Declaration at ¶ 4.)

There may be historical practices and protocols in diplomatic circles supportive of defendants' position, and probably are. In recognition of that history, Congress could have shielded all materials either generated or held by DOS from FOIA disclosure, but chose instead to defer to the Executive Branch. The Executive Branch could have shielded all materials either generated or held by DOS from FOIA disclosure, and for all practical purposes did so in 1982 when EO 12356 was signed. In 1995, the current administration eliminated the presumption of harm found in former EO 12356 § 1.3(c) and now requires a showing of harm on a case-by-case basis. EO 12958 § 1.2(a)(4). This is a major shift in policy. Defendants might not view this evolution as prudent policy, but the answer is to direct their concerns to the President, not to ask courts to rewrite an executive order by inserting language the President pointedly deleted.

(c) Scope of inquiry: The Court exceeded the scope of the inquiry as framed by plaintiff, but not the scope of the case as developed by defendants. In these sui generis FOIA actions, a plaintiff may have little or no idea what the basis for withholding is until the agency responds. That is what occurred here.

(d) Supplementation: Defendants apparently believe there is no end to their right to supplement ad infinitum. FOIA actions are unique in many respects, and it is true that decisions on occasion sanction remand as a remedy (*e.g.*, *Wiener*, *supra*), but as noted in the Order under reconsideration:

> [U]nlike the fact patterns of most of the authorities cited herein, this is a very modest controversy. It involves one letter two pages long. No reason appears why the declarations now on file could not have been drafted with the specificity and particularity required by [*Wiener*].

(e) Applicability of former 12356: In their reply, defendants contend that former EO 12356 should apply because it was effective when the letter was generated. The first problem with this premise is that it runs afoul of the rule that the governing executive order is the one in effect when the classification decision is made. *Afshar v. Department of State*, 702 F.2d 1125, 1135-37 (D.C. Cir. 1983). The second problem is that defendants had it within their power to apply former EO 12356. Plaintiff's request was made on November 29, 1994. EO 12958 was signed five months later on April 17, 1995. It did not become effective until 180 days later on October 14, 1995. Defendants did not seek input from U.K. until August 4, 1995, and U.K. did not respond until October 18, 1995, four days after the effective date of EO 12958. Had the classification

decision been made with reasonable dispatch, former EO 12356 would have applied, and given the presumption of harm contained in § 1.3(c), the outcome of this action may have been quite different. To apply former EO 12356 at this juncture would be to rewrite the history of why, when and how defendants processed the request and arrived at the classification decision. The protracted delay standing alone has no bearing on the outcome, but the delay carries with it consequences and no reason appears why the Court should relieve defendants of those consequences.

(3) New law: Other than authorities directed to entry of a stay pending appeal, no new law is cited. Defendants apparently think *Schiffer v. F.B.I.*, 78 F.3d 1405 (9th Cir. 1996) is new, because they have attached a copy to their brief, but *Schiffer* is a conventional application of *Wiener*, *supra*.

(4) Other, highly unusual, circumstances warranting reconsideration: As previously noted, the Court accepted the letter for in camera review reluctantly because the procedure does not serve the adversarial process and there was no guarantee it would inform the Court. In deference to defendants' announced concerns in their declarations, however, the Court concluded that these risks paled beside the danger that highly sensitive and injurious material might be released only because defendants were unable to articulate a factual basis for their concerns without giving away the information itself. That proved to be the case. When the Court read the letter, it knew without hesitation or reservation that the letter could not be released. The Court is unable to say why for the same reason defendants were unable to say why. The letter is two pages long, tightly written, and there is no portion of it

which could be disclosed without simultaneously disclosing injurious materials.

In signing the 1995 executive order, the President doubtless thought it in the public interest to cast aside veils of secrecy not truly justified by the facts. This major shift in policy is not without its costs. Now that the presumption of harm no longer exists, and each case must stand on its own facts, the result which obtained here may well be repeated in district courts across the country. FOIA actions are none too adversarial to begin with, and this one ended with the adversarial process in tatters. A litigant in this situation is left only with the solace of knowing that not only do two high ranking DOS officers believe disclosure of the subject material injurious to the national interest, but so does an independent federal judge. This may be some comfort, but probably not much.

IT IS HEREBY ORDERED:

Defendant's Motions for Reconsideration or in the alternative to File Document In Camera, or in the alternative to Stay Pending Appeal (Ct. Rec. 16) are GRANTED in part and DENIED in part as moot as provided in the text.

IT IS SO ORDERED. The Clerk is hereby directed to enter this Order and furnish copies to counsel.

Dated this 9th day of September 1996.

/s/ FRED VAN SICKLE
FRED VAN SICKLE
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. CS-95-519-FVS

LESLIE R. WEATHERHEAD, PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL. DEFENDANTS

[Filed: Mar. 29, 1996]

ORDER

In this matter, plaintiff is represented by Gregory Workland; defendants are represented by Assistant United States Attorney James R. Shivley. Plaintiff Weatherhead brings this motion for summary judgment pursuant to 5 U.S.C. § 552 seeking an order to compel the defendants to cease withholding a document pursuant to the Freedom of Information Act [FOIA]. Jurisdiction is properly in this Court. The motion was argued on March 6 and 13, 1996 and taken under advisement. This Order will memorialize the Court's ruling.

Background

On November 29, 1994, plaintiff requested a copy of a letter sent by the British Home Office to George

Procter of the United States Department of Justice [DOJ] dated July 28, 1994 relating to the extradition and prosecution of two women, Sally Croft and Susan Hagan. (Exhibits A & B to plaintiff's complaint). Separate requests were directed to DOJ and the Department of State [DOS]. On May 4, 1995, DOS advised that no responsive document could be located. DOJ did locate the letter and informed plaintiff that because it was created by a foreign government, it would be referred to DOS for review to determine whether it could be released. Correspondence and administrative appeals followed throughout the summer. On September 12, 1995, DOJ advised the matter was still under consideration. This action was commenced on November 17, 1995. On December 11, 1995, DOS declined to release the letter and asserted for the first time an exemption under FOIA. DOS informed plaintiff that the letter was now classified because the British Home Office did not wish the letter released. The same information was later provided plaintiff by DOJ.

Analysis

Initially, defendants correctly point out that the protracted delay in responding to plaintiff's request is not a basis for compelling disclosure, but rather a basis for plaintiff to demonstrate there has been an exhaustion of the necessary administrative remedies and allows plaintiff to bring this action in the United States District Court.

Defendants contend the information sought is exempt from disclosure under 5 U.S.C. § 552(b)(1) which provides:

> This section does not apply to matters that are–
>
> (1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order[.]

The Executive Order [EO] applicable to this case is the one in effect at the time of classification on October 27, 1995; EO 12958 (signed April 17, 1995 and effective 180 days later). *See*, *e.g.*, *Afshar v. Department of State*, 702 F.2d 1125, 1135-37 (D.C. Cir. 1983) (EO in effect at time of classification controls).

Defendants have submitted "*Vaughn* affidavits" containing the declarations of Peter M. Sheils and Marshall R. Williams.[1] The reference to "*Vaughn* affidavits" comes from *Vaughn v. Rosen*, 484 F.2d 820, 826-28 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977, 94 S. Ct. 1564 (1974) which is the seminal case which designed the affidavit system now universally recognized as appropriate and necessary in FOIA actions. The mechanics of the process are that the agency prepares a "*Vaughn* index" "identifying each document withheld, the statutory exemption claimed, and a particularized explanation of how disclosure of the particular document would damage the interest protected by the claimed exemption." *Wiener v. F.B.I.*, 943 F.2d 972, 977

---

[1] Only Mr. Sheils' declaration is germane to these proceedings. Mr. Williams' declaration does not attempt to support the classification decision and merely chronciles the flow path as the subject request was processed through administrative channels.

(9th Cir. 1991), *cert. denied*, 505 U.S. 1212, 112 S. Ct. 3013 (1992). A court then reviews the factual representations in light of the relevant classification standards.

> The current EO at § 1.2 provides for the following standards:
>
> (a) Information may be originally classified under the terms of this order only if all of the following conditions are met:
>
> (1) an original classification authority is classifying the information;
>
> (2) the information is owned by, produced by or for, or is under the control of the Unites States government;
>
> (3) the information falls within one or more of the categories of information listed in § 1.5 of this order; and
>
> (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security and the original classification authority is able to identify or describe the damage.

As to § 1.2(a)(1), the original classification authority is classifying the information. The Court believes that DOS is the original classification authority and is classifying the information.

As to § 1.2(a)(2), the information is under the control of the United States government.

Section § 1.2(a)(3) involves application of several subsections of § 1.5. Defendants contend that § 1.5(b) "foreign government information" applies here. The definition of foreign government is found at § 1.1(d). Foreign government information means "(1) information provided to the United States Government by a foreign government or governments, an international organization of governments, or any element thereof, *with the expectation that the information, the source of the information, or both, are to be held in confidence* [emphasis added][.]"

The language "with the expectation" should be read as referring to the time the information was provided and not after the fact. "With," as used in this context, means "accompanied by, attended by." Webster's New World Dictionary 1534 (3rd College ed.). "Expectation" means " a thing looked forward to." *Id.* at 478. When a person performs an act "with expectation," he has a present belief or desire that some anticipated result will obtain in the future. Thus, the expectation that the information would be held in confidence relates to the time frame of July 28, 1994, being the date the letter was sent by the British Home Office. There is no showing in this record of a contemporaneous expectation of confidentiality with respect to the letter; only that upon being later approached by DOS, Great Britain was "unable to agree to its release."

Contrary to the government's position during oral argument, there has been no showing that the prior EO in effect at the time the letter was sent (EO 12356) would allow a foreign government to believe that information it provided to the United States would be presumptively treated as confidential.

Defendants further contend that the declaration of Mr. Sheils at paragraph 13 applies. The first sentence reads "There is a general understanding among governments that confidentiality is normally to be accorded exchanges between governments." Defendants contend that this general understanding applies and that the information was thus provided with an understanding of confidentiality.

This rationale does not logically follow. The Court is aware that foreign governments are sophisticated in understanding the law and would appreciate that information provided by a foreign government is subject to disclosure under FOIA unless it satisfies the exemption requirements of § 1.2(a).

If such a rational applies, *i.e.*, the general understanding among governments that confidentiality is normally to be accorded exchanges between governments, then all such exchanges would be confidential and the definition of "foreign government information" in EO § 1.1(d) would have no meaning and serve no purpose under FOIA. The Court does not believe that § 1.1(d) is or was intended to be of no import or to be meaningless surplusage.

Further, § 1.1(d)(3) seeks to utilize provisions of the previous EO by providing that "information received and treated as 'Foreign Government Information' under the terms of a predecessor order" also constitutes foreign government information under the current EO. The prior EO at § 6.1(d)(1) defines the term as "information provided by a foreign government . . . with the expectation, expressed or implied, that the information, the source, or both, are to be held in confidence." This subsection adds nothing to the current EO except the words "expressed or implied." Even if the current

EO added anything to the definition, § 1.1(d)(3) requires that the foreign government information must be treated as confidential to be included under the current EO. Neither DOJ nor DOS treated the letter as confidential at the time of receipt. Neither agency classified the letter until nearly a year after the subject FOIA request. Neither asserted an exemption until more than a year after the request, and then only at the request of Great Britain.

The result of this review is that the classification is not proper under EO § 1.5(b) because the July 28, 1994 letter does not fall within the definition of "foreign government information." If not properly classified under § 1.5(b), neither is it properly classified pursuant to 552(b)(1)(A).

Defendants also contend that EO § 1.5(d) applies. That section provides "Information may not be considered for classification unless it concerns: . . . (d) foreign relations or foreign activities of the United States including confidential sources[.]" While "foreign relations" is not defined in the EO, it would appear that the fundamental function of DOS is to oversee foreign relations and thus it would be assumed that the letter does meet the definition of involving foreign relations. Based on the assumption that § 1.5(d) applies, § 1.2(a)(3) has been satisfied and so has § 552(b)(1)(A).

The EO requires that the provisions of § 1.2(a)(4) also be met. That subsection is satisfied when "the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security and the original classification authority is able to identify or describe the damage." The EO in § 1.1(1) defines damage to national security as "harm to the

national defense or foreign relations of the United States from the unauthorized disclosure of information, to include the sensitivity, value, and utility of that information."

Wiener, *supra*, requires "a particularized explanation of how disclosure of a particular document would damage the interest protected by the claimed exemption." 943 F.2d at 977. The Court goes on to indicate that the purpose of requiring the showing is to "restore the adversary process to some extent, and to permit more effective judicial review of the agency's decision." *Id.* at 977-78. "Particularized explanation" means that "[e]ffective advocacy is possible only if the requester knows the precise basis for the nondisclosure." *Id.* at 979. "The agency 'must provide a relatively detailed justification, *specifically* identifying the reasons why a particular exemption is relevant and correlating those claims with the *particular* part of a withheld document to which they apply.'" *Bay Area Lawyers Alliance v. Dept. of State*, 818 F. Supp. 1291, 1296 (N.D. Cal. 1992) (emphasis original, citation omitted).

Here, the Court must apply the requirements of *Wiener* and *Bay Area Lawyers Alliance* to the *Vaughn* declarations. Classification decisions are treated with a measure of deference, but not until the agency makes "an initial showing which would justify deference by the district court." *Rosenfeld v. U.S. Dept. of Justice*, 57 F.3d 803, 807 (9th Cir. 1995), *cert. dism'd*, ____U.S. ____, 116 S. Ct. 833 (1996). At the same time, exemptions are construed narrowly and the burden is on the agency to establish the claim of exemption. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152, 110 S. Ct. 471, 475 (1989); *Church of Scientology Intern. v. U.S. Dept. of Justice*, 30 F.3d 224, 228 (1st Cir. 1994); *Bay*

Area Lawyers Alliance, *supra*, 818 F. Supp. at 1295). In terms of procedure the difficulty in these circumstances is set out in *Jones v. F.B.I*, 41 F.3d 238 (6th Cir. 1994):

> FOIA cases typically come up on appeal in this fashion, based on the defendant agency's *Vaughn* affidavits and before the plaintiff has had a chance to engage in discovery. This is a peculiar posture, difficult for our adversarial system to handle. The problem goes to the very nature of these actions as petitions for the release of documents. Where material has been withheld by the government agency, the plaintiff must argue that the withholding goes beyond that allowed by the statute. But the plaintiff is handicapped in this endeavor by the fact that only the agency truly knows the content of the withheld material. Except in cases in which the court takes the entire set of responsive documents *in camera*, even the court does not know.

Id. at 242 (citations omitted).

Thus, in this case, the application of the above-described standards must be viewed in light of the *Vaughn* declarations. Mr. Sheils, in his declaration at paragraph 14, states:

> Disclosure of foreign government information in violation of an understood or, as in this case, clearly stated expectation of confidentiality would cause foreign officials, not only of the government providing the information, but of other governments as well, to conclude that U.S. officials are unable and/or unwilling to preserve the confidentiality expected in exchanges between governments; thus foreign governments and their representatives

> would be less willing in the future to furnish information important to the conduct of U.S. foreign relations and other governmental functions, and in general less disposed to cooperate in foreign relations matters of common interest. Disclosure of the document at issue in the circumstances of this case would clearly result in damage to relations between the United Stats and the United Kingdom and, therefore, to the national security in a clearly identifiable way.

The declaration of Mr. Sheils goes on to say at paragraphs 16 and 17:

> 16. The one document withheld in this case clearly concerns the foreign relations or activities of the United State inasmuch as it is a communication from a British Home Office official to an official of the U.S. Department of Justice concerning the extradition from the U.K. to the U.S. of two individuals, apparently British nationals, to stand trial in the United States in a highly publicized case. Disclosure of the document by the Government of the United States, particularly in light of the refusal of the British Government to agree to its release, would inevitably result in damage to relations between the U.K. and the U.S.
>
> 17. The withheld document is a two-page letter dated July 28, 1994 from an official of the British Home Office to an official of the U.S. Department of Justice. Originally unclassified. Classified on October 27, 1995. Withheld in full. Exemption (b)(1).
>
> The letter comments on certain aspects of the extradition of two women, apparently British citizens, to face charges in the United States. The

> letter conveys certain concerns of the U.K. Government regarding the case which apparently was the subject of considerable attention in the British Parliament and otherwise in the U.K. with particular reference to the U.S.-U.K. extradition agreement.

The issue is whether the information provided in the *Vaughn* declarations meets the requirement of a particularized explanation of how disclosure of this particular document would damage the interest protected by the claimed exemption. While there are no specific rules or concrete standards to assist this Court other than those indicated in *Wiener*, this Court determines that the information provided in the several sections of the declaration of Mr. Sheils is of a general and conclusory nature and not a particularized explanation of how disclosure of this letter would damage the relations between the United States and the United Kingdom and therefore national security or how disclosure of this letter in light of the refusal of the British Government to agree to its release would inevitably result in damage to relations between the United Kingdom and the United States. Simply put, the declaration does not "afford the requester an opportunity to intelligently advocate release of the withheld documents and . . . afford the court an opportunity to intelligently judge the contest." *Wiener*, *supra*, 943 F.2d at 979; *accord*, *Church of Scientology*, *supra*, 30 F.3d at 231.

In essence, what defendants are saying is that it is the act of disclosure itself, not disclosure of the *contents*, which would harm national security. This line of reasoning is inconsistent with EO § 1.1(1) which defines damage to the national security as "harm to the na-

tional defense or foreign relations of the United States from the unauthorized disclosure of information, *to include the sensitivity, value, and utility of that information* [emphasis added]." Clearly, these criteria place the focus on the information disclosed, not the act of disclosing. If defendants' rationale were carried forward, if any foreign government did not want a document disclosed, its request would automatically supersede FOIA thereby defeating the public policy of providing properly requested information.

Finally, the declarations do not adequately address segregability. Mr. Sheils' declaration merely states that the letter is being "withheld in full" because "no meaningful segregation of information from the withheld material can be made without disclosing information requiring protection." "This is entirely insufficient." *Bay Area Lawyers Alliance*, *supra*, 818 F. Supp. at 1300.

> [E]ven if part of a document is FOIA exempt, the agency still must disclose any portions which are not exempt—i.e., all "segregable" information—and must address in its *Vaughn* index why the remaining information is not segregable. The district court must make specific factual findings on the issue of segregability to establish that the required *de novo* review of the agency's withholding decision has in fact taken place. The Court may not "'simply approve the withholding of an entire document without entering a finding on segregability. . . .'"

Id. at 1296 (citations omitted).

The Court cannot make the required findings because the record reflects no facts from which findings could be developed.

Defendants urge that summary judgment is inappropriate because a material dispute exists over Great Britain's expectation of confidentiality. There may be a dispute, but it is not material. The Court has assumed for purposes of disposition that the letter falls within EO § 1.5(d) as "foreign relations material" thereby satisfying § 552(b)(1)(A). Whether it also falls within § 1.5(b) as "foreign government information" is thus not material to the outcome because whether it does or not, § 552(b)(1)(B) is not satisfied.

Defendants also urge that summary judgment is inappropriate because material disputes exist over the nature and magnitude of harm as recited in Mr. Sheils' declaration at paragraphs 14 and 16. Initially, it is not clear how this case could proceed to discovery and trial. If defendants do not wish to release the letter, the significance of which does not appear in the record, it seems most improbable they would be wiling to open up their inner departmental workings so the system could test why the exemption was claimed and how that decision was made.

However, the interesting possibility of proceeding to trial need not be addressed because the Court concludes there are no genuine issues of material fact. The information in the *Vaughn* declarations is undisputed in terms of the operative (as opposed to ultimate) facts. The Court may rule as a matter of law in this case. Moreover, unlike the fact patterns of most of the authorities cited herein, this is a very modest controversy. It involves one letter two pages long. No reason appears why the declarations now on file could not have been drafted with the specificity and particularity required by that decision. The burden of validating the

claimed exemption is on defendants. *John Doe Agency*, 493 U.S. at 152, 110 S. Ct. at 475.

It is the determination of the Court that the exemption provision of 5 U.S.C. § 552(b)(1)(B) has not been shown to apply and therefore plaintiff's Motion for Summary Judgment **(Ct. Rec. 4)** requiring disclosure of the July 28, 1994 letter would be **GRANTED**. If any particular form of Order is required to effectuate this ruling, plaintiff may submit a proposed Order in due course.

IT IS SO ORDERED. The Clerk is hereby directed to enter this Order, enter judgment thereon, furnish copies to counsel and close this file.

DATED this 29 day of March, 1996.

/s/ FRED VAN SICKLE
FRED VAN SICKLE
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. CS-95-519-FVS

LESLIE R. WEATHERHEAD, PLAINTIFF

v.

UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF JUSTICE, AND
UNITED STATES DEPARTMENT OF STATE, DEFENDANT

[Filed: Apr. 12, 1996]

JUDGMENT IN A CIVIL CASE

This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that it is the determination of the Court that the exemption provision of 5 USC 552 (b)(1)(B) has not been shown to apply and therefore plaintiff's motion for summary judgment (Ct. Rec. 4) requiring disclosure of the July 28, 1994 letter be GRANTED. If any particular form of Order is required to effectuate this ruling, plaintiff may submit a proposed Order in due course.

Dated: April 12, 1996 JAMES R. LARSEN, Clerk

by: ANNIE SMITH
ANNIE SMITH, Deputy

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-36260
D.C. No. CV-95-00519-FVS

LES WEATHERHEAD, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA; DEPARTMENT OF JUSTICE; UNITED STATES DEPARTMENT OF STATE, DEFENDANTS-APPELLEES

[Filed: Feb. 26, 1999]

ORDER

Before: HUG, Chief Judge, REINHARDT and SILVERMAN, Circuit Judges.

The panel has voted to deny Appellees' petition for rehearing and to reject the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the non-

recused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-36260
D.C. No. CV-95-00519-FVS

LES WEATHERHEAD, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA; DEPARTMENT OF JUSTICE; UNITED STATES DEPARTMENT OF STATE, DEFENDANTS-APPELLEES

[Filed: Mar. 9, 1999]

AMENDED ORDER

Before: HUG, Chief Judge, REINHARDT and SILVERMAN, Circuit Judges.

Chief Judge Hug and Judge Reinhardt voted to deny Appellees' petition for rehearing and to reject the suggestion for rehearing en banc. Judge Silverman voted to grant the petition for rehearing and to accept the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the non-

recused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

Civil Action No. 95-0519-FVS

LESLIE R. WEATHERHEAD, PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

DECLARATION OF PETER M. SHEILS

I, Peter M. Sheils, declare and state as follows:

1. I am the Department of State's Acting Information and Privacy Coordinator and the Acting Director of the Department's Office of Freedom of Information, Privacy, and Classification Review (FPC). In these capacities, I am the Department official immediately responsible for responding to requests for records under the Freedom of Information Act (FOIA), 5 U.S.C. §552, the Privacy Act, 5 U.S.C. §552a, and other applicable records access provisions. I have been in the employ of the Department of State since 1975, and have served in a variety of positions with the Department's Information Access Program for most of my tenure with the Department. I am authorized to classify to the Top Secret level and to downgrade and to declassify national security information pursuant to Executive Order (E.O.) 12958 and Department of State

regulations set forth in 22 CFR 9.14. I make the following statements based upon my personal knowledge, which is in turn based on a personal review of the document withheld, and upon information furnished to me in the course of my official duties.

2. FPC is responsible for the coordination and processing of external requests for Department records, including the receipt, acknowledgment, retrieval and classification review of records determined to be responsive to such requests. External requests include those that have been made by the general public, members of Congress, and other government agencies, and those that have been made pursuant to judicial processes, such as subpoenas, court orders, and discovery requests.

3. I have personal knowledge of the efforts of Department personnel to review and process one document, consisting of two pages, referred to the Department of State in connection with a Freedom of Information Act request dated November 29, 1994, submitted by plaintiff to the Department of Justice ("DOJ"). The actions taken by the Department of State in connection with the processing of this referral are set forth below.

4. By memorandum dated May 17, 1995 (Exhibit 1), DOJ referred one document, consisting of two pages, to the Department of State for processing and direct response to plaintiff. The Department of State conducted a review of this document, and by letter dated December 11, 1995 (Exhibit 2), advised plaintiff that the document was exempt from disclosure pursuant to exemption (b)(1) of the FOIA.

5. In applying the (b)(1) exemption to the single denied document, and after a line-by-line review of the document, I have determined that no meaningful segregation of information from the withheld material can be made without disclosing information requiring protection. This declaration includes the justification for asserting the (b)(1) exemption to the withheld information, and a document description which addresses the withheld document.

FOIA EXEMPTIONS CLAIMED

Exemption (b)(1)—Classified Information

6. 5 U.S.C. Section 552 (b)(1) states that the FOIA does not apply to matters that are:

> (A) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy, and
>
> (B) are in fact properly classified pursuant to such an Executive order.

The information to which the (b)(1) exemption has been applied in this case is required to be kept secret because it is foreign government information and in the interest of foreign policy pursuant to Executive Order 12958, and is properly classified pursuant to that Executive Order. This information is therefore exempt from disclosure under subsection (b)(1) of the FOIA.

7. The one document withheld from the plaintiff is classified "Confidential". Section 1.3(a)(3) of E.O. 12958 states that the designation "Confidential" shall be applied to information, the unauthorized disclosure of

which reasonably could be expected to cause damage to the national security that the original classification authority is able to identify or describe. "Damage to the national security" is defined in Section 1.1(1) as meaning "harm to the national defense or foreign relations of the United States from the unauthorized disclosure of information, to include the sensitivity, value, and utility of that information."

8. The withheld document has been reviewed by an official with original classification and declassification authority. The document comes within two particular categories enumerated in E.O. 12958: "foreign government information" [Section 1.5(b)]; and "foreign relations or foreign activities of the United States" [Section 1.5(d)]. With respect to the document withheld, an original classification authority has determined that "the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security," consistent with the provision of section 1.2(4) of E.O. 12958.

9. Procedurally, the document to which the (b)(1) exemption has been applied was classified by the Department of State under Executive Order 12958. The document was carefully reviewed to ensure that it was properly marked in accordance with that Order.

10. Substantively, the information with respect to which the (b)(1) exemption has been applied meets the classification criteria of E.O. 12958. Section 1.5 of the Executive Order states in pertinent part that "Information may not be considered for classification unless it concerns: . . . (b) foreign government information;"

and "(d) foreign relations or foreign activities of the United States . . . ."

Section 1.5(b)—Foreign Government Information

11. Section 1.5(b) of E.O. 12958 provides, in pertinent part, that:

Information may not be considered for classification unless it concerns: . . .
(b) foreign government information

12. Section 1.1(d) states, in pertinent part, that "'Foreign Government Information' means: (1) 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."

13. There is a general understanding among governments that confidentiality is normally to be accorded exchanges between governments. The document addressed in this declaration is a letter from an official of the British Home Office to an official of the U.S. Department of Justice. That the information in the document was intended by the U.K. Government to be held in confidence is confirmed by the British response to a Department of State inquiry regarding possible release to plaintiff. The British Foreign and Commonwealth Office responded, through the British Embassy in Washington, that it was "*unable to agree to its release*" (emphasis in the original). Consequently, the Department of State classified the document Confidential to protect its confidential character as foreign government information.

14. Disclosure of foreign government information in violation of an understood or, as in this case, clearly stated expectation of confidentiality would cause foreign officials, not only of the government providing the information, but of other governments as well, to conclude that U.S. officials are unable and/or unwilling to preserve the confidentiality expected in exchanges between governments; thus foreign governments and their representatives would be less willing in the future to furnish information important to the conduct of U.S. foreign relations and other governmental functions, and in general less disposed to cooperate in foreign relations matters of common interest. Disclosure of the document at issue in the circumstances of this case would clearly result in damage to relations between the United States and the United Kingdom and, therefore, to the national security in a clearly identifiable way.

Section 1.5(d)—Foreign Relations or Foreign Activities of the United States

15. Section 1.5 of E.O. 12958 provides, in pertinent part, that:

Information may not be considered for classification unless it concerns. . .

(d) foreign relations or foreign activities of the United States; . . .

16. The one document withheld in this case clearly concerns the foreign relations or activities of the United States inasmuch as it is a communication from a British Home Office official to an official of the U.S. Department of Justice concerning the extradition from the

U.K. to the U.S. of two individuals, apparently British nationals, to stand trial in the United States in a highly publicized case. Disclosure of the document by the Government of the United States, particularly in light of the refusal of the British Government to agree to its release, would inevitably result in damage to relations between the U.K. and the U.S.

DOCUMENT DESCRIPTION FOR WITHHELD DOCUMENT

17. The withheld document is a two-page letter dated July 28, 1994 from an official of the British Home Office to an official of the U.S. Department of Justice. Originally unclassified. Classified on October 27, 1995. Withheld in full. Exemption (b)(1).

The letter comments on certain aspects of the extradition of two women, apparently British citizens, to face charges in the United States. The letter conveys certain concerns of the U.K. Government regarding the case which apparently was the subject of considerable attention in the British Parliament and otherwise in the U.K. with particular reference to the U.S.-U.K. extradition agreement.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed this 5th day of March, 1996.

/s/ PETER M. SHEILS
PETER M. SHEILS

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

Civil Action No. 95-0519-FVS

LESLIE R. WEATHERHEAD, PLAINTIFF

v.

DEPARTMENT OF JUSTICE, ET AL., DEFENDANTS

DECLARATION OF PATRICK F. KENNEDY

I, Patrick F. Kennedy, declare and state as follows:

1. I am the Department of State's Assistant Secretary for Administration. In this capacity, I am the Department official responsible for supervising the Department's Office of Freedom of Information, Privacy, and Classification Review (FPC) and for administration of the agency's program under the Executive Order on Classification of National Security Information (E.O. 12958). I have been in the employ of the Department of State since 1972. I make the following statement based upon my personal review of the document withheld, and upon information furnished to me in the course of my official duties.

2. I incorporate by reference the declaration dated March 5, 1996 of Peter M. Sheils, Acting Director, Office of Freedom of Information, Privacy, and Classification Review.

3. I make this supplemental declaration in support of the motion of the United States for reconsideration of the order of the District Court dated March 29, 1996 that a document withheld by the Department of State under the Freedom of Information Act should be disclosed to plaintiff. The Department of State urges that the decision of the District Court be reconsidered because of the damage to U.S. foreign relations that could result from compliance with the District Court's disclosure order.

4. It is a longstanding custom and accepted practice in international relations to treat as confidential and not subject to public disclosure information and documents exchanged between governments and their officials. Such confidentiality is presumptively accorded with respect to information unless an understanding exists between the governments involved that the information may be disclosed. Diplomatic confidentiality obtains even between governments that are hostile to each other and even with respect to information that may appear to be innocuous. It also applies whether or not the foreign government document was marked with some security classification at the time by the sending or receiving government.

5. In keeping with the rule of diplomatic confidentiality, the Department of State normally withholds documents containing information that originated with a foreign government from public disclosure, including in response to a Freedom of Information Act (FOIA), Privacy Act, discovery, or other type of disclosure request usually without consultation with that government. When a request for such information

is made under the FOIA or similar process, the information, based on the subject matter and if not previously classified, is classified by the Department without consultation with the government concerned. In certain cases, such as this one, the Department may seek the views of the foreign government and then may classify the document. We expect and receive similar treatment from foreign governments. The information in this document is of a nature that it is evident that confidentiality was expected at the time it was sent and its contents cannot be described in greater detail without revealing the sensitivity of the document and I therefore urge the court to conduct an *in camera* review.

6. Disclosure of the information in violation of the accepted rule of diplomatic confidentiality reasonably could be expected to cause damage to relations between the U.S. and the originating government. Disclosure of information considered confidential in diplomatic communications, voluntarily or in compliance with a court order, may lead not only the government directly affected, but also other governments more generally to conclude that the U.S. cannot be trusted to protect information furnished by them. This, in turn, would damage our relations with affected governments. It would also likely make other governments reluctant to provide sensitive information to the U.S. in diplomatic communications, thereby damaging our ability to conduct the foreign relations of the U.S. and our national security, in which information received from foreign government officials plays a major role.

7. Disclosure by the U.S. of information furnished by another government in violation of the confidentiality

normally accorded such information may also make other governments hesitant to cooperate in matters of interest to the U.S. This includes U.S. law enforcement interests such as those involved in the extradition case that is the subject of the document at issue in this litigation. Cooperation between the U.S. and the U.K. in international extradition of fugitives is a matter of substantial national interest to both governments. It can also be a matter of political sensitivity in the extraditing country, as has been the case with regard to fugitives extradited by the U.S. to the U.K. charged with crimes in Northern Ireland and extradition of the two women by the U.K. to the U.S. in the case discussed in the British document at issue here. Because of the sensitivity I cannot be more specific on the contents of the document and urge the court to conduct an *in camera* review.

8. Although, the Department normally classifies and withholds foreign government information in response to FOIA and other disclosure requests without consulting the government that originated the information, in some cases, the foreign government is consulted regarding possible disclosure. In this case, after receiving the FOIA request from the plaintiff, the Department sent a letter (Exhibit 1) dated August 4, 1995 to the British Embassy in Washington seeking the views of the U.K. authorities on possible disclosure, in whole or in part, of the letter from the British Home Office to the U.S. Department of Justice.

9. The British Embassy replied by letter (Exhibit 2) dated October 18, 1995, noting the expectation of confidentiality of such documents and stating that the Government of the United Kingdom was unable to

agree to disclosure, in whole or in part. The Embassy noted, in particular, that U.K. authorities had already refused, "on the grounds of confidentiality," to disclose the contents of the document in response to a request by representatives of the defendants in the extradition case. In view of the British Embassy's reply, it is clear that the British authorities expected at the time the Home Office sent the letter to the Department of Justice and continue to expect that the document would be protected from disclosure in accordance with accepted practice.

10. In view of the expectation of the confidentiality of foreign government information and the explicit confirmation of that expectation by the British Embassy letter at Exhibit 2, I have no doubt disclosure of the document by the U.S. government would harm the U.S. foreign relations and thereby damage national security. For this reason, the document is currently and properly classified under E.O. 12958 and is exempt from disclosure under exemption (b)(1) of the FOIA.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed this 11th of April, 1996

/s/ PATRICK F. KENNEDY
PATRICK F. KENNEDY

APPENDIX I

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-36260

LESLIE R. WEATHERHEAD, PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

DECLARATION OF STROBE TALBOTT

I, STROBE TALBOTT, declare as follows:

1. I am the Acting Secretary of State of the United States. In this capacity I am responsible for the formulation and implementation of the foreign policy and conduct of the foreign relations of the United States, subject to the direction of the President. I am familiar with the foreign policy issues that relate to the United Kingdom, and with the conduct of our foreign relations in general.

2. Pursuant to the authority vested in me as Secretary of State, I make this declaration in support of the government's motion for a stay of the mandate and to reaffirm the national security exemption over the British Government document that is the subject of this case. I am making this declaration and the following statements based upon the information conveyed to me by my advisers in the course of their official duties and

upon my own personal judgment that the nature of the information in question merits an assertion of this exemption.

3. Great Britain is perhaps our staunchest and certainly one of our most important allies. On a daily basis, the United States engages in complex and sensitive discussions with the British at various levels on numerous important subjects of concern, including weapons non-proliferation, trade disputes, matters before the United Nations Security Council, human rights and law enforcement. In many of these areas we have engaged in diplomatic dialogue with officials of the British in the course of which information was exchanged with an expectation of confidentiality. Such confidential diplomatic dialogue is essential to the conduct of foreign relations. Candid exchange such as the letter that is the subject of this litigation can only occur in a confidential setting. Such a setting is often essential to explore and resolve issues and concerns and achieve U.S. foreign policy goals. Further, the information that the United States acquires in confidence from other governments, or instrumentalities thereof, is essential to the formulation of U.S. foreign policy and to the conduct of U.S. foreign relations. Disclosure, either voluntarily by the Department of State or by order of the Court, of foreign government information where there remains the expectation of confidentiality with which the information was provided would convey to British Government officials, and indeed to all other foreign government officials as well, that U.S. officials are not able or willing to preserve the confidentiality expected in such exchanges. Such officials would be less willing in the future to engage in candid discussion and to furnish information important to the conduct of

U.S. foreign relations and other governmental functions, and less disposed to cooperate in foreign relations matters of common interest.

4. When advised of the Court's latest decision in this case, the British Government requested that the letter remain confidential, as they had previously requested on three occasions spanning two different British Governments. In this case, the British Government specifically asked that the U.S. Government seek an appeal.

5. One important foreign policy objective of the United States in recent years has been to strengthen international cooperation on law enforcement matters such as those involved in the extradition case that is the subject of the document at issue in this litigation. This effort has led to an unprecedented level of cooperation between the government of the United States and foreign governments around the world. In fact, the cooperation between the United States and the British on law enforcement matters has been long and successful.

6. A breach of confidentiality in this instance could adversely affect our efforts with British officials and other governments. Cooperation between the U.S. and U.K. in international extradition of fugitives is a matter of substantial national interest to both governments. It can also be a matter of political sensitivity in the extraditing country, as has been the case with regard to fugitives extradited by the U.S. to the U.K. for crimes in Northern Ireland and extradition of the two women by the U.K. to the U.S. in the case discussed in the British document at issue here. Consequently, dis-

closure of the British government information withheld in this case could reasonably be expected to cause damage to the foreign relations of the United States. Moreover, by calling into question the confidentiality of diplomatic exchanges generally, such a disclosure reasonably could also be expected to affect the more general bilateral relationship between the U.S. and the U.K. on law enforcement cooperation and other matters.

7. The ability of U.S. officials to make confidential assessments, analyses or recommendations on foreign relations or foreign activities is also essential to the conduct of foreign policy. It is necessary to have frank internal assessments by foreign government officials of their motivations, objectives and strategies, as well as of the implications for achieving U.S. foreign policy goals. If such material were made public, not only would the United States be seriously disadvantaged in pursuing its objectives, but also bilateral relations often would be adversely affected by the reaction of foreign governments or officials to disclosure of their "candid" views.

8. Upon review of the document and the above factors, I conclude that revealing the letter from the British Home Secretary made in confidence to a U.S. official, reasonably could be expected to damage the national interest of the United States by dealing a setback to U.K. confidence in U.S. reliability as a law enforcement partner. In addition, by calling into question the expectation of confidentiality in diplomatic exchanges and revealing the confidential assessments of the British Government, release reasonably could be

expected to damage other aspects of the bilateral relationship that are important to the United States.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Washington, D.C.

/s/ STROBE TALBOTT
STROBE TALBOTT

March 2, 1999

APPENDIX J

Executive Order No. 12,958, 60 Fed. Reg. 19,825 (Apr. 17, 1995) (3 C.F.R. 333 (1996)) provides:

Classified National Security Information

This order prescribes a uniform system for classifying, safeguarding, and declassifying national security information. Our democratic principles require that the American people be informed of the activities of their Government. Also, our Nation's progress depends on the free flow of information. Nevertheless, throughout our history, the national interest has required that certain information be maintained in confidence in order to protect our citizens, our democratic institutions, and our participation within the community of nations. Protecting information critical to our Nation's security remains a priority. In recent years, however, dramatic changes have altered, although not eliminated, the national security threats that we confront. These changes provide a greater opportunity to emphasize our commitment to open Government.

NOW, THEREFORE, by the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

PART 1—ORIGINAL CLASSIFICATION

Section 1.1. Definitions. For purposes of this order:

(a) "National security"means the national defense or foreign relations of the United States.

(b) "Information" means any knowledge that can be communicated or documentary material, regardless of its physical form or characteristics, that is owned by,

produced by or for, or is under the control of the United States Government. "Control" means the authority of the agency that originates information, or its successor in function, to regulate access to the information.

(c) "Classified national security information" (hereafter "classified information") means information that has been determined pursuant to this order or any predecessor order to require protection against unauthorized disclosure and is marked to indicate its classified status when in documentary form.

(d) "Foreign Government Information" means:

(1) information provided to the United States Government by a foreign government or governments, an international organization of governments, or any element thereof, with the expectation that the information, the source of the information, or both, are to be held in confidence;

(2) information produced by the United States pursuant to or as a result of a joint arrangement with a foreign government or governments, or an international organization of governments, or any element thereof, requiring that the information, the arrangement, or both, are to be held in confidence; or

(3) information received and treated as "Foreign Government Information" under the terms of a predecessor order.

(e) "Classification" means the act or process by which information is determined to be classified information.

(f) "Original classification" means an initial determination that information requires, in the interest of national security, protection against unauthorized disclosure.

(g) "Original classification authority" means an individual authorized in writing, either by the President, or by agency heads or other officials designated by the President, to classify information in the first instance.

(h) "Unauthorized disclosure" means a communication or physical transfer of classified information to an unauthorized recipient.

(i) "Agency" means any "Executive agency," as defined in 5 U.S.C. 105, and any other entity within the executive branch that comes into the possession of classified information.

(j) "Senior agency official" means the official designated by the agency head under section 5.6(c) of this order to direct and administer the agency's program under which information is classified, safeguarded, and declassified.

(k) "Confidential source" means any individual or organization that has provided, or that may reasonably be expected to provide, information to the United States on matters pertaining to the national security with the expectation that the information or relationship, or both, are to be held in confidence.

(l) "Damage to the national security" means harm to the national defense or foreign relations of the United States from the unauthorized disclosure of

information, to include the sensitivity, value, and utility of that information.

Sec. 1.2. Classification Standards. (a) Information may be originally classified under the terms of this order only if all of the following conditions are met:

(1) an original classification authority is classifying the information;

(2) the information is owned by, produced by or for, or is under the control of the United States Government;

(3) the information falls within one or more of the categories of information listed in section 1.5 of this order; and

(4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security and the original classification authority is able to identify or describe the damage.

(b) If there is significant doubt about the need to classify information, it shall not be classified. This provision does not:

(1) amplify or modify the substantive criteria or procedures for classification; or

(2) create any substantive or procedural rights subject to judicial review.

(c) Classified information shall not be declassified automatically as a result of any unauthorized disclosure of identical or similar information.

Sec. 1.3. Classification Levels. (a) Information may be classified at one of the following three levels:

(1) "Top Secret" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security that the original classification authority is able to identify or describe.

(2) "Secret" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security that the original classification authority is able to identify or describe.

(3) "Confidential" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause damage to the national security that the original classification authority is able to identify or describe.

(b) Except as otherwise provided by statute, no other terms shall be used to identify United States classified information.

(c) If there is significant doubt about the appropriate level of classification, it shall be classified at the lower level.

Sec. 1.4. Classification Authority. (a) The authority to classify information originally may be exercised only by:

(1) the President;

(2) agency heads and officials designated by the President in the **Federal Register**; or

(3) United States Government officials delegated this authority pursuant to paragraph (c), below.

(b) Officials authorized to classify information at a specified level are also authorized to classify information at a lower level.

(c) Delegation of original classification authority.

(1) Delegations of original classification authority shall be limited to the minimum required to administer this order. Agency heads are responsible for ensuring that designated subordinate officials have a demonstrable and continuing need to exercise this authority.

(2) "Top Secret" original classification authority may be delegated only by the President or by an agency head or official designated pursuant to paragraph (a)(2), above.

(3) "Secret" or "Confidential" original classification authority may be delegated only by the President; an agency head or official designated pursuant to paragraph (a)(2), above; or the senior agency official, provided that official has been delegated "Top Secret" original classification authority by the agency head.

(4) Each delegation of original classification authority shall be in writing and the authority shall not be redelegated except as provided in this order. Each delegation shall identify the official by name or position title.

(d) Original classification authorities must receive training in original classification as provided in this order and its implementing directives.

(e) Exceptional cases. When an employee, contractor, licensee, certificate holder, or grantee of an agency

that does not have original classification authority originates information believed by that person to require classification, the information shall be protected in a manner consistent with this order and its implementing directives. The information shall be transmitted promptly as provided under this order or its implementing directives to the agency that has appropriate subject matter interest and classification authority with respect to this information. That agency shall decide within 30 days whether to classify this information. If it is not clear which agency has classification responsibility for this information, it shall be sent to the Director of the Information Security Oversight Office. The Director shall determine the agency having primary subject matter interest and forward the information, with appropriate recommenations, to that agency for a classification determination.

Sec. 1.5. Classification Categories.

Information may not be considered for classification unless it concerns:

(a) military plans, weapons systems, or operations;

(b) foreign government information;

(c) intelligence activities (including special activities), intelligence sources or methods, or cryptology;

(d) foreign relations or foreign activities of the United States, including confidential sources;

(e) scientific, technological, or economic matters relating to the national security;

(f) United States Government programs for safeguarding nuclear materials or facilities; or

(g) vulnerabilities or capabilities of systems, installations, projects or plans relating to the national security.

Sec. 1.6. Duration of Classification. (a) At the time of original classification, the original classification authority shall attempt to establish a specific date or event for declassification based upon the duration of the national security sensitivity of the information. The date or event shall not exceed the time frame in paragraph (b), below.

(b) If the original classification authority cannot determine an earlier specific date or event for declassification, information shall be marked for declassification 10 years from the date of the original decision, except as provided in paragraph (d), below.

(c) An original classification authority may extend the duration of classification or reclassify specific information for successive periods not to exceed 10 years at a time if such action is consistent with the standards and procedures established under this order. This provision does not apply to information contained in records that are more than 25 years old and have been determined to have permanent historical value under title 44, United States Code.

(d) At the time of original classification, the original classification authority may exempt from declassification within 10 years specific information, the unauthorized disclosure of which could reasonably be expected to cause damage to the national security for a period greater than that provided in paragraph (b),

above, and the release of which could reasonably be expected to:

(1) reveal an intelligence source, method, or activity, or a cryptologic system or activity;

(2) reveal information that would assist in the development or use of weapons of mass destruction;

(3) reveal information that would impair the development or use of technology within a United States weapons system;

(4) reveal United States military plans, or national security emergency preparedness plans;

(5) reveal foreign government information;

(6) damage relations between the United States and a foreign government, reveal a confidential source, or seriously undermine diplomatic activities that are reasonably expected to be ongoing for a period greater than that provided in paragraph (b), above;

(7) impair the ability of responsible United States Government officials to protect the President, the Vice President, and other individuals for whom protection services, in the interest of national security, are authorized; or

(8) violate a statute, treaty, or international agreement.

(e) Information marked for an indefinite duration of classification under predecessor orders, for example, "Originating Agency's Determination Required," or information classified under predecessor orders that

contains no declassification instructions shall be declassified in accordance with part 3 of this order.

Sec. 1.7. Identification and Markings. (a) At the time of original classification, the following shall appear on the face of each classified document, or shall be applied to other classified media in an appropriate manner:

(1) one of the three classification levels defined in section 1.3 of this order;

(2) the identity, by name or personal identifier and position, of the original classification authority;

(3) the agency and office of origin, if not otherwise evident;

(4) declassification instructions, which shall indicate one of the following:

(A) the date or event for declassification, as prescribed in section 1.6(a) or section 1.6(c); or

(B) the date that is 10 years from the date of original classification, as prescribed in section 1.6(b); or

(C) the exemption category from declassification, as prescribed in section 1.6(d); and

(5) a concise reason for classification which, at a minimum, cites the applicable classification categories in section 1.5 of this order.

(b) Specific information contained in paragraph (a), above, may be excluded if it would reveal additional classified information.

(c) Each classified document shall, by marking or other means, indicate which portions are classified, with the applicable classification level, which portions are exempt from declassification under section 1.6(d) of this order, and which portions are unclassified. In accordance with standards prescribed in directives issued under this order, the Director of the Information Security Oversight Office may grant waivers of this requirement for specified classes of documents or information. The Director shall revoke any waiver upon a finding of abuse.

(d) Markings implementing the provisions of this order, including abbreviations and requirements to safeguard classified working papers, shall conform to the standards prescribed in implementing directives issued pursuant to this order.

(e) Foreign government information shall retain its original classification markings or shall be assigned a U.S. classification that provides a degree of protection at least equivalent to that required by the entity that furnished the information.

(f) Information assigned a level of classification under this or predecessor orders shall be considered as classified at that level of classification despite the omission of other required markings. Whenever such information is used in the derivative classification process or is reviewed for possible declassification, holders of such information shall coordinate with an appropriate classification authority for the application of omitted markings.

(g) The classification authority shall, whenever practicable, use a classified addendum whenever classi-

fied information constitutes a small portion of an otherwise unclassified document.

Sec. 1.8. Classification Prohibitions and Limitations . (a) In no case shall information be classified in order to:

(1) conceal violations of law, inefficiency, or administrative error;

(2) prevent embarrassment to a person, organization, or agency;

(3) restrain competition; or

(4) prevent or delay the release of information that does not require protection in the interest of national security.

(b) Basic scientific research information not clearly related to the national security may not be classified.

(c) Information may not be reclassified after it has been declassified and released to the public under proper authority.

(d) Information 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 Freedom of Information Act (5 U.S.C. 552) or the Privacy Act of 1974 (5 U.S.C. 552a), or the mandatory review provisions of section 3.6 of this order only if such classification meets the requirements of this order and is accomplished on a document-by-document basis with the personal participation or under the direction of the agency head, the deputy agency head, or the senior agency official designated under section 5.6 of this order. This provision does not apply to classified information contained in records that are

more than 25 years old and have been determined to have permanent historical value under title 44, United States Code.

(e) Compilations of items of information which are individually unclassified may be classified if the compiled information reveals an additional association or relationship that:

(1) meets the standards for classification under this order; and

(2) is not otherwise revealed in the individual items of information.

As used in this order, "compilation" means an aggregation of pre-existing unclassified items of information.

Sec. 1.9. Classification Challenges. (a) Authorized holders of information who, in good faith, believe that its classification status is improper are encouraged and expected to challenge the classification status of the information in accordance with agency procedures established under paragraph (b), below.

(b) In accordance with implementing directives issued pursuant to this order, an agency head or senior agency official shall establish procedures under which authorized holders of information are encouraged and expected to challenge the classification of information that they believe is improperly classified or unclassified. These procedures shall assure that:

(1) individuals are not subject to retribution for bringing such actions;

(2) an opportunity is provided for review by an impartial official or panel; and

(3) individuals are advised of their right to appeal agency decisions to the Interagency Security Classification Appeals Panel established by section 5.4 of this order.

PART 2—DERIVATIVE CLASSIFICATION

Sec. 2.1. Definitions. For purposes of this order:

(a) "Derivative classification" means the incorporating, paraphrasing, restating or generating in new form information that is already classified, and marking the newly developed material consistent with the classification markings that apply to the source information. Derivative classification includes the classification of information based on classification guidance. The duplication or reproduction of existing classified information is not derivative classification.

(b) "Classification guidance" means any instruction or source that prescribes the classification of specific information.

(c) "Classification guide" means a documentary form of classification guidance issued by an original classification authority that identifies the elements of information regarding a specific subject that must be classified and establishes the level and duration of classification for each such element.

(d) "Source document" means an existing document that contains classified information that is incorporated, paraphrased, restated, or generated in new form into a new document.

(e) "Multiple sources" means two or more source documents, classification guides, or a combination of both.

Sec. 2.2. Use of Derivative Classification. (a) Persons who only reproduce, extract, or summarize classified information, or who only apply classification markings derived from source material or as directed by a classification guide, need not possess original classification authority.

(b) Persons who apply derivative classification markings shall:

(1) observe and respect original classification decisions; and

(2) carry forward to any newly created documents the pertinent classification markings. For information derivatively classified based on multiple sources, the derivative classifier shall carry forward:

(A) the date or event for declassification that corresponds to the longest period of classification among the sources; and

(B) a listing of these sources on or attached to the official file or record copy.

Sec. 2.3. Classification Guides. (a) Agencies with original classification authority shall prepare classification guides to facilitate the proper and uniform derivative classification of information. These guides shall conform to standards contained in directives issued under this order.

(b) Each guide shall be approved personally and in writing by an official who:

(1) has program or supervisory responsibility over the information or is the senior agency official; and

(2) is authorized to classify information originally at the highest level of classification prescribed in the guide.

(c) Agencies shall establish procedures to assure that classification guides are reviewed and updated as provided in directives issued under this order.

PART 3—DECLASSIFICATION AND DOWNGRADING

Sec. 3.1. Definitions. For purposes of this order:

(a) "Declassification" means the authorized change in the status of information from classified information to unclassified information.

(b) "Automatic declassification" means the declassification of information based solely upon:

(1) the occurrence of a specific date or event as determined by the original classification authority; or

(2) the expiration of a maximum time frame for duration of classification established under this order.

(c) "Declassification authority" means:

(1) the official who authorized the original classification, if that official is still serving in the same position;

(2) the originator's current successor in function;

(3) a supervisory official of either; or

(4) officials delegated declassification authority in writing by the agency head or the senior agency official.

(d) "Mandatory declassification review" means the review for declassification of classified information in response to a request for declassification that meets the requirements under section 3.6 of this order.

(e) "Systematic declassification review" means the review for declassification of classified information contained in records that have been determined by the Archivist of the United States ("Archivist") to have permanent historical value in accordance with chapter 33 of title 44, United States Code.

(f) "Declassification guide" means written instructions issued by a declassification authority that describes the elements of information regarding a specific subject that may be declassified and the elements that must remain classified.

(g) "Downgrading" means a determination by a declassification authority that information classified and safeguarded at a specified level shall be classified and safeguarded at a lower level.

(h) "File series" means documentary material, regardless of its physical form or characteristics, that is arranged in accordance with a filing system or maintained as a unit because it pertains to the same function or activity.

Sec. 3.2. Authority for Declassification. (a) Information shall be declassified as soon as it no longer meets the standards for classification under this order.

(b) It is presumed that information that continues to meet the classification requirements under this order requires continued protection. In some exceptional cases, however, the need to protect such information

may be outweighed by the public interest in disclosure of the information, and in these cases the information should be declassified. When such questions arise, they shall be referred to the agency head or the senior agency official. That official will determine, as an exercise of discretion, whether the public interest in disclosure outweighs the damage to national security that might reasonably be expected from disclosure. This provision does not:

(1) amplify or modify the substantive criteria or procedures for classification; or

(2) create any substantive or procedural rights subject to judicial review.

(c) If the Director of the Information Security Oversight Office determines that information is classified in violation of this order, the Director may require the information to be declassified by the agency that originated the classification. Any such decision by the Director may be appealed to the President through the Assistant to the President for National Security Affairs. The information shall remain classified pending a prompt decision on the appeal.

(d) The provisions of this section shall also apply to agencies that, under the terms of this order, do not have original classification authority, but had such authority under predecessor orders.

Sec. 3.3. Transferred Information. (a) In the case of classified information transferred in conjunction with a transfer of functions, and not merely for storage purposes, the receiving agency shall be deemed to be the originating agency for purposes of this order.

(b) In the case of classified information that is not officially transferred as described in paragraph (a), above, but that originated in an agency that has ceased to exist and for which there is no successor agency, each agency in possession of such information shall be deemed to be the originating agency for purposes of this order. Such information may be declassified or downgraded by the agency in possession after consultation with any other agency that has an interest in the subject matter of the information.

(c) Classified information accessioned into the National Archives and Records Administration ("National Archives") as of the effective date of this order shall be declassified or downgraded by the Archivist in accordance with this order, the directives issued pursuant to this order, agency declassification guides, and any existing procedural agreement between the Archivist and the relevant agency head.

(d) The originating agency shall take all reasonable steps to declassify classified information contained in records determined to have permanent historical value before they are accessioned into the National Archives. However, the Archivist may require that records containing classified information be accessioned into the National Archives when necessary to comply with the provisions of the Federal Records Act. This provision does not apply to information being transferred to the Archivist pursuant to section 2203 of title 44, United States Code, or information for which the National Archives and Records Administration serves as the custodian of the records of an agency or organization that goes out of existence.

(e) To the extent practicable, agencies shall adopt a system of records management that will facilitate the public release of documents at the time such documents are declassified pursuant to the provisions for automatic declassification in sections 1.6 and 3.4 of this order.

Sec. 3.4. Automatic Declassification. (a) Subject to paragraph (b), below, within 5 years from the date of this order, all classified information contained in records that (1) are more than 25 years old, and (2) have been determined to have permanent historical value under title 44, United States Code, shall be automatically declassified whether or not the records have been reviewed. Subsequently, all classified information in such records shall be automatically declassified no longer than 25 years from the date of its original classification, except as provided in paragraph (b), below.

(b) An agency head may exempt from automatic declassification under paragraph (a), above, specific information, the release of which should be expected to:

(1) reveal the identity of a confidential human source, or reveal information about the application of an intelligence source or method, or reveal the identity of a human intelligence source when the unauthorized disclosure of that source would clearly and demonstrably damage the national security interests of the United States;

(2) reveal information that would assist in the development or use of weapons of mass destruction;

(3) reveal information that would impair U.S. cryptologic systems or activities;

(4) reveal information that would impair the application of state of the art technology within a U.S. weapon system;

(5) reveal actual U.S. military war plans that remain in effect;

(6) reveal information that would seriously and demonstrably impair relations between the United States and a foreign government, or seriously and demonstrably undermine ongoing diplomatic activities of the United States;

(7) reveal information that would clearly and demonstrably impair the current ability of United States Government officials to protect the President, Vice President, and other officials for whom protection services, in the interest of national security, are authorized;

(8) reveal information that would seriously and demonstrably impair current national security emergency preparedness plans; or

(9) violate a statute, treaty, or international agreement.

(c) No later than the effective date of this order, an agency head shall notify the President through the Assistant to the President for National Security Affairs of any specific file series of records for which a review or assessment has determined that the information within those file series almost invariably falls within one or more of the exemption categories listed in paragraph (b), above, and which the agency proposes to exempt from automatic declassification. The notification shall include:

(1) a description of the file series;

(2) an explanation of why the information within the file series is almost invariably exempt from automatic declassification and why the information must remain classified for a longer period of time; and

(3) except for the identity of a confidential human source or a human intelligence source, as provided in paragraph (b), above, a specific date or event for declassification of the information.

The President may direct the agency head not to exempt the file series or to declassify the information within that series at an earlier date than recommended.

(d) At least 180 days before information is automatically declassified under this section, an agency head or senior agency official shall notify the Director of the Information Security Oversight Office, serving as Executive Secretary of the Interagency Security Classification Appeals Panel, of any specific information beyond that included in a notification to the President under paragraph (c), above, that the agency proposes to exempt from automatic declassification. The notification shall include:

(1) a description of the information;

(2) an explanation of why the information is exempt from automatic declassification and must remain classified for a longer period of time; and

(3) except for the identity of a confidential human source or a human intelligence source, as provided in paragraph (b), above, a specific date or event for declassification of the information. The Panel may

direct the agency not to exempt the information or to declassify it at an earlier date than recommended. The agency head may appeal such a decision to the President through the Assistant to the President for National Security Affairs. The information will remain classified while such an appeal is pending.

(e) No later than the effective date of this order, the agency head or senior agency official shall provide the Director of the Information Security Oversight Office with a plan for compliance with the requirements of this section, including the establishment of interim target dates. Each such plan shall include the requirement that the agency declassify at least 15 percent of the records affected by this section no later than 1 year from the effective date of this order, and similar commitments for subsequent years until the effective date for automatic declassification.

(f) Information exempted from automatic declassification under this section shall remain subject to the mandatory and systematic declassification review provisions of this order.

(g) The Secretary of State shall determine when the United States should commence negotiations with the appropriate officials of a foreign government or international organization of governments to modify any treaty or international agreement that requires the classification of information contained in records affected by this section for a period longer than 25 years from the date of its creation, unless the treaty or international agreement pertains to information that may otherwise remain classified beyond 25 years under this section.

Sec. 3.5. Systematic Declassification Review. (a) Each agency that has originated classified information under this order or its predecessors shall establish and conduct a program for systematic declassification review. This program shall apply to historically valuable records exempted from automatic declassification under section 3.4 of this order. Agencies shall prioritize the systematic review of records based upon:

(1) recommendations of the Information Security Policy Advisory Council, established in section 5.5 of this order, on specific subject areas for systematic review concentration; or

(2) the degree of researcher interest and the likelihood of declassification upon review.

(b) The Archivist shall conduct a systematic declassification review program for classified information: (1) accessioned into the National Archives as of the effective date of this order; (2) information transferred to the Archivist pursuant to section 2203 of title 44, United States Code; and (3) information for which the National Archives and Records Administration serves as the custodian of the records of an agency or organization that has gone out of existence. This program shall apply to pertinent records no later than 25 years from the date of their creation. The Archivist shall establish priorities for the systematic review of these records based upon the recommendations of the Information Security Policy Advisory Council; or the degree of researcher interest and the likelihood of declassification upon review. These records shall be reviewed in accordance with the standards of this order, its implementing directives, and declassification guides provided to the Archivist by each agency that

originated the records. The Director of the Information Security Oversight Office shall assure that agencies provide the Archivist with adequate and current declassification guides.

(c) After consultation with affected agencies, the Secretary of Defense may establish special procedures for systematic review for declassification of classified cryptologic information, and the Director of Central Intelligence may establish special procedures for systematic review for declassification of classified information pertaining to intelligence activities (including special activities), or intelligence sources or methods.

Sec. 3.6. Mandatory Declassification Review. (a) Except as provided in paragraph (b), below, all information classified under this order or predecessor orders shall be subject to a review for declassification by the originating agency if:

(1) the request for a review describes the document or material containing the information with sufficient specificity to enable the agency to locate it with a reasonable amount of effort;

(2) the information is not exempted from search and review under the Central Intelligence Agency Information Act; and

(3) the information has not been reviewed for declassification within the past 2 years. If the agency has reviewed the information within the past 2 years, or the information is the subject of pending litigation, the agency shall inform the requester of this fact and of the requester's appeal rights.

(b) Information originated by:

(1) the incumbent President;

(2) the incumbent President's White House Staff;

(3) committees, commissions, or boards appointed by the incumbent President; or

(4) other entities within the Executive Office of the President that solely advise and assist the incumbent President is exempted from the provisions of paragraph (a), above. However, the Archivist shall have the authority to review, downgrade, and declassify information of former Presidents under the control of the Archivist pursuant to sections 2107, 2111, 2111 note, or 2203 of title 44, United States Code. Review procedures developed by the Archivist shall provide for consultation with agencies having primary subject matter interest and shall be consistent with the provisions of applicable laws or lawful agreements that pertain to the respective Presidential papers or records. Agencies with primary subject matter interest shall be notified promptly of the Archivist's decision. Any final decision by the Archivist may be appealed by the requester or an agency to the Interagency Security Classification Appeals Panel. The information shall remain classified pending a prompt decision on the appeal.

(c) Agencies conducting a mandatory review for declassification shall declassify information that no longer meets the standards for classification under this order. They shall release this information unless withholding is otherwise authorized and warranted under applicable law.

(d) In accordance with directives issued pursuant to this order, agency heads shall develop procedures to process requests for the mandatory review of classified information. These procedures shall apply to information classified under this or predecessor orders. They also shall provide a means for administratively appealing a denial of a mandatory review request, and for notifying the requester of the right to appeal a final agency decision to the Interagency Security Classification Appeals Panel.

(e) After consultation with affected agencies, the Secretary of Defense shall develop special procedures for the review of cryptologic information, the Director of Central Intelligence shall develop special procedures for the review of information pertaining to intelligence activities (including special activities), or intelligence sources or methods, and the Archivist shall develop special procedures for the review of information accessioned into the National Archives.

Sec. 3.7. Processing Requests and Reviews. In response to a request for information under the Freedom of Information Act, the Privacy Act of 1974, or the mandatory review provisions of this order, or pursuant to the automatic declassification or systematic review provisions of this order:

(a) An agency may refuse to confirm or deny the existence or nonexistence of requested information whenever the fact of its existence or nonexistence is itself classified under this order.

(b) When an agency receives any request for documents in its custody that contain information that was originally classified by another agency, or comes across such documents in the process of the automatic

declassification or systematic review provisions of this order, it shall refer copies of any request and the pertinent documents to the originating agency for processing, and may, after consultation with the originating agency, inform any requester of the referral unless such association is itself classified under this order. In cases in which the originating agency determines in writing that a response under paragraph (a), above, is required, the referring agency shall respond to the requester in accordance with that paragraph.

Sec. 3.8. Declassification Database. (a) The Archivist in conjunction with the Director of the Information Security Oversight Office and those agencies that originate classified information, shall establish a Government wide database of information that has been declassified. The Archivist shall also explore other possible uses of technology to facilitate the declassification process.

(b) Agency heads shall fully cooperate with the Archivist in these efforts.

(c) Except as otherwise authorized and warranted by law, all declassified information contained within the database established under paragraph (a), above, shall be available to the public.

PART 4—SAFEGUARDING

Sec. 4.1. Definitions. For purposes of this order: (a) "Safeguarding" means measures and controls that are prescribed to protect classified information.

(b) "Access" means the ability or opportunity to gain knowledge of classified information.

(c) "Need-to-know" means a determination made by an authorized holder of classified information that a prospective recipient requires access to specific classified information in order to perform or assist in a lawful and authorized governmental function.

(d) "Automated information system" means an assembly of computer hardware, software, or firmware configured to collect, create, communicate, compute, disseminate, process, store, or control data or information.

(e) "Integrity" means the state that exists when information is unchanged from its source and has not been accidentally or intentionally modified, altered, or destroyed.

(f) "Network" means a system of two or more computers that can exchange data or information.

(g) "Telecommunications" means the preparation, transmission, or communication of information by electronic means.

(h) "Special access program" means a program established for a specific class of classified information that imposes safeguarding and access requirements that exceed those normally required for information at the same classification level.

Sec. 4.2. General Restrictions on Access. (a) A person may have access to classified information provided that:

(1) a favorable determination of eligibility for access has been made by an agency head or the agency head's designee;

(2) the person has signed an approved nondisclosure agreement; and

(3) the person has a need-to-know the information.

(b) Classified information shall remain under the control of the originating agency or its successor in function. An agency shall not disclose information originally classified by another agency without its authorization. An official or employee leaving agency service may not remove classified information from the agency's control.

(c) Classified information may not be removed from official premises without proper authorization.

(d) Persons authorized to disseminate classified information outside the executive branch shall assure the protection of the information in a manner equivalent to that provided within the executive branch.

(e) Consistent with law, directives, and regulation, an agency head or senior agency official shall establish uniform procedures to ensure that automated information systems, including networks and telecommunications systems, that collect, create, communicate, compute, disseminate, process, or store classified informaion have controls that:

(1) prevent access by unauthorized persons; and

(2) ensure the integrity of the information.

(f) Consistent with law, directives, and regulation, each agency head or senior agency official shall establish controls to ensure that classified information is used, processed, stored, reproduced, transmitted, and

destroyed under conditions that provide adequate protection and prevent access by unauthorized persons.

(g) Consistent with directives issued pursuant to this order, an agency shall safeguard foreign government information under standards that provide a degree of protection at least equivalent to that required by the government or international organization of governments that furnished the information. When adequate to achieve equivalency, these standards may be less restrictive than the safeguarding standards that ordinarily apply to United States "Confidential" information, including allowing access to individuals with a need-to-know who have not otherwise been cleared for access to classified information or executed an approved nondisclosure agreement.

(h) Except as provided by statute or directives issued pursuant to this order, classified information originating in one agency may not be disseminated outside any other agency to which it has been made available without the consent of the originating agency. An agency head or senior agency official may waive this requirement for specific information originated within that agency. For purposes of this section, the Department of Defense shall be considered one agency.

Sec. 4.3. Distribution Controls. (a) Each agency shall establish controls over the distribution of classified information to assure that it is distributed only to organizations or individuals eligible for access who also have a need-to-know the information.

(b) Each agency shall update, at least annually, the automatic, routine, or recurring distribution of classified information that they distribute. Recipients shall cooperate fully with distributors who are updating

distribution lists and shall notify distributors whenever a relevant change in status occurs.

Sec. 4.4. Special Access Programs. (a) Establishment of special access programs. Unless otherwise authorized by the President, only the Secretaries of State, Defense and Energy, and the Director of Central Intelligence, or the principal deputy of each, may create a special access program. For special access programs pertaining to intelligence activities (including special activities, but not including military operational, strategic and tactical programs), or intelligence sources or methods, this function will be exercised by the Director of Central Intelligence. These officials shall keep the number of these programs at an absolute minimum, and shall establish them only upon a specific finding that:

(1) the vulnerability of, or threat to, specific information is exceptional; and

(2) the normal criteria for determining eligibility for access applicable to information classified at the same level are not deemed sufficient to protect the information from unauthorized disclosure; or

(3) the program is required by statute.

(b) Requirements and Limitations. (1) Special access programs shall be limited to programs in which the number of persons who will have access ordinarily will be reasonably small and commensurate with the objective of providing enhanced protection for the information involved.

(2) Each agency head shall establish and maintain a system of accounting for special access programs

consistent with directives issued pursuant to this order.

(3) Special access programs shall be subject to the oversight program established under section 5.6(c) of this order. In addition, the Director of the Information Security Oversight Office shall be afforded access to these programs, in accordance with the security requirements of each program, in order to perform the functions assigned to the Information Security Oversight Office under this order. An agency head may limit access to a special access program to the Director and no more than one other employee of the Information Security Oversight Office; or, for special access programs that are extraordinarily sensitive and vulnerable, to the Director only.

(4) The agency head or principal deputy shall review annually each special access program to determine whether it continues to meet the requirements of this order.

(5) Upon request, an agency shall brief the Assistant to the President for National Security Affairs, or his or her designee, on any or all of the agency's special access programs.

(c) Within 180 days after the effective date of this order, each agency head or principal deputy shall review all existing special access programs under the agency's jurisdiction. These officials shall terminate any special access programs that do not clearly meet the provisions of this order. Each existing special access program that an agency head or principal deputy

validates shall be treated as if it were established on the effective date of this order.

(d) Nothing in this order shall supersede any requirement made by or under 10 U.S.C. 119.

Sec. 4.5. Access by Historical Researchers and Former Presidential Appointees. (a) The requirement in section 4.2(a)(3) of this order that access to classified information may be granted only to individuals who have a need-to-know the information may be waived for persons who:

(1) are engaged in historical research projects; or

(2) previously have occupied policy-making positions to which they were appointed by the President.

(b) Waivers under this section may be granted only if the agency head or senior agency official of the originating agency:

(1) determines in writing that access is consistent with the interest of national security;

(2) takes appropriate steps to protect classified information from unauthorized disclosure or compromise, and ensures that the information is safeguarded in a manner consistent with this order; and

(3) limits the access granted to former Presidential appointees to items that the person originated, reviewed, signed, or received while serving as a Presidential appointee.

PART 5—IMPLEMENTATION AND REVIEW

Sec. 5.1. Definitions. For purposes of this order: (a) "Self-inspection" means the internal review and evaluation of individual agency activities and the agency as a whole with respect to the implementation of the program established under this order and its implementing directives.

(b) "Violation" means:

(1) any knowing, willful, or negligent action that could reasonably be expected to result in an unauthorized disclosure of classified information;

(2) any knowing, willful, or negligent action to classify or continue the classification of information contrary to the requirements of this order or its implementing directives; or

(3) any knowing, willful, or negligent action to create or continue a special access program contrary to the requirements of this order.

(c) "Infraction" means any knowing, willful, or negligent action contrary to the requirements of this order or its implementing directives that does not comprise a "violation," as defined above.

Sec. 5.2. Program Direction. (a) The Director of the Office of Management and Budget, in consultation with the Assistant to the President for National Security Affairs and the co-chairs of the Security Policy Board, shall issue such directives as are necessary to implement this order. These directives shall be binding upon

the agencies. Directives issued by the Director of the Office of Management and Budget shall establish standards for:

(1) classification and marking principles;

(2) agency security education and training programs;

(3) agency self-inspection programs; and

(4) classification and declassification guides.

(b) The Director of the Office of Management and Budget shall delegate the implementation and monitorship functions of this program to the Director of the Information Security Oversight Office.

(c) The Security Policy Board, established by a Presidential Decision Directive, shall make a recommendation to the President through the Assistant to the President for National Security Affairs with respect to the issuance of a Presidential directive on safeguarding classified information. The Presidential directive shall pertain to the handling, storage, distribution, transmittal, and destruction of and accounting for classified information.

Sec. 5.3. Information Security Oversight Office. (a) There is established within the Office of Management and Budget an Information Security Oversight Office. The Director of the Office of Management and Budget shall appoint the Director of the Information Security Oversight Office, subject to the approval of the President.

(b) Under the direction of the Director of the Office of Management and Budget acting in consultation with

the Assistant to the President for National Security Affairs, the Director of the Information Security Oversight Office shall:

(1) develop directives for the implementation of this order;

(2) oversee agency actions to ensure compliance with this order and its implementing directives;

(3) review and approve agency implementing regulations and agency guides for systematic declassification review prior to their issuance by the agency;

(4) have the authority to conduct on-site reviews of each agency's program established under this order, and to require of each agency those reports, information, and other cooperation that may be necessary to fulfill its responsibilities. If granting access to specific categories of classified information would pose an exceptional national security risk, the affected agency head or the senior agency official shall submit a written justification recommending the denial of access to the Director of the Office of Management and Budget within 60 days of the request for access. Access shall be denied pending a prompt decision by the Director of the Office of Management and Budget, who shall consult on this decision with the Assistant to the President for National Security Affairs;

(5) review requests for original classification authority from agencies or officials not granted original classification authority and, if deemed appropriate, recommend Presidential approval

through the Director of the Office of Management and Budget;

(6) consider and take action on complaints and suggestions from persons within or outside the Government with respect to the administration of the program established under this order;

(7) have the authority to prescribe, after consultation with affected agencies, standardization of forms or procedures that will promote the implementation of the program established under this order;

(8) report at least annually to the President on the implementation of this order; and

(9) convene and chair interagency meetings to discuss matters pertaining to the program established by this order.

Sec. 5.4. Interagency Security Classification Appeals Panel.

(a) Establishment and Administration.

(1) There is established an Interagency Security Classification Appeals Panel ("Panel"). The Secretaries of State and Defense, the Attorney General, the Director of Central Intelligence, the Archivist of the United States, and the Assistant to the President for National Security Affairs shall each appoint a senior level representative to serve as a member of the Panel. The President shall select the Chair of the Panel from among the Panel members.

(2) A vacancy on the Panel shall be filled as quickly as possible as provided in paragraph (1), above.

(3) The Director of the Information Security Oversight Office shall serve as the Executive Secretary. The staff of the Information Security Oversight Office shall provide program and administrative support for the Panel.

(4) The members and staff of the Panel shall be required to meet eligibility for access standards in order to fulfill the Panel's functions.

(5) The Panel shall meet at the call of the Chair. The Chair shall schedule meetings as may be necessary for the Panel to fulfill its functions in a timely manner.

(6) The Information Security Oversight Office shall include in its reports to the President a summary of the Panel's activities.

(b) Functions. The Panel shall:

(1) decide on appeals by persons who have filed classification challenges under section 1.9 of this order;

(2) approve, deny, or amend agency exemptions from automatic declassification as provided in section 3.4 of this order; and

(3) decide on appeals by persons or entities who have filed requests for mandatory declassification review under section 3.6 of this order.

(c) Rules and Procedures. The Panel shall issue bylaws, which shall be published in the Federal Register

no later than 120 days from the effective date of this order. The bylaws shall establish the rules and procedures that the Panel will follow in accepting, considering, and issuing decisions on appeals. The rules and procedures of the Panel shall provide that the Panel will consider appeals only on actions in which: (1) the appellant has exhausted his or her administrative remedies within the responsible agency; (2) there is no current action pending on the issue within the federal courts; and (3) the information has not been the subject of review by the federal courts or the Panel within the past 2 years.

(d) Agency heads will cooperate fully with the Panel so that it can fulfill its functions in a timely and fully informed manner. An agency head may appeal a decision of the Panel to the President through the Assistant to the President for National Security Affairs. The Panel will report to the President through the Assistant to the President for National Security Affairs any instance in which it believes that an agency head is not cooperating fully with the Panel.

(e) The Appeals Panel is established for the sole purpose of advising and assisting the President in the discharge of his constitutional and discretionary authority to protect the national security of the United States. Panel decisions are committed to the discretion of the Panel, unless reversed by the President.

Sec. 5.5. Information Security Policy Advisory Council.

(a) Establishment. There is established an Information Security Policy Advisory Council ("Council"). The Council shall be composed of seven members appointed by the President for staggered terms not to exceed 4

years, from among persons who have demonstrated interest and expertise in an area related to the subject matter of this order and are not otherwise employees of the Federal Government. The President shall appoint the Council Chair from among the members. The Council shall comply with the Federal Advisory Committee Act, as amended, 5 U.S.C. App. 2.

(b) Functions. The Council shall:

(1) advise the President, the Assistant to the President for National Security Affairs, the Director of the Office of Management and Budget, or such other executive branch officials as it deems appropriate, on policies established under this order or its implementing directives, including recommended changes to those policies;

(2) provide recommendations to agency heads for specific subject areas for systematic declassification review; and

(3) serve as a forum to discuss policy issues in dispute.

(c) Meetings. The Council shall meet at least twice each calendar year, and as determined by the Assistant to the President for National Security Affairs or the Director of the Office of Management and Budget.

(d) Administration.

(1) Each Council member may be compensated at a rate of pay not to exceed the daily equivalent of the annual rate of basic pay in effect for grade GS-18 of the general schedule under section 5376 of title 5, United States Code, for each day during which that

member is engaged in the actual performance of the duties of the Council.

(2) While away from their homes or regular place of business in the actual performance of the duties of the Council, members may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by law for persons serving intermittently in the Government service (5 U.S.C. 5703(b)).

(3) To the extent permitted by law and subject to the availability of funds, the Information Security Oversight Office shall provide the Council with administrative services, facilities, staff, and other support services necessary for the performance of its functions.

(4) Notwithstanding any other Executive order, the functions of the President under the Federal Advisory Committee Act, as amended, that are applicable to the Council, except that of reporting to the Congress, shall be performed by the Director of the Information Security Oversight Office in accordance with the guidelines and procedures established by the General Services Administration.

Sec. 5.6. General Responsibilities. Heads of agencies that originate or handle classified information shall:

(a) demonstrate personal commitment and commit senior management to the successful implementation of the program established under this order;

(b) commit necessary resources to the effective implementation of the program established under this order; and

(c) designate a senior agency official to direct and administer the program, whose responsibilities shall include:

(1) overseeing the agency's program established under this order, provided, an agency head may designate a separate official to oversee special access programs authorized under this order. This official shall provide a full accounting of the agency's special access programs at least annually;

(2) promulgating implementing regulations, which shall be published in the **Federal Register** to the extent that they affect members of the public;

(3) establishing and maintaining security education and training programs;

(4) establishing and maintaining an ongoing self-inspection program, which shall include the periodic review and assessment of the agency's classified product;

(5) establishing procedures to prevent unnecessary access to classified information, including procedures that: (i) require that a need for access to classified information is established before initiating administrative clearance procedures; and (ii) ensure that the number of persons granted access to classified information is limited to the minimum consistent with operational and security requirements and needs;

(6) developing special contingency plans for the safeguarding of classified information used in or near hostile or potentially hostile areas;

(7) assuring that the performance contract or other system used to rate civilian or military personnel performance includes the management of classified information as a critical element or item to be evaluated in the rating of: (i) original classification authorities; (ii) security managers or security specialists; and (iii) all other personnel whose duties significantly involve the creation or handling of classified information;

(8) accounting for the costs associated with the implementation of this order, which shall be reported to the Director of the Information Security Oversight Office for publication; and

(9) assigning in a prompt manner agency personnel to respond to any request, appeal, challenge, complaint, or suggestion arising out of this order that pertains to classified information that originated in a component of the agency that no longer exists and for which there is no clear successor in function.

Sec. 5.7. Sanctions. (a) If the Director of the Information Security Oversight Office finds that a violation of this order or its implementing directives may have occurred, the Director shall make a report to the head of the agency or to the senior agency official so that corrective steps, if appropriate, may be taken.

(b) Officers and employees of the United States Government, and its contractors, licensees, certificate holders, and grantees shall be subject to appropriate sanctions if they knowingly, willfully, or negligently:

(1) disclose to unauthorized persons information properly classified under this order or predecessor orders;

(2) classify or continue the classification of information in violation of this order or any implementing directive;

(3) create or continue a special access program contrary to the requirements of this order; or

(4) contravene any other provision of this order or its implementing directives.

(c) Sanctions may include reprimand, suspension without pay, removal, termination of classification authority, loss or denial of access to classified information, or other sanctions in accordance with applicable law and agency regulation.

(d) The agency head, senior agency official, or other supervisory official shall, at a minimum, promptly remove the classification authority of any individual who demonstrates reckless disregard or a pattern of error in applying the classification standards of this order.

(e) The agency head or senior agency official shall:

(1) take appropriate and prompt corrective action when a violation or infraction under paragraph (b), above, occurs; and

(2) notify the Director of the Information Security Oversight Office when a violation under paragraph (b)(1), (2) or (3), above, occurs.

PART 6—GENERAL PROVISIONS

Sec. 6.1. General Provisions. (a) Nothing in this order shall supersede any requirement made by or under the Atomic Energy Act of 1954, as amended, or the National Security Act of 1947, as amended. "Restricted Data" and "Formerly Restricted Data" shall be handled, protected, classified, downgraded, and declassified in conformity with the provisions of the Atomic Energy Act of 1954, as amended, and regulations issued under that Act.

(b) The Attorney General, upon request by the head of an agency or the Director of the Information Security Oversight Office, shall render an interpretation of this order with respect to any question arising in the course of its administration.

(c) Nothing in this order limits the protection afforded any information by other provisions of law, including the exemptions to the Freedom of Information Act, the Privacy Act, and the National Security Act of 1947, as amended. This order is not intended, and should not be construed, to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or its employees. The foregoing is in addition to the specific provisos set forth in sections 1.2(b), 3.2(b) and 5.4(e) of this order.

(d) Executive Order No. 12356 of April 6, 1982, is revoked as of the effective date of this order.

Sec. 6.2. Effective Date. This order shall become effective 180 days from the date of this order.

/s/ WILLIAM J. CLINTON
WILLIAM J. CLINTON
THE WHITE HOUSE,
April 17, 1995.