

FREEDOM OF INFORMATION ACT

Processing FOIA Requests for records marked as classified.

You have asked whether a record marked with a national security classified marking under Executive Order 13526 (EO), *Classified National Security Information*, such as “Secret,” can be withheld in its entirety under exemption (b)(1) of the Freedom of Information Act (FOIA, if the record also contains unclassified information. Usually, the answer to your question will be “no.”

The FOIA, 5 U.S.C. § 552, is implemented within the Department of Defense and Air Force by DoD 5400.7-R_AFMAN 33-302, *Freedom of Information Act Program*. The FOIA provides that “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under” the subsection setting forth the exemption. 5 U.S.C. § 552(b). “The focus of FOIA is information, not documents, and an agency cannot justify withholding an entire document simply by showing that it contains some exempt material.” *Mead Data Cent., Inc. v. Dept of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977).

Accordingly, under the FOIA and the implementing Department of Defense (DoD) and Air Force guidance, classified records requested under the FOIA must be reviewed by the appropriate classification authority for declassification and release. *See* DoD 5400.7-R_AFMAN 302, paragraphs C3.2.1.1 and C3.2.1.1.3, and C5.2.4. The classification authority must determine whether the document and information contained in the document is currently and properly classified under existing executive orders (Executive Order 13526) and/or applicable statutes, such as the Atomic Energy Act. If the record/information is not currently properly classified, appropriate information that does not meet current classification standards is declassified and cannot be withheld under FOIA exemption (b)(1), which is the exemption that requires the Government to withhold properly classified information from release. At the same time, information that had been marked unclassified can be classified if the review determines it should be classified. *See* DoD 5400.7-R_AFMAN 302, paragraph C3.2.1.1.2.

Of course, another FOIA exemption may also pertain to classified or unclassified information contained in a document marked with a classification marking, which would permit withholding under that particular FOIA exemption.

If after this review by the classification authority the record is found to contain properly classified information, any segregable unclassified portions of the document can’t normally be withheld under FOIA exemption (b)(1). Again, another FOIA exemption might warrant withholding unclassified portions of otherwise classified records.

As with all the use of all FOIA exemptions, “one size does not fit all” with respect to redaction and release issues. This opinion is intended to address general matters and issues to consider in determining release of records marked with a national security classification under EO 13526 or an applicable statute. The above listed authorities, as well as guidance on the Department of Justice website and as contained in their current “*Guide to the Freedom of Information Act*” provides further helpful information.

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