BRIEF FOR PLAINTIFF-APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA

No. 78-2305

JAMES H. LESAR,

Plaintiff-Appellant

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant-Appellee

On Appeal from the United States District Court for the District of Columbia, Hon. Gerhard A. Gesell, Judge

James H. Lesar
910 16th Street, N.W., #600
Washington, D.C. 20006

Pro se

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	:	
Plaintiff-Appellant	:	
	:	
v.	:	No. 78-2305
	:	
	:	
U.S. DEPARTMENT OF JUSTICE	:	
	:	
Defendant-Appellee	:	

CERTIFICATE REQUIRED BY RULE 8(c) OF THE GENERAL RULES OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Appellant pro se certifies that the following listed parties and amici (if any) appeared below:

James H. Lesar (Plaintiff)

U.S. Department of Justice (Defendant)

These representations are made in order that judges of this Court, inter alia, may evaluate possible disqualification or recusal.

JAMES H. LESAR
Appellant pro se

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BRIEF FOR PLAINTIFF-APPELLANT

STATEMENT OF ISSUES

1. Whether change in law during pendency of appeal requires remand for de novo review of Exemption 1 claims under provisions of new Executive order (E.O. 12065) and Ray v. Turner, 190 U.S.App. D.C. 290, 587 F.2d 1187 (1978)?

2. Where records sought by plaintiff were classified after agency received his Freedom of Information Act request, was it

error for the District Court to grant summary judgment without allowing him to engage in discovery and without conducting in camera examination?

3. Are federal agency copies of the records of a local law enforcement agency entitled to blanket immunity under 5 U.S.C. § 552(b)(7)(D)?

4. Can agency properly excise information under 5 U.S.C. § 552(b)(7)(C) and (D) where records sought were not compiled for law enforcement purposes?

5. Can information withheld pursuant to 5 U.S.C. § 552(b)(2) be released in a manner which accomodates legitimate public interest in disclosure without harming governmental interests?

6. Did genuine issues of material fact preclude award of summary judgment in favor of defendant?

This case has not previously been before this Court, or any other Court (other than the Court below), under this or any other title.

STATUTES AND REGULATIONS

The Freedom of Information Act, 5 U.S.C. § 552, provides in pertinent part:

> (b) 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;
>
> (2) related solely to the internal personnel rules and practices of an agency;
>
> (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would *** (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source

Because of their length Executive order 11652, Executive order 12065, and the National Security Council directive of May 19, 1972 implementing Executive order 11652 are set forth in the addendum to this brief.

REFERENCES TO PARTIES AND RULINGS

The parties to this litigation are James H. Lesar, the plaintiff-appellant, and the United States Department of Justice, the defendant-appellee.

On July 28, 1978 United States District Court Judge Gerhard A. Gesell filed a memorandum opinion on the issues in this Freedom of Information Act suit. This opinion is officially reported in

Lesar v. United States Dept. of Justice, 455 F.Supp. 921 (1978) and is reprinted at App. _____.

On July 31, 1978, Judge Gesell filed an order and judgment granting summary judgment in favor of the defendant. [App. ____ _____]

STATEMENT OF THE CASE

A. Historical Background--Genesis of OPR Task Force

On November 1, 1975, William C. Sullivan, who had formerly served as Assistant Director, Domestic Intelligence Division, Federal Bureau of Investigation (FBI), testified to a Senate committee about the FBI's campaign of harrassment against Dr. Martin Luther King, Jr. He stated that from late 1963 until his assassination in April, 1968, Dr. King was the target of an intensive campaign by the FBI to "neutralize him as an effective civil rights leader. He asserted that in the war against King, "No holds were barred." (Senate Report No. 94-755, Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, Book II, p. 11)

On November 24, 1975, as a consequence of Sullivan's testimony, Attorney General Edward H. Levi directed the Civil Rights Division of the Department of Justice to review Department of Justice and FBI files to determine whether the investigation of Dr. King's assassination should be reopened. On December 1, 1975,

Assistant Attorney General J. Stanley Pottinger, Chief of the Civil Rights Division, specified that answers to two questions should be sought:

> 1. What action, if any, was undertaken by the FBI which had or may have had an effect, direct or indirect, on the assassination of Dr. Martin Luther King?
>
> 2. What action, if any, was undertaken by the FBI which had or may have had any other adverse effect, direct or indirect, on Martin Luther King?

On March 31, 1976, the Chief of the Civil Rights Division's Criminal Section, Mr. Robert A. Murphy, submitted a 51-page report on the results of his inquiry.[1/] In a memorandum accompanying his report, Murphy recommended against reopening the investigation into Dr. King's assassination because "there is no evidence that the Bureau had anything to do with the shooting of Dr. King." Murphy further stated that while he believed that serious violations of the privacy of Dr. King and many others had resulted from FBI actions, he did not recommend that action be taken against any individual because: (1) if criminal acts had occurred, the statute of limitations had long since expired; (2) no one had filed a civil suit against the Department or the FBI, in spite of publicity about the FBI's activities, so no decision had been made about what position the Department might take; and (3) no FBI employee who was a section chief or higher who was involved in the

---

1/ Murphy's March 31, 1976 report is one of the records at issue in plaintiff's suit. Initially it was withheld in its entirety under Exemptions 1, 5, and 7(C) and (E). [App. ___] Most of it was later released, but substantial portions remain withheld under Exemptions 1 and 7(C). (App. _____]

King case still worked for the FBI, so no disciplinary action was needed. Murphy's memorandum also stated:

> I recommend against a public report by the Department or the appointing of a "blue ribbon" committee. The Church committee has largely performed that function and the risk of adversely affecting the reputation of many people is too great. I certainly recommend against my report being made public.

The Murphy report, most of which was made public as a result of this lawsuit, is almost entirely devoted to the FBI's long campaign of harassment against Dr. King. Of its 51 pages, less than a page and a half contain material relating to Dr. King's assassination. This includes Murphy's statement that, "I saw nothing in the files I read that indicates any invovlement of the FBI in the assassination of Dr. King."

Murphy's report was transmitted to the Attorney General along with a covering memorandum by Assistant Attorney General J. Stanley Pottinger dated April 9, 1976. Pottinger stated that on the basis of the five-month preliminary review of files at FBI Headquarters which the Civil Rights Division had performed at his his direction, his tentative conclusions were: (1) there was no basis to believe that the FBI in any way caused the death of Dr. King, (2) no evidence was discovered that the FBI investigation of the assassination of Dr. King was not thorough and honest, and (3) instances were found indicating that the FBI undertook a systematic program of harasment of Dr. King in order to discredit him and harm both him and the movement he led.

Stating that the FBI's campaign of harassment against Dr. King "fairly gives rise to the question whether it culminated in some action which caused his death, and logically raises the question whether the investigation by the Bureau into his death was tainted by its institutional dislike for King," Pottinger recommended the establishment of a Justice Department Task Force "for the purpose of completing the review which we have begun." Pottinger also recommended the appointment of an Advisory Committee of five to nine distinguished citizens to review the work of the Task Force. The Advisory Committee would have total and unfettered access to all "files, witnesses, and other information available to the Department and the Task Force . . . ." Its purpose would be to "have an outside, fresh perspective on the state of our present information and the conduct of the investigation as it proceeds to its conclusions."

On April 26, 1976, Attorney General Edward H. Levi directed Michael E. Shaheen of the Office of Professional Responsibility to continue the review which the Civil Rights Division had begun and to furnish him and FBI Director Clarence M. Kelley with answers to four specific questions: (1) Whether the FBI investigation of Dr. King's assassination was thorough and honest; (2) Whether there is any evidence that the FBI was involved in the assassination of Dr. King; (3) Whether, in light of the first two matters, there is any new evidence which has come to the attention of the Department concerning the assassination of Dr. King; (4) Whether the nature

of the relationship between the Bureau and Dr. King calls for criminal prosecutions, disciplinary proceedings, or other appropriate action." The Attorney General also directed that in view of the work already done, and the tentative conclusions reached, "special emphasis should be be given to the fourth question."

Ten months later, on February 18, 1977, the "Report of the Justice Department Task Force to Review the FBI Martin Luther King, Jr. Security and Assassination Investigations" ("Task Force Report") was publicly released. Based on the work of five attorneys and two research analysts who are said to have reviewed more than 200,000 documents from FBI Headquarters and Field Office files and interviewed some 40 witnesses, it concluded that "the FBI had conducted a painstaking and successful investigation of the 1968 assassination in Memphis, Tennessee," that the Task Force had found "no evidence of FBI complicity" in Dr. King's murder, and that the FBI's COINTELPRO-type harassment of Dr. King and its efforts to drive him out of the civil rights movement were clearly improper.

B. Plaintiff's FOIA Request

Although not publicly released until February 18, 1977, the Task Force Report was released to governmental officials as early as January 11, 1977, when it was leaked on Capitol Hill. [June 4, 1978 Weisberg Affidavit, ¶144] On February 7, 1977,

plaintiff-appellant James H. Lesar ("Lesar") requested that the Department of Justice ("the Department") provide him with copies of the following records:

> 1. Any orders, memorandums, or directives instructing the Civil Rights Division to review the investigation into the assassination of Dr. Martin Luther King, Jr.
>
> 2. The report made by Assistant Attorney General J. Stanley Pottinger on the 1975-1976 review which the Civil Rights Division conducted of the King assassination.
>
> 3. Any press release relating to a review by the Civil Rights Division of the King assassination.
>
> 4. Any orders, memorandums, or directives instructing the Office of Professional Responsibility to review the investigation of Dr. King's assassination.
>
> 5. Any orders, memorandums, or directives to the Project Team which conducted the review of Dr. King's assassination for the Office of Professional Responsibility.
>
> 6. the 148 page report by the Office of Professional Responsibility on its review of the King assassination.

By letter dated February 23, 1977, Michael E. Shaheen, Jr., Counsel for the Office of Professional Responsibility (OPR), addressed items 4-6 of Lesar's Fredom of Information Act ("FOIA") request. In response to item 4, he enclosed the Attorney General's April 26, 1976 memorandum instructing OPR "to complete the review of the FBI's investigation of the assassination of Dr. King." He advised Lesar that there were no "written orders, memoranda or directives" responsive to item 5 other than the Attorney General's

April 26, 1976 memorandum released in response to item 4. In response to item 6, he closed a copy of the Task Force Report "on the FBI's investigation of the assassination of Dr. King. [_____]

By letter dated March 2, 1977, the Civil Rights Division notified Lesar that it was processing his request with respect to items 1 and 2 but would need to extend the deadline for response an additional five working days in order to consult with "appropriate Department staff prior to making any final determination as to what, if any, records may be released . . . ." [App. _____]

By letter dated March 3, 1977, Marvin Wall, Director of Public Information, Department of Justice, furnished Lesar with copies of press releases on Dr. King and transcripts of of press conferences and interviews in which he was mentioned. [App. ___]

On March 9, 1977, Deputy Assistant Attorney James P. Turner of the Civil Rights Division wrote Lesar that as a matter of discretion it was releasing the one document it had located responsive to item 1 of his request, an intra-agency memorandum which he asserted was exempt from disclosure as a matter of law under 5 U.S.C. § 552(b)(5). He informed Lesar that there were two memoranda responsive to item 2 of his request, an April 9, 1976 memorandum from the Assistant Attorney General, Civil Rights Divsion, to the Attorney General, and a March 31, 1976 memoranda from the Chief of the Criminal Section, Civil Rights Dvision, to the Assistant Attoreny General of that Division, which was attached to the

former and "incorporated in it by reference." [App. _____]

Turner denied access to both these memoranda. He asserted that both were classified pursuant to Executive order 11652 and therefore exempt under 5 U.S.C. § 552(b)(1). He also claimed that the memoranda were exempt under (b)(5) and that portions were exempt under (b)(7)(C) and (E). [App. _____]

By letter dated March 10, 1977, Lesar appealed Turner's denial of item 2 of his request. He noted that the copy of the OPR Task Force Report which Shaheen had furnished him did not contain Appendix B and that deletions ahd been made in the Appendix A materials. He stated that he had intended his FOIA request to include all appendix material and appealed the denial of these materials. [App. _____]

By letter dated April 8, 1977, Mr. Quinlan J. Shea, Jr., Director, Office of Information and Privacy Appeals, informed Lesar that his office had been unable to act upon his appeal within the time limits specified by the Freedom of Information Act. [App. _____]

C. Proceedings in District Court

1. Preliminaries

On April 21, 1977, Lesar brought suit under the Freedom of Information Act. After filing an answer which denied the allegations of the complaint and asked that the action be dismissed with prejudice, the Department moved, on June 20, 1977, for a stay of judicial proceedings pending review of Lesar's administrative ap-

peal on the grounds that exceptional circumstances existed and it was exercising due diligence in responding to the appeal. An affidavit in support of the motion for a stay avowed that "each appeal . . . receives the particularized treatment it requires," and that, "[a]lmost invariably, all of the records in question or a representative sampling are reviewed de novo by a number of my staff." [June 20, 1977 Shea Affidavit, ¶12]

In the meantime Lesar had received a letter from Shaheen dated June 10, 1977, which responded to his March 10 appeal letter. Shaheen advised Lesar that material deleted from Appendix A was exempt under (b)(1) or (5) or (7)(C). He provided Lesar with a copy of Appendix B with a relatively few excisions under (b)(1) or (5) or (7)(C). For the first time, Lesar learned that the Task Force Report also contained a secret Appendix C. Shaheen wrote that Appendix C was not being provided and that material contained in it was exempt under (b)(1) and (5). [App. _____]

On June 24, 1977, Shaheen wrote Lesar again. He stated that because "it is the policy of the Department to make a discretionary release of documents where it is determined that such disclosure would not be detrimental to the Department's interest," a second review had been conducted and "a determination has been made to release the Appendix C Index, except for material classified pursuant to Executive Order 11652." [App. _____] The Appendix C Index revealed, for the first time, that this Appendix consists consists of twenty volumes. (Allegedly because of a labelling error, the twenty volumes are numbered I through XVII

and XIX-XXI) Although this index revealed that several volumes consisted of public court documents, Shaheen denied access to all documents except the index itself. [App. _____] For Volumes I-XI and XXI, Shaheen relied upon Exemptions 1 and 5. For Volumes XII-XX, which include the volumes containing the courtroom testimony of James Earl Ray and his brothers, Shaheen cited Exemption 7(D) Clause 2. The allegedly classified part of the Appendix C Index, which although masked was not marked classified, was the description of the contents of Volume VII. The contents of this volume ultimately turned out to be the FBI's files on Stanley David Levinson, who has frequently been named publicly as an advisor to Dr. King.

On July 13, 1977, Lesar filed an opposition to the Department's motion for a stay. On the same date he also filed a Vaughn motion to require the Department to file a detailed justification, itemization and indexing of withheld records within thirty days. Two months later, on September 19, 1977, the Department filed an opposition to the Vaughn motion but promised to provide a detailed inventory and justification "for whatever records continue to be withheld by the Department of Justice as a result of the outcome of the appellate administrative review."

On September 22, 1977, the district court stayed action on Lesar's Vaughn motion "until completion of administrative review," and ordered the Department to advise plaintiff and the court when the review is completed." [App. _____]

By letter dated October 31, 1977, Mr. Quinlan J. Shea, Jr., Director of the Office of Information and Privacy Appeals, advised Lesar of the results of his administrative appeal. He was provided with copies of the two Civil Rights Division memoranda which had previously been denied him. However, portions of the memoranda had been excised under Exemption 7(C) on the ground that their disclosure "would constitute an unwarranted invasion of privacy of certain third persons or of Dr. King's immediate family." Other portions were excised under Exemption 1 on the ground that their continued classification was warranted by sections 5(B)(2) and (3) of Executive order 11652. [App. _____]

Shea's October 31 letter also stated that Exhibits 8 and 11 of Appendix A would be released again with fewer excisions; that "Exhibit 9 will be provided in its entirety and Exhibit 12 will be released for the first time, subject to certain excisions;" that "minor excisions were made in exhibits 7 and 12 to protect the personal privacy of other individuals against unwarranted invasion," (citing Exemptions 1 and 7(C), and that "classified information in exhibits 8, 11, 12, 17 and 18 is being withheld on the basis of . . . (b)(1)." [App. _____]

With respect to Appendix B, Shea's letter stated that eight pages would be released again, this time with no excisions. Other excisions of Appendix B materials were upheld on Exemption 1 and 7(C) grounds. Shea stated that names of Special Agents of the FBI were withheld on 7(C) grounds.

Regarding Appendix C, Shea noted that Volumes XII, XIX, and XX contained matters of public record and offered furnish copies of them to Lesar. He stated, however, that,

> Volume VII and certain materials in Volumes I through VI, VIII through XI and XXI are being withheld to protect specific administrative markings which cannot be released to you without actual harm to the operational capability of the F.B.I., the names of Special Agents, the privacy of certain theird (sic) persons against unwarranted invasions, and the identities of confidential sources. 5 U.S.C. 552(b)(2), (7)(C) and (7)(D).

Stating that "Memphis Police Department documents comprise Volumes XIII through XVII," Shea asserted that [a]s the information is of a confidential nature and was provided in confidence, these volumes will continue to be withheld in their entirety," for which he invoked Exemption 7(D).

The review of his administravive appeal having been completed, Lesar filed a new Vaughn motion on November 11, 1977. In a supporting affidavit Lesar noted that "[t]here is very little information about the King assassination which is confidential," and that "the FBI has already made many Memphis Police Department documents in its files available to Mr. Harold Weisberg" as the result of another FOIA lawsuit. He expressed confidence that if provided with a Vaughn index to the MPD records, "Mr. Weisberg and I will be able to demonstrate that many, if not all, of these documents cannot possible be withheld under a claim of confidentiality." [November 10, 1977 Lesar Affidavit, ¶15]

On December 1, 1977, the Department filed an opposition to Lesar's renewed Vaughn motion. It asserted that because records

in the custody of OPR were in large part "based on highly sensitive FBI documents which need to be reviewed by the FBI, and many of the underlying FBI documents may be duplicates of documents which Judge John Lewis Smith has ordered placed under seal in the National Archives," it would not be possible to compile a Vaughn index and justification within 30 days, but it was believed possible to do so within 60 days. A supporting affidavit by FBI Special Agent Horace P. Beckwith[2/] stated that, "On November 29, 1977, the OPR contacted the FOIPA Branch of the FBI and requested assistance in complying with plaintiff's request." [Beckwith Affidavit, ¶4] This request came a month after the Office of Information and Privacy Appeals had completed its allegedly "particularized" and "de novo" review of Lesar's administrative review.

By order dated December 6, 1977, the district court denied Lesar's renewed motion for a Vaughn showing within 30 days but did direct the Department to file "a detailed index and justification" of the withheld materials no later than February 1, 1978. [App. _____]

2. Vaughn Response

On February 1, 1978, the Department did file an attempt at a Vaughn showing. However, it was inadequate and incomplete. For

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2/ The Department has made extensive use of Special Agent Beckwith in several FOIA lawsuits brought by Mr. Harold Weisberg. Beckwith has been publicly identified as an unindicted co-conspirator in some of the FBI's illegal activities.

example, there was no index or justification provided for the many individual documents contained in the five volumes of Memphis Police Department records which comprise Volumes XIII-XVII of the OPR Report's Appendix C. Instead, the February 1, 1978 affidavit of Micahel E. Shaheen, Jr. simply asserted a blanket exemption for these records under 5 U.S.C. § 552(b)(7)(D). [App. _____]

The affidavits of Michael E. Shaheen, Jr., James P. Turner, Salliann M. Dougherty, and William N. Preusse which were submitted as part of the Vaughn filing consisted of generalized and conclusory allegations of exemptions.

For example, the January 6, 1978 affidavit of James P. Turner asserts that three Civil Rights Division memoranda were located in response to Item 2 of Lesar FOIA request; that they were classified on April 9, 1976, pursuant to Executive Order 11652; that he reviewed them after Lesar's FOIA request was received and found that they were exempt under Exemptions 1 and 5, with portions also exempt undre 7(C) and (D); and that as a result of Lesar's administrative appeal, he reviewed them again and with the "guidance and concurrence of the Department of Justice Classification Review Committee, the Document Classification and Review Section of the Federal Bureau of Investigation and the Chief, Security Programs Group" regraded some of the information upward from Secret to Top Secret, but also declassified most of it.[3/] [Turner Affidavit,

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3/ Turner's affidavit states that he upgraded information "in accordance with 28 C.F.R. § 17.26. However, that regulation only authorizes the downgrading and declassification of national security information, not its upgrading.

¶¶3-5] He did not provide a detailed justification for withholding this information on national security grounds. In fact, he did not even assert that he had determined that the unauthorized disclosure of such information could reasonably be expected to cause damage for the national security.

And with respect to excisions made in the now "declassified" portions of these memoranda, Turner simply made the conclusory assertion that they are "of names and other identifying data the disclosure of which would constitute a clearly unwarranted invasion of the personal privacy of Dr. King's family and/or certain third parties" and thus are exempt under (b)(7)(C).[4/] [Turner Affidavit, ¶5]

3. Summary Judgment Motions

On May 11, 1978, the parties filed cross motions for summary judgment. The Department's motion was supported by the affidavits of Lewis L. Small and James F. Walker and the supplemental affidavit of James P. Turner. The Department disowned the affidavits on security classified information which it had filed as part of its Vaughn showing, declaring that the Small Affidavit was now "the primary classification affidavit of all classified documents involved in this lawsuit and effectively supplants the classification discussions contained in the previous affidavits of James P.

4/ Although information may be withheld under Exemption 6 where its disclosure would result in a "clearly unwarranted" invasion of personal privacy, Turner claimed only 7(C).

Turner and William N. Preusse." [Motion for Summary Judgment, p. 8, fn. 13]

On May 22, 1978, the Department filed a Reply Memorandum in support of its Motion for Summary Judgment. It was accompanied by the affidavits of Horace P. Beckwith and Hugh W. Stanton, Jr. and the supplemental affidavit of Lewis L. Small.

On May 23, 1978, Lesar filed an Opposition to the Department's Motion for Summary Judgment which including a lengthy affidavit by Mr. Harold Weisberg and numerous exhibits.

At the same time, Lesar also filed an affidavit pursuant to Rule 56(f) of the Federal Rules of Civil Procedure which asserted that "[i]n order to effectively oppose defendant's motion for summary judgment, it is essential that I be allowed to undertake discovery to establish facts which I cannot conclusively or satisfactorily demonstrate absent such discovery." [5/23/78 Lesar Affidavit, ¶2] His affidavit also set forth a number of examples of the kinds of facts he intended to establish through discovery if allowed the opportunity.

On June 2, 1978, Lesar filed a Supplemental Affidavit of James H. Lesar in Opposition to Defendant's Motion for Summary Judgment. On June 5, 1978, he filed a second lengthy and detailed affidavit by Harold Weisberg.

4. Oral Argument

On two occasions, June 9, 1978, and July 20, 1978, the parties appeared before Judge Gesell to argue the motions for summary judgment. On each occasion the Court expressed doubts about the merits

of the Department's case. For example, upon being informed that the Department's national security claims did not involve surveillance of foreign embassies, the Court then inquired what kind of national security information he was dealing with. Told that, "[t]hat is indicated in the affidavit of Lewis Small," the Court commented: "He just says he looked at them and he thinks the national security is important." [June 9, 1978 transcript, p. 30.]

This skepticism towards the Department's claims was not limited to national security information. During a discussion of whether the Court should inspect some of the documents in camera to see whether the excisions were warranted, Department counsel sought to suggest that because 7(C) excisions were "often a name only" and 7(D) excisions "an informant's name or information about an informant," the Court could determine whether they were warranted by looking at the expurgated copies alone. The following colloguy ensued:

> THE COURT: There are some places where you have taken out a paragraph, haven't you?
>
> MR. METCALFE: That is correct, Your Honor. I would suggest that the affidavits that are on file are adequate to describe that.
>
> THE COURT: Well, they don't tell me anything. If that is what you mean. They just tell me some agent of the Bureau has decided he doesn't want me to see it. They don't tell me anything else.

[June 9, 1978 Transcript, p. 38]

Similarly, in commenting on the Department's claim that its copies of the Memphis Police Department records were entitled to

blanket protection under 7(D), the Court said that it was difficult for him "to see why or how under the statute or in common sense" the Memphis records "are entitled to greater confidentiality than the records of the Federal Bureau of Investigation." [July 20, 1978 transcript, p. 6] Nor did the Court seem impressed with the cases the Department cited on this point, notably Nix v. United States, 572 F.2d 998 (4th Cir. 1978), and Church of Scientology v. United States Dept. of Justice, 410 F.Supp. 1297 (C.D.Cal.1976), remarking, "It doesn't seem to me they are thoughtful cases particularly . . ." and ". . . I don't find any argument in any of those cases at all. They just state the flat position." [July 20, 1978 transcript, p. 7, p. 12]

5. The District Court's Decision

On July 28, 1978, the District Court granted summary judgment in favor of the Department and issued a memorandum opinion which set forth the basis of its decision. Essential to the Court's holdings throughout was its decision to accept the representations made in the Department's affidavits at face value and to disregard the conflicting representations contained in the affidavits submitted by Lesar.[5/]

5/ However, in concluding its opinion, the Court stated: "The Court in this instance is impressed with the detailed nature of the affidavits submitted by both sides, the competence of Government counsel, and the apparent care with which the matter has been dealt with administratively. Thus reliance is placed on the Government's representations." Lesar v. United States Dept. of Justice, 455 F.Supp. 921, 926.

With respect to the records which the OPR obtained from the Atlanta and Memphis Police Departments, the Court found that both police departments had submitted the records to the Department of Justice in confidence. Saying that Lesar's desire to use discovery techniques to substantiate his belief that the Memphis Police may have disclosed some or all of their records to others would prove "fruitless," and holding that "the public interest requires that the FBI's cooperative arrangements with local police[6/] not be breached under FOIA compulsion where the cooperating agencies have objected and by affidavits continue to insist upon confidentiality," the Court sustained the Department's claim of a blanket 7(D) exemption for these records. Lesar v. United States Dept. of Justice, 455 F.Supp. 921 at 924.

With respect to information allegedly withheld on grounds of national security, the District Court found that the fact that such information was not classified until after Lesar's FOIA request was received did not undermine the Department's Exemption 1 claim. Ac-

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6/ The OPR obtained the Memphis Police Department (MPD) records from the District Attorney General of Shelby County, Tennesee, not the MPD. The MPD filed no affidavit asserting that these records have been or should continue to be kept confidential. Thus, "the FBI's cooperative arrangements with local police" are not at issue. The Atlanta Police Department also has not stated that its records have been or should continue to be kept confidential. Although unindicted co-conspirator Horace P. Beckwith swore in his May 22, 1978 affidavit that the Atlanta PD transmitted the 29 pages of their records obtained by the OPR to the FBI in confidence--at the time of its investigation into Dr. King's murder--the FBI made some of these same pages available to Harold Weisberg in Civil Action No. 75-1996, while at the same time concealing the existence of the rest. (See June 5, 1978 Weisberg Affidavit, ¶¶94-116)

cepting the Department's affidavits at face value and relying upon this Court's decision in Weissman v. CIA, 184 U.S.App.D.C. 117, 565 F.2d 692 (1977), the District Court sustained all Exemption 1 claims without allowing discovery or examining any of the alleged national security information in camera. Lesar, supra, at 925.

In regard to the Department's Exemption 2 claims, the District Court held: (1) "[t]here is no legitimate public interest in releasing these symbols," and (2) "such release would aid identification of informers and significantly harm governmental interests." Thus he sustained the Exemption 2 claims. Lesar, supra, at 925.

Finally, with respect to the Department's Exemption 7(C) claims, the Court noted that the Department had invoked this exemption "to protect certain aspects of the privacy of Dr. King's family and the identity of persons connected with the FBI investigation where privacy interests are involved." He asserted that "[p]rimarily these include the names of persons supplying information and FBI personnel below the rank of section chief." Declaring that "[t]here is no reason to question the bona fides of these deletions," and that it would be impossible to undertake discovery on this issue without revealing the withheld information, the Court by concluded that: "The Court . . . accepts the view that because of the contemporary character[7/] of the data, protection of FBI personnel and their informants is warranted." Consequently, he upheld the 7(C) claim.

7/ Virtually all of the information sought in this case is at least 11 years old. Much of it dates back to the early 1960s and some to 1953, which makes it 26 years old.

SUMMARY OF ARGUMENT

Lesar contends that changes in the law while this case has been pending on appeal require that the Exemption 1 claims be remanded for a de novo review by the District Court. Significant changes in national security classification criteria were accomplished by Executive order 12065, which became effective on December 1, 1978, after the decision in this case. Important changes in the advice of this Court to the district courts on the handling of national security claims under FOIA were made in Ray v. Turner, 190 U.S.App.D.C. 290, 587 F.2d 1187 (1978). Since an appellate court must apply the law in effect at the time it renders its decision, the District' Courts determinations must be reversed on this basis. Bradley v. Richmond School Board, 416 U.S. 696, 711-715 (1974).

In addition, Lesar contends that the District Court erroneously granted summary judgment on the Exemption 1 claims because (1) the proper classification procedures under Executive order 11652 were not follow; (2) the nature of the material withheld and the surrounding circumstances indicate that it does pertain to "national defense or foreign policy," as required by 5 U.S.C. § 552(b)(1); and the government's classification affidavits were conclusory and nonspecific. Given the procedural violations--failure to classify at time of origination and lack of required warning stamp--the District Court was required to examine the materials in camera to determine whether they may be withheld according to the exacting

standard employed in First Amendment cases involving prior restraint. Halperin v. Department of State, 184 U.S.App.D.C. 124, 131-132, 565 F.2d 699, 706-707 (1977). However, the District Court did not do this. In addition, given these circumstances, the District Court erred in denying Lesar an opportunity to conduct discovery. Ray v. Turner, supra, 190 U.S.App.D.C. at 321, 587 F.2d at 1218 (concurring opinion of Chief Judge Wright).

Lesar further contends that the District Court erred in sustaining the Department's claim of blanket immunity under Exemption 7(D) for federal agency copies of certain records of the Atlanta and Memphis Police Departments. The legislative history of the amendments to Exemption 7 makes it clear that "confidential source" refers to human sources, not agencies, whether they be state, local or federal. Moreover, logic and common sense suggest that Congress did not intend that federal agency copies of local law enforcement records should receive greater protection than copies of such records which originate with federal agencies. Accordingly, once it was determined that these were federal agency records for FOIA purposes, they were subject to the requirements of a Vaughn v. Rosen index and it was error for the District Court to grant summary judgment as to these records without having required such an index.

Lesar also argues that information cannot be deleted under Exemption 7 unless the records were "compiled for law enforcement purposes." Since the FBI's so-called national security investigation of Dr. King was not carried out for law enforcement purposes, it was error for the District Court to uphold excisions which the

Department made under Exemption 7(C),(D), and (E) on the records pertaining to that investigation. Weissman v. CIA, 184 U.S.App. D.C. 117, 120, 565 F.2d 692, 695 (1977).

In granting summary judgment in favor of the Department, the District Court improperly adjudicated disputed issues of material fact against Lesar, rather than confinding his role to that of determining whether such factual issues existed. Thus he ruled that the Atlanta and Memphis Police records were received under a promise of confidentiality even though Lesar filed detailed affidavits contradicting claims that these records or there contents had been kept confidential. Moreover, under Exemption 7(C) he upheld the deletion of the names of FBI agents from these records. Lesar contends that there is no general privacy interest of FBI agents in their names as they appear on public records. Ferguson v. Kelley, 448 F.Supp. 919, 923 (N.D.Ill. 1977). Also, the District Court failed to weigh the fact that these are historically important records and the disclosure of such names is important to writers and scholars who inform the public about these events. The District Court was, therefore, wrong as a matter of law that such names may be withheld under Exemption 7(C).

Finally, Lesar contends that the release of informant symbol numbers does not disclose the identity of informants and that there is a legitimate public interest in the disclosure of such numbers. However, he also suggests that if this Court agrees with the District Court's determination to the contrary, the public interest may be accomodated by replacing the symbol numbers with a letter

(or some other arbitrary designation) to represent each individual informant. This will enable him to ascertain how many different informants have been used and which informants are responsible for which information and thus facilitate a more accurate appraisal of the events set forth in these records and their content; for example, it would enable him to evaluate whether an informant was being used as an agent provocateur to heat up a situation and which information is suspect because it was supplied by an informant who had provided other information known to be false.

ARGUMENT

I. CHANGE IN LAW PENDING APPEAL REQUIRES REMAND FOR DE NOVO REVIEW OF EXEMPTION 1 CLAIMS UNDER E.O. 12065 AND RAY V. TURNER

The Freedom of Information Act, 5 U.S.C. § 552(b), exempts from 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

When the District Court awarded summary judgment to the Department on July 28, 1978, the Executive order governing national security classification was E.O. 11652. However, E.O. 11652 was supplanted, while this appeal was pending, by E.O. 12065, which became effective on December 1, 1978. 43 Fed. Reg. 28949 (July 3, 1978). In addition, at the time of the District Court's decision Weissman v. CIA, 184 U.S.App.D.C. 117, 565 F.2d 692 (1977), which set forth this Court's views on Exemption 1, was in full force and effect. Although the District Court relied on Weissman, that case was later substantially modified by Ray v. Turner, 190 U.S.App.D.C. 290, 587 F.2d 1187 (1978).

E.O. 12065 changes the law as it applies to national security classified information. Under the new order, information is protected by Exemption 1 only: (a) if it fits within one of seven specifically enumerated categories of classifiable information, (b) if disclosure would result in identifiable harm to the national

security, and (c) if that identifiable harm is not outweighed by the public interest in disclosure. Each of these requirements differs from the provisions of E.O. 11652, and the last two changes would seem to have a particularly significant impact on the withholding of information under Exemption 1.[8/]

Similarly, Ray v. Turner also changed the Freedom of Information law as it relates to Exemption 1. It held, inter alia, that: "In camera inspection does not depend on a finding or even tentative finding of bad faith." 184 U.S.App.D.C. at 298, 587 F.2d at 1195. Weissman, on the other hand, held that: "In deciding whether to conduct an in camera inspection [the District Court] need not go further to test the expertise of the agency, or to question its veracity when nothing appears to raise the issue of good faith." 184 U.S.App.D.C. at 122, 587 F.2d at 697.

These changes are especially important in this case. Most of the information withheld under Exemption 1 dates to the early or mid-1960s and some goes as far back as 1952. Even the dubious affidavits which assert that such information is classified state only that its release could result in the disclosure of intelligence sources or methods or some other form of national security information, not that it would. And it is apparent that the purported national security information in this case generally has nothing at all to do with national defense or foreign policy but

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8/ For a discussion of E.O. 12065 see "The FOIA National Security Exemption and the New Executive Order," by William F. Fox and Peter N. Weiss, 37 Federal Bar Journal 1 (1978).

in fact deals with the FBI's COINTELPRO operations against the leader of a domestic political movement who was intensely hated by the FBI. [See 5/22/78 Weisberg Affidavit, ¶¶43-44] It is, therefore, extremely unlikely that the release of this information would cause identifiable harm to the national security. Moreover, because these are historically important records of the very FBI COINTELPRO operations which have been the subject of congressional inquiries and which have brought such heavy censure upon the FBI, the public interest in their disclosure is exceptionally strong.

In light of these circumstances, as well as others which will be detailed later, it seems extremely unlikely that the identifiable harm to national security required by E.O. 12065 can be established for the kind of information sought by this lawsuit, or that if such harm is present, the need to keep the information secret outweighs the obvious and substantial public interest in its disclosure. Moreover, in light of these circumstances Ray v. Turner requires that Exemption 1 claims not be sustained on summary judgment absent adequate adversarial testing through discovery and/or in camera inspection.

It is a well-established principle that an appellate court must apply the law in effect at the time it renders its decision. Bradley v. Richmond School Board, 416 U.S. 696, 711-715 (1974). This principle has been applied where the Department of Housing and Urban Development ordered a new procedural prerequisite for an eviction which became effective pending review by the United States

Supreme Court. Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268 (1969). It has also been applied in Freedom of Information Act cases. See, e. g., NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 165 (1975); Church of Scientology v. U.S. Postal Serv., 593 F.2d 902 (9th Cir. 1979); Lee Pharmaceuticals v. Kreps, 577 F. 2d 610, 614 (9th Cir. 1978); Chamberlain v. Kurtz, 589 F.2d 827 (5th Cir. 1979).

This principle requires that the Exemption 1 claims in this case be remanded to the District Court for a de novo determination as to whether the information withheld is presently classifiable under the new standards prescribed by E.O. 12065. NLRB v. Sears, Roebuck & Co., supra, at 162.

II. DISTRICT COURT ERRONEOUSLY GRANTED SUMMARY JUDGMENT IN FAVOR OF DEPARTMENT ON EXEMPTION 1 CLAIMS WITHOUT ALLOWING DISCOVERY OR CONDUCTING AN IN CAMERA EXAMINATION

A. Violation of Classification Procedures

This Court has recently asserted that:

> Exemption 1 now applies only if the District Court determines that (1) the material withheld is properly classified under the substantive criteria set forth in the relevant Executive order, and (2) the material has in fact been properly classified according to procedures outlined in the Executive order.

Ray v. Turner, 190 U.S.App.D.C. 290, 320, 587 F.2d 1187, 1217 (1978)(concurring opinion of Chief Judge Wright).

It is quite clear, therefore, that in order to qualify for Exemption 1, material must be classified in accordance with the

the procedures set forth in the applicable Executive order. Halperin v. Department of State, 184 U.S.App.D.C. 124, 131, 565 F.2d 699, 706 (1977). Even prior to the enactment of the 1974 amendments to the Freedom of Information Act, this Court had held that failure to comply with the classification procedures prescribed by Executive order, including the time of classification, could compel disclosure. Schaffer v. Kissinger, 164 U.S.App.D.C. 282, 505 F.2d 389 (1974).

The information withheld from Lesar was purportedly classified pursuant to Executive order 11652. Section 7(A) of E.O. 11652 provides that "[t]he National Security Council shall monitor the implementation of this order." Pursuant to this authority, the NSC issued a directive supplementing E.O. 11652 with further details. 37 Fed.Reg. 10053(1972). The NSC directive unequivocally stated that:

> [a]t the time of origination, each document or other material containing classified information shall be marked with its assigned security classification and whether it is subject to or exempt from the General Declassification Schedule.

(Emphasis added.)

With the exception of two Civil Rights Division memoranda, none of the materials withheld from Lesar were classified at or even close to the time of origination.[9/] Insofar as is known, the

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9/ The Exemption 1 claims in this case involve three categories of documents. These are:

1. Civil Rights Division Memoranda. Two paragraphs of the 10-page April 9, 1976 Pottinger memorandum have been ex-

(footnore continued on following page)

Appendix A materials all originated in 1963.[10/] None of these materials were classified until January 17, 1977, six days after the OPR Report first leaked on Capitol Hill. [6/5/78 Weisberg Affidavit, ¶144] Some were not classified until October 25, 1977, more than 8 months after Lesar's FOIA request, when Classification Officer No. 6922 conducted a second review and classified what Officer No. 4915 had not classified during the January 17, 1977 review. [App. -]

Similarly, none of the Appendix C materials were classified until May, 1977, some three months after Lesar's FOIA request was received, and many were not classified until December, 1977 or Jan-

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9/ (cont.) cized on national security grounds. Exemption 1 excisions have also been made on 25 pages of the 51-page March 31, 1976 Murphy memorandum. These excisions are extensive; some pages of the Murphy memorandum have been deleted entirely. [See selected pages in the Appendix at -]

2. Appendix A Materials. Exhibits 8, 11, and 12 to Appendix A of the OPR Report contain Exemption 1 excisions. [See Appendix at pages -] In addition, Exhibits 17 and 18 have been withheld in their entirety.

3. Appendix C Materials. These consist of some two thousand pages of notes which the OPR Task Force members made as they reviewed the FBI's files on its inquiry into Dr. King's murder and the so-called "national security" investigations of Dr. King, his organization, and his associates. Insofar as the investigation of Dr. King's assassination is concerned, relatively few excisions have been made on grounds of national security. But the notes on the "national security" investigation of Dr. King--in reality the FBI's campaign of harassment against him--contain numerous Exemption 1 deletions. At times these excisions extend to entire pages of notes. [A selection of Appendix C materials on which national security excisions have been made is found in the Appendix at pages -]

10/ Exhibits 17 and 18 are withheld entirely, so their dates of origination are unknown.

uary, 1978. As with the Appendix A materials, Classification Officer No. 7922 classified what Officer 4915 had not classified during the first review of the same materials some 5-8 months earlier. [A table summarizing the classification of withheld materials is found in the Addendum to this brief at pages -]

The Department's counsel offered three different explanations for the failure to classify these materials at the time of their origination, none of them under oath. First he argued that the failure to classify the documents at the time of their origination was "not so irregular" given "atypical circumstances," such as the fact that the documents were generated when the Task Force was "primarily concerned with preparing their final report." At the same he asserted that: "It should be noted that the classification resources of the FBI were not as readily at hand when these second-generation documents were generated." [Defendant's Reply Memorandum in Support of Its Motion for Summary Judgment, p. 6] One difficulty with the first explanation is that most of the approximately two thousand pages of notes must have been generated long before the Task Force was in the throes of its final report. Some of the notes may actually have been generated as part of the special review which began under AAG Pottinger in December, 1975, and, in any event, one does not generate two thousand pages of notes overnight. The second explanation is simply false. Since the OPR's review of the FBI's records was conducted at the FBI Building, its classification resources were readily at hand. [See 6/4/78 Weisberg Affidavit, ¶144]

At oral argument the Department's counsel offered yet a third exemption for the failure to classify these materials at the time of their origination. Asserting that "the members of the Task Force, believe me, have no FOIA knowledge whatsoever," he told the Court, "[b]ecause of that, they did not recognize that there was a need to classify them immediately." [June 9, 1978 transcript, p. 40] Indeed, there is no evidence that they would ever have recognized the need to classify these materials had it not been for Lesar's Freedom of Information Act request.

This "testimony" of the Department's counsel, if true, constitutes an admission that the Department classified the OPR materials not because of their national security content but to protect against their being made public as the result of an FOIA request. But the need to classify information when it originates does not arise from the effect that failure to do so will have upon its susceptibility to disclosure under FOIA. Rather, it arises from the fact that the national security may be breached if qualifying information is not classified promptly. In the case of the OPR materials, their classification when generated was required by E.O. 11652, as implemented by the May 19, 1972 NSC directive. In addition, the same requirement was also prescribed by Justice Department regulations. 28 C.F.R. § 17.14. And the members of the Task Force were required to familiarize themselves with, and to adhere to the Department's regulations "relating to the classification, declassification, and protection of national security information and material." 28 C.F.R. § 17.4.

The District Court found that the OPR notes "were not immediately classified and lay dormant, unclassified, until [Lesar's] FOIA request." However, he sloughed off this fact, asserting that "[t]his atypical slip-up does not undermine the claimed exemption. The working notes receive derivative protection." Lesar v. Dept. of Justice, 455 F.Supp. 921 at 925.

Since the Department made no showing whatsoever that any of the underlying documents on which the OPR notes were based were ever properly classified, there was no basis upon which the District Court could properly make a finding that the notes received derivative protection." In fact, the affidavit of William N. Preusse states that: "Some of the originals of these documents from which the summaries came were created at times when the FBI did not place a classification marking on documents prepared for internal use only, despite the fact that the information contained therein would qualify for classification under EO 10450, the predecessor of EO 11652." [2/1/78 Preusse Affidavit, ¶(3)(b)] This admits that some of the underlying originals were not classified at all, much less in accordance with proper procedures. Without testimony that the underlying originals on which the OPR notes are based have been classified in accordance with the substantive and procedural requirements of the appropriate Executive order, and that such classified information has not been made public, the District Court's finding that the OPR notes received derivative protection cannot be sustained.

In addition to the failure to classify the OPR notes when they originated, other classification procedures were also violated. For example, Section IV(A)(4) of the NSC directive implementing E.O. 11652 provides that:

> For classified information or material relating to sensitive intelligence sources and methods, the following warning notice shall be used . . .:
>
> "WARNING NOTICE--SENSITIVE INTELLIGENCE SOURCES AND METHODS INVOLVED"

Yet no such warning notice appears on any of the numerous pages on which material has been excised on the grounds that its disclosure could allegedly endanger the national security by revealing intelligence sources and methods.

The Freedom of Information Act clearly provides that in order to qualify for nondisclosure under Exemption 1, the material withheld must be classified in accordance with both the substantive and procedural requirements of the relevant Executive order. 5 U.S.C. § 552(b)(1). The Conference Report on the 1974 amendments explicity states that material withheld under Exemption 1 must be properly classified "pursuant to both procedural and substantive criteria contained in such Executive Order." H.Rep. No. 93-1200, 93d Cong., 2d Sess. 12 (1974). (Emphasis added)

The courts have hedged enforcing this provision of the law as it was written. However, this Circuit has held that where the proper classification procedures have not been followed and the government alleges that disclosure would constitute a grave danger

danger to national security, the District Court should examine the materials in camera to determine whether they may be withheld according to the exacting standard employed in First Amendment cases involving prior restraint. Halperin v. Department of State, 184 U.S.App.D.C. 124, 131-132, 565 F.2d 699, 706-707; Ray v. Turner, 190 U.S.App.D.C. 290, 318, 587 F.2d 1187, 1215, note 62 (concurring opinion of Chief Judge Wright).

At a minimum therefore, the failure to follow proper classification procedures requires that the District Court be reversed as to the Exemption 1 claims. If, on remand, the Department does not allege that disclosure of these materials will result in grave danger to the national security, an order should issue for their immediate release, without the necessity of an in camera examination.

B. Conclusory Affidavits

In Weissman v. CIA, 184 U.S.App.D.C. 117, 122, 565 F.2d 692, 697 (1977), this Court held that:

> If exemption is claimed on the basis of national security the District Court must, of course, be satisfied that proper procedures have been followed, and that by it sufficient description the contested document logically falls into the category of the exemption indicated.

In Ray v. Turner, supra, the Court noted, in citing this passage, that "[w]hether there is a 'sufficient description' to establish the exemptions is, of course, a key issue." 190 U.S.App.D.C. at 297, 587 F.2d at 1195, note 22.

The affidavits submitted in support of the Department's national security claims are of a conclusory nature. The minimal test for compliance with the substantive requirements of E.O. 11652 is whether the unauthorized disclosure of the information "could reasonably be expected to cause damage to the national security." The February 1, 1978 Preusse Affidavit filed as part of the Department's Vaughn showing makes no such claim. It merely lists the documents, or portions thereof, which it says were classified by two different classification officers, and then asserts that these materials are "exempt from automatic declassification as authorized by EO 11652." [2/1/78 Preusse Affidavit, ¶(3)(c)]

(The apparent reason for having Preusse rather than the two classification officers execute the classification affidavit is to gloss over the fact that the actual classifiers, who both reviewed the same materials, had reached different conclusions as to what materials were classifiable, thus placing the validity of their determinations in doubt.)

Because of the obvious deficiencies in the Preusse Affidavit, the Department withdrew it when it moved for summary judgment. In its place it substituted the May 11, 1978 affidavit of Lewis L. Small. For the most part, the Small Affidavit parroted the boilerplate allegations of the Preusse Affidavit.[11/] It did, however,

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11/ There are some descrepancies between the Preusse and Small Affidavits. For example, while the Preusse Affidavit says that Volume II-M (Murkin) was classified on December 15, 1977, the Small Affidavit says it was classified on December 8, 1977.

recite Small's conclusion that the disclosure of the materials classified by officers 4915 and 6922 "could reasonably be expected to cause damage to the national security as specified below." [Small Affidavit, ¶6] Small then provides a description of "intelligence sources" which encompasses, among others, any journalist, politician, or citizen who has contacted an embassy, foreign newspaper office, or other "foreign establishment" in the United States; a priest in contact with the Vatican; and anyone who ever wrote, phoned, telegrammed, or visited someone in a foreign country. [Small Affidavit, ¶7(A)]

Exemption 1 protects information that is "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy. . ." 5 U.S.C. § 552(b)(1)(A). (Emphasis added) The Small affidavit does not state that the information withheld from Lesar under Exemption 1 is even related to national defense or foreign policy. Lesar contends that the information being withheld relates not to national defense or foreign policy but to the FBI's COINTELPRO-type harassment of Dr. King and the domestic political movement he led, the Civil Rights Movement. If this is true, then the Department is not entitled to withhold this information on Exemption 1 grounds.

The available evidence supports Lesar's contention. Agents from the FBI's Internal Security Division are said to have admitted to the OPR Task Force that there was no evidence that Dr. King had

ever been a member of the Communist Party or espoused its philosophy or followed a party line. [See Supplemental Lesar Affidavit, ¶12, Attachment 2]

The Church Committee reached the same conclusion. It found that the FBI's efforts were focused upon trying to destroy Dr. King and his reputation rather than upon preventing any alleged danger to the national security. Its Report states that "[t]he FBI's COMINFIL investigation appears to have centered almost entirely on discussions among Dr. King and his advisers about proposed civil rights activities rather than on whether those advisers were in fact agents of the Communist Party." Indeed, rather than trying to discredit the advisers who were alleged to be communists, "the Bureau adopted the curious tactic of trying to discredit the supposed target of Communist Party interest--Dr. King." [Report of Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the "Church Report"), Book III, "Dr. Martin Luther King, Jr. Case Study, p. 85]

In addition, a contemporaneous record shows that where the original records pertaining to the FBI's campaign against Dr. King were classified at all, it was done not in the interest of protecting national defense or foreign policy but "to minimize the liklihood that this material will be read by somone who will leak it to King." [1/13/64 Memorandum from Assistant FBI Director William C. Sullivan to Alan Belmont. Quoted in Church Report, Book III, pp. 124-125.]

This Court has recently noted that the language of protecting the CIA's "intelligence sources and methods" which is used in 50 U.S.C. § 403(d)(3) is "potentially quite expansive" and warned that courts "must be particularly careful when scrutinizing claims of exemptions based on such expansive terms." Ray v. Turner, supra, 190 U.S.App.D.C. at 322, 587 F.2d at 1219 (concurring opinion of Chief Judge Wright). The same may be said of the FBI's use of "intelligence sources" in this case.

Proof is available that the FBI has improperly withheld information in this case under the guise that it qualifies for Exemption 1. Exhibit 8 to the Appendix A materials is an August 30, 1963 memorandum from Sullivan to Belmont. According to Small, the first paragraph was classified "Secret" on January 17, 1977 because "its disclosure could reveal an intelligence source, as described above, reveal the FBI's interest in a specific foreign relations matter or place an individual in physical jeopardy." [App.] The classified segment consists of a quote from FBI Director J. Edgar Hoover which reads as follows: "I for one can't ignore the memos re King [(b)(1)] et al as having only an infinitesimal effect on the efforts to exploit the American Negro by the Communists." [App.]

The Church Committee quotes this exact language but inserts "Advisers A and B" where the (b)(1) deletion occurs on the document tiven Lesar. [Church Report, Book III, pp. 107-108] Deleting the names of Dr. King's advisers, who are well-known, has nothing whatsoever to do with protecting national defense or foreign policy.

At oral argument the District Court tersely summed up the conclusory nature of the Small affidavit: "He just says he looked at them and he thinks the national security is important." [June 9, 1978 transcript, p. 9] Nevertheless, he granted summary judgment in this case before any discovery had occurred, even though Lesar had submitted a Rule 56(f) affidavit detaling some of the reasons why discovery was necessary.

This Court has noted that "[i]nterrogatories and depositions are especially important in a case where one party has an effective monopoly on the relevant information." Ray v. Turner, supra, 190 U.S.App.D.C. at 321, 587 F.2d at 1218 (concurring opinion of Chief Judge Wright). The conclusory nature of the Department's affidavits made discovery essential in this case. To give but one example, when the Small affidavit asserts that disclosure "could reveal the FBI's interest in a specific foreign relations matter," would that language encompass Dr. King's trip abroad to receive the Nobel Peace Prize or his visit to the Pope? If so, why and how would these matters endanger the national security? The District Court's refusal to allow Lesar to engage in discovery shifted the burden of proof from the Department, where the FOIA places it, to Lesar, and left him to fend against the Department's conclusory affidavits with both hands tied behind his back. Given the circumstances presented by this case, it was error for the District Court to have granted summary judgment without allowing discovery and/or conducting an in camera examination.

Finally, Lesar notes that with respect to the Appendix A materials, the Small Affidavit repeatedly states that information has been classified because "its disclosure could reveal an intelligence source as described above, reveal the FBI's interest in a specific foreign relations matter or place an individual in physical jeopardy." (Emphasis added) [Small Affidavit, ¶(9)] This disjunctive phrasing makes it impossible to correlate the material deleted with the justification for not disclosing it. Not being able to determine which alternative justification applies, the reviewing court cannot gauge the correctness of the agency's claim of exemption. This Court recently dealt with an analogous situation in which an agency's Vaughn index claimed different exemptions for multiple deletions in a specific document without correlating them. The Court found that such an index was fatally defective. Founding Church of Scientology of Washington, D.C., Inc. v. Griffin Bell, et al., D.C.Cir. No. 78-1391 (decided June 25, 1979).

Exhibit 17 to Appendix A is a glaring example of the inadequacy of a description which states the justifications for withholding in the alternative. This is an 11-page document, yet the disjunctive phrasing employed, the same as that quoted in the preceding paragraph, makes it impossible to determine which justification is claimed. Yet it is entirely implausible that the entire document could be justifiably withheld under either the first or third of the three justifications. In addition, there is no statement that segregable portions of this document cannot be released without damaging the national security. In Founding Church, supra,

this Court ruled that segregability applies to Exemption 1. (Slip Op. at 12) Thus, any such portions which can be disclosed without danger to national security must be released to Lesar.

III. FEDERAL AGENCY COPIES OF RECORDS OF A LOCAL LAW ENFORCEMENT AGENCY ARE NOT ENTITLED TO BLANKET IMMUNITY UNDER (b)(7)(D)

During its investigation of Dr. King's murder, the OPR Task Force obtained copies of certain records of the Atlanta and Memphis Police Departments. The Department asserted a claim of blanket immunity for these records under Exemption 7(D) and refused to provide a Vaughn v. Rosen index for them.

Exemption 7(D) exempts from compulsory disclosure "investigatory records compiled for law enforcement purposes," but only to the extent that the production of such records would:

> (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, . . . confidential information furnished only by the confidential source.

The term "confidential source" is not defined in the FOIA. However, the legislative history of the Act rules out the possibility that Congress intended 7(D) to create a blanket exemption for federal agency copies of the records of local law enforcement agencies. The Senate amendment to Exemption 7 originally employed the term "informer" rather than "confidential source." In explaining the substitution, the Conference Committee said:

> The substitution of term "confidential source" in section 552(b)(7)(D) is to make clear that the identity of a person other than a paid informer may be protected if the person provided information under an express assurance of confidentiality or in circumstances from which such an assurance could be reasonably inferred.

(Emphasis added) H.Rep. No. 93-1380, 93d Cong., 2d Sess. 13 (1974)

This makes it clear that Congress intended to broaden the term "informer," a term which refers only to persons, to include persons other than paid informers. It obviously did not contemplate that the term would be expanded to include agencies, whether state, federal, or local. If this were the case, it would be possible to defeat the intent of Exemption 7(D) by transferring records from one federal agency to another under a promise of confidentiality.

In addition to the fact that the legislative history makes it clear that Congress limited the meaning of "confidential sources" to human sources, logic and common sense suggest that Congress did not intend that federal agency copies of local law enforcement records should receive greater protection than copies of law enforcement records which originated with the federal agencies themselves.

The District Court erred in upholding the Department's claim that these records are entitled to blanket immunity under 7(D). Once it was established that the were federal agency records for FOIA purposes--and the Department never claimed they were not--then they were subject to the requirements of a Vaughn v. Rosen index. It was, therefore, reversible error for the District Court to grant summary judgment as to these records without having required such an index.

IV. INFORMATION CANNOT BE EXCISED UNDER EXEMPTION 7 WHERE RECORDS WERE NOT COMPILED FOR LAW ENFORCEMENT PURPOSES

Countless excisions have been made under Exemptions 7(C) and 7(D), and occasionally 7(E), in the records which pertain to Dr. King's murder and the so-called national security investigation of him. Insofar as the records of the national security investigation are concerned, a threshhold question arises as to whether any information can be properly withheld under Exemption 7. Lesar contends it cannot.

By its express terms, Exemption 7 applies only to "investigatory records compiled for law enforcement purposes." Lesar contends that the so-called national security investigation of Dr. King was not conducted for law enforcement purposes but rather as part of a personal and political vendetta against him. In support of his position, Lesar cites the testimony of Deputy Associate Director of the FBI James B. Adams that he saw "no statutory basis or no basis of justification" for the actions taken by the FBI to discredit Dr. King. [See Church Report, Book III, pp. 83-84] In addition, he points out that Dr. King was never charged with any crime and that the FBI engaged in numerous acts of harrassment against Dr. King which were totally at war with serving law enforcement purposes. Nor has the Department asserted that the "national security" investigation of Dr. King was conducted for law enforcement purposes.

In Weissman v. CIA, supra, this Court held that where the

CIA had conducted an extensive investigation of an American citizens living at home, without his knowledge and without authority to do so, "[i]t cannot be contended that this activity was for law enforcement purposes." 184 U.S.App.D.C. at 120, 565 F.2d at 695. The same applies to this case as well.

V. DISTRICT COURT FAILED TO APPLY PROPER SUMMARY JUDGMENT STANDARDS IN THIS CASE

A motion for summary judgment is properly granted only when no material fact is genuinely in dispute, and then only when the movant is entitled to prevail as a matter of law. Fed. R. Civ. P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Bouchard v. Washington, 168 U.S.App.D.C. 402, 405, 514 F.2d 824, 827 (1974); Nyhus v. Travel Management Corp., 151 U.S.App.D.C. 269, 271, 466 F.2d 440, 442 (1972). In assessing the motion, all "inferences to be drawn from the underlying facts contained in [the movant's] materials must be viewed in the light most favorable to the party opposing the motion." United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). The movant must shoulder the burden of showing affirmatively the absence of any meaningful factual issue. Bloomgarden v. Coyer, 156 U.S.App.D.C. 109-114-114, 4779 F.2d 201, 206-207 (1973). That responsibility may not be relieved through adjudication since "[t]he court's function is limited to ascertaining whether any factual issue pertinent to the controversy exists [and] does not extend to the resolution of any such issue." Nyhus,

supra, note 32, 151 U.S.App.D.C. at 271, 466 F.2d at 442.

The District Court failed to apply these standards to the issues in this case. Instead, he accepted the Department's conclusory and untested affidavits at face value and adjudicated disputed issues of material fact in favor of the Department. Some examples which illustrate the District Court's errors in this regard are set forth below.

Exemption 1. Lesar contends that the conclusory nature of the classification affidavits, the nature of the materials involved (i.e., the fact that the underlying originals are from 12-27 years old and concern a campaign of harassment against the leader of a domestic social and political movement), the failure to classify the information at the time of origination, the FBI's motive to coverup these embarrassing materials, the failure to assert that the information being withheld is not already public, and the evidence showing that the FBI has employed this exemption to delete the publicly-known names of Dr. King's advisers raise a question of fact as to whether the present disclosure of this information "can reasonably be expected to cause damage to the national security."

Atlanta and Memphis Police Records. In order to sustain its Exemption 7(D) claim for these records, the Department had to show that release of the information would disclose the identity of a confidential source. Lesar put into the record detailed affidavits which vigorously disputed any claim of confidentiality with respect to these records. Thus, the affidavit of Mr. Harold Weis-

berg, an authority on the assassination of Dr. King, declared that former Memphis DA Phil M. Canale had not kept the files on the King assassination in confidence but had made them available to other writers; that the FBI had made copies of MPD records available to him; that he believed the contents of the MPD records withheld from Lesar had been made available to him in many thousands of pages provided by the FBI in an FOIA suit; and that the FBI had in fact given him some of the very Atlanta Police records which it withheld from Lesar under a claim that they had been to the FBI "with the clear understanding that the FBI would insure their confidentiality. Weisberg also pointed out that because of court proceedings, news leaks, and the disclosure of FBI files containing information obtained from the MPD, "[t]here is very little liklihood that any substantial information in the Memphis police reports is not public knowledge . . ." [See 5/22/78 Weisberg Affidavit, ¶¶18-38; 6/4/78 Weisberg Affidavit, ¶¶49, 93, 94-139]

Because Weisberg's affidavits directly disputed the Department's claim of confidentiality with detailed factual allegations which were supported in part by documentary evidence, they raised issues of fact which made it improper for the District Court to grant summary judgment with respect to these police records.

Exemption 7(C). The District Court held that the names of FBI personnel are properly withheld under Exemption 7(C). Lesar contends that this wrong as a matter of law, and that summary judgment was therefore improper. FBI agents "have no legitimate

privacy right to deletion of their names. Their involvement in investigative activities for the FBI is not a 'private fact'." Ferguson v. Kelley, 448 F.Supp. 919, 923 (N.D.Ill. 1977) And with respect to this category of Exemption 7(C) claims, as with the others, the District Court did not consider the fact that this case involves historically important records, or that the disclosure of these names is important to students, writers, and scholars of these events who inform the public about them.

Lesar has also filed affidavits alleging that the FBI is withholding publicly known information under Exemption 7(C) and is notorious for using this exemption to delete information that has no privacy aspect. For example, the FBI has invoked 7(C) to delete the name of an FBI agent from a newspaper article on his involvement in the James Earl Ray case and to delete the name of the Public Relations Director of Look Magazine. [6/4/78 Weisberg Affidavit, ¶68, Exhibit 8] In this case, for example 7(C) has been invoked to delete the names of those with whom Dr. King met or talked. Even the name of the person who requested that he speak at Illinois State College has been deleted on privacy grounds. [7/25/78 Lesar Affidavit, ¶20] In general, the FBI's privacy concerns are slanted and inconsistent. [See Weisberg Affidavit, ¶¶45-71]

Because these examples show the FBI's Exemption 7(C) claims to be inconsistent and far removed from the requirements of this exemption, and because the Department's affidavits were extemely vague and generalized in specifying the privacy interest involved,

summary judgment was inappropriate.

Exemption 7(D). Under this exemption the Department has the burden of showing that the withheld information is confidential and that there was an agency promise or implicit agreement to hold the matter in confidence. Rural Housing Alliance v. U.S.Dept. of Agriculture, 162 U.S.App.D.C. 122, 498 F.2d 73 (1974); Local 32 v. Irving, 91 LRRM 2513 (W.D.Washin. 1976). In this case the exemption has been used to conceal the number of years that the files of Stanley Levinson (a King adviser) reflected no communist activities and to excise the names of cities in which Klu Klux Klan meetings were held.

While this case was pending on appeal, the House Select Committee on Assassinations (HSCA) published a few of the records involved in this case. As a result, it has been established that the name of Cardinal Spellman was deleted from the materials given Lesar on 7(D) grounds. [Cf. HSCA Hearings on Investigation of the Assassination of Martin Luther King, Jr., Vol, VI, pp. 254-255, with page of OPR notes on FBI Headquarters document 100-106670-797 at App.] This document deals with the FBI's campaign to undermine Dr. King's relationship with Catholic organizations which were honoring him. There was no law enforcement purpose whatsoever involved, Cardinal Spellman has been dead 12 years now, so there is no protectible privacy interest, and the information in the document, including Spellman's name, was all published in the Church Committee's Report. [Church Report, Book III, p. 172]

These examples show that the FBI did not apply Exemption 7(D) properly when excising materials in this case; hence, an award of

summary judgment cannot be sustained.

VI. MATERIAL WITHHELD UNDER EXEMPTION 2 CAN BE RELEASED IN A MANNER WHICH ACCOMODATES LEGITIMATE PUBLIC INTEREST IN DISCLOSURE WITHOUT HARMING GOVERNMENTAL INTERESTS

The District Court sustained the withholding of informant symbol numbers under Exemption 2, stating that "[t]here is no legitimate public interest in releasing these symbols and such release would aid in the identification of informers and significantly harm governmental interests." Lesar, supra, 455 F.Supp. at 925.

Lesar contends this ruling was in error. Disclosure of informant symbol numbers does not reveal the identity of the informants, and the FBI not infrequently releases such symbol numbers itself. [5/22/78 Weisberg Affidavit, ¶38] Disclosure of informant symbol numbers would give an idea of how many informants were used and provide a means of assessing the extent of the FBI's coverage. Repetition of a symbol number can show that an agent provocateur is heating up a situation. Disclosure of symbol numbers makes it possible to evaluate the accuracy and prejudice of a given informant without disclosing his identity. This in turn makes it possible to evaluate the accuracy and prejudice of the review conducted by the OPR Task Force. Informant symbol numbers provide a means of evaluating the content and significance of events and information. For example, if the informant represented by a particular symbol number provides information known to be false on any occasion, all information provided by him must be viewed as suspect unless more reliably confirmed. In cases such as this, content

cannot be evaluated apart from the informant. There is, therefore, a legitimate public interest in disclosing these informant symbol numbers. [See 5/22/78 Weisberg Affidavit, ¶38; 6/4/78 Weisberg Affidavit, ¶¶72-89]

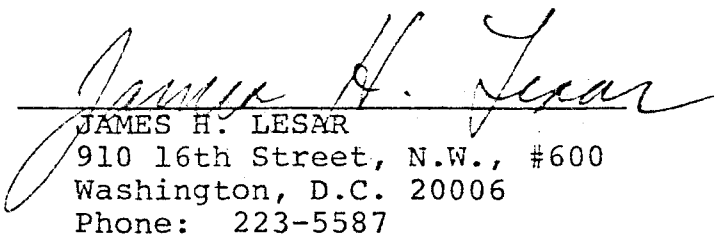
The public interest in learning more about the FBI's use of informants is has recently become very obvious, as witness the probes of alleged abuses which are being conducted by Congress and the Department of Justice itself.

However, should this Court agree with the District Court that release of symbol numbers will disclose the identities of informants, Lesar suggests that the public interest can be accomodated by replacing the symbols numbers with a letter (or some other arbitrary designation) to represent each individual informant. This will enable him to asertain how many different informants have been used and which informants are responsible for which information.

CONCLUSION

For the reasons stated above, summary judgment in favor of the Department should not have been granted on any of the issues in this case. The District Court should be reversed and the case should be remanded for further proceedings, including discovery on all issues, a Vaughn v. Rosen index for the Memphis Police records, and, if after discovery has been completed it is still necessary, in camera inspection of selected documents, with the aid of a classification expert where national security is allegedly the basis for withholding.

Respectfully submitted,



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A D D E N D U M

DIRECTIVE OF MAY 17, 1972

National Security Council Directive Governing the Classification, Downgrading, Declassification and Safeguarding of National Security Information

The President has directed that Executive Order 11652, "Classification and Declassification of National Security Information and Material," approved March 8, 1972 (37 F.R. 5209, March 10, 1972) be implemented in accordance with the following:

I Authority To Classify

A. *Personal and Non-delegable.* Classification authority may be exercised only by those officials who are designated by, or in writing pursuant to, Section 2 of Executive Order 11652 (hereinafter the "Order"). Such officials may classify information or material only at the level authorized or below. This authority vests only to the official designated under the Order, and may not be delegated.

B. *Observance of Classification.* Whenever information or material classified by an official designated under A above is incorporated in another document or other material by any person other than the classifier, the previously assigned security classification category shall be reflected thereon together with the identity of the classifier.

C. *Identification of Classifier.* The person at the highest level authorizing the classification must be identified on the face of the information or material classified, unless the identity of such person might disclose sensitive intelligence information. In the latter instance the Department shall establish some other record by which the classifier can readily be identified.

D. *Record Requirement.* Each Department listed in Section 2(A) of the Order shall maintain a listing by name of the officials who have been designated in writing to have Top Secret classification authority. Each Department listed in Section 2 (A) and (B) of the Order shall also maintain separate listings by name of the persons designated in writing to have Secret authority and persons designated in writing to have Confidential authority. In cases where listing of the names of officials having classification authority might disclose sensitive intelligence information, the Department shall establish some other record by which such officials can readily be identified. The foregoing listings and records shall be compiled beginning July 1, 1972 and updated at least on a quarterly basis.

E. *Resolution of Doubts.* If the classifier has any substantial doubt as to which security classification category is appropriate, or as to whether

the material should be classified at all, he should designate the less restrictive treatment.

II Downgrading and Declassification

A. *General Declassification Schedule and Exemptions.* Classified information and material shall be declassified as soon as there are no longer any grounds for continued classification within the classification category definitions set forth in Section 1 of the Order. At the time of origination the classifier shall, whenever possible, clearly mark on the information or material a specific date or event upon which downgrading or declassification shall occur. Such dates or events shall be as early as is permissible without causing damage to the national security as defined in Section 1 of the Order. Whenever earlier dates or events cannot be determined, the General Declassification Schedule set forth in Section 5(A) of the Order shall apply. If the information or material is exempted under Section 5(B) of the Order from the General Declassification Schedule, the classifier shall clearly mark the material to show that it is exempt and indicate the applicable exemption category. Unless impossible, the exempted information or material shall be assigned and clearly marked by the classifier with a specific date or event upon which declassification shall occur. Downgrading and declassification dates or events established in acordance with the foregoing, whether scheduled or non-scheduled, shall to the extent possible be carried forward and applied whenever the classified information or material is incorporated in other documents or material.

B. *Extracts and Compilations.* When classified information or material from more than one source is incorporated into a new document or other material, the document or other material shall be classified, downgraded or declassified in accordance with the provisions of the Order and Directives thereunder applicable to the information requiring the greatest protection.

C. *Material Not Officially Transferred.* When a Department holding classified information or material under the circumstances described in Section 3(D) of the Order notifies another Department of its intention to downgrade or declassify, it shall allow the notified Department 30 days in which to express its objections before taking action.

D. *Declassification of Material 30 Years Old.* The head of each Department shall assign experienced personnel to assist the Archivist of the United States in the exercise of his responsibility under Section 5(E) of the Order to systematically review for declassification all materials classified before June 1, 1972 and more than 30 years old. Such personnel will: (1) provide guidance and assistance to archival employees in identifying and separating those materials originated in their Departments which are deemed to require continued classification; and (2) develop a list for submission to the head of the Department which identifies the materials so separated, with recommendations concerning continued classification. The head of the originating Department will then make the determination required under Section 5(E) of the Order and cause a list to be created which identifies the documentation included

in the determination, indicates the reason for continued classification and specifies the date on which such material shall be declassified.

E. *Notification of Expedited Downgrading or Declassification.* When classified information or material is downgraded or declassified in a manner other than originally specified, whether scheduled or exempted, the classifier shall, to the extent practicable, promptly notify all addressees to whom the information or material was originally officially transmitted. In turn, the addressees shall notify any other known recipient of the classified information or material.

III Review of Classified Material for Declassification Purposes

A. *Systematic Reviews.* All information and material classified after the effective date of the Order and determined in accordance with Chapter 21, 44 U.S.C. (82 Stat. 1287) to be of sufficient historical or other value to warrant preservation shall be systematically reviewed on a timely basis by each Department for the purpose of making such information and material publicly available in accordance with the determination regarding declassification made by the classifier under Section 5 of the Order. During each calendar year each Department shall segregate to the maximum extent possible all such information and material warranting preservation and becoming declassified at or prior to the end of such year. Promptly after the end of such year the Department responsible, or the Archives of the United States if transferred thereto, shall make the declassified information and material available to the public to the extent permitted by law.

B. *Review for Declassification of Classified Material Over 10 Years Old.* Each Department shall designate in its implementing regulations an office to which members of the public or Departments may direct requests for mandatory review for declassification under Section 5 (C) and (D) of the Order. This office shall in turn assign the request to the appropriate office for action. In addition, this office or the office which has been assigned action shall immediately acknowledge receipt of the request in writing. If the request requires the rendering of services for which fair and equitable fees should be charged pursuant to Title 5 of the Independent Offices Appropriations Act, 1952, 65 Stat. 290, 31 U.S.C. 483a the requester shall be so notified. The office which has been assigned action shall thereafter make a determination within 30 days of receipt or shall explain the reasons why further time is necessary. If at the end of 60 days from receipt of the request for review no determination has been made, the requester may apply to the Departmental Committee established by Section 7(B) of the Order for a determination. Should the office assigned action on a request for review determine that under the criteria set forth in Section 5(B) of the Order continued classification is required, the requester shall promptly be notified, and whenever possible, provided with a brief statement as to why the requested information or material cannot be declassified. The requester may appeal any such determination to the Departmental Committee and the notice of determination shall advise him of this right.

C. *Departmental Committee Review for Declassification.* The Departmental Committee shall establish procedures to review and act within

30 days upon all applications and appeals regarding requests for declassification. The Department head, acting through the Departmental Committee shall be authorized to over-rule previous determinations in whole or in part when, in its judgment, continued protection is no longer required. If the Departmental Committee determines that continued classification is required under the criteria of Section 5(B) of the Order it shall promptly so notify the requester and advise him that he may appeal the denial to the Interagency Classification Review Committee.

D. *Review of Classified Material Over 30 Years Old.* A request by a member of the public or by a Department under Section 5 (C) or (D) of the Order to review for declassification documents more than 30 years old shall be referred directly to the Archivist of the United States, and he shall have the requested documents reviewed for declassification in accordance with Part II.D. hereof. If the information or material requested has not been transferred to the General Services Administration for accession into the Archives, the Archivist shall, together with the head of the Department having custody, have the requested documents reviewed for declassification. Classification shall be continued in either case only where the head of the Department concerned makes at that time the personal determination required by Section 5(E)(1) of the Order. The Archivist shall promptly notify the requester of such determination and of his right to appeal the denial to the Interagency Classification Review Committee.

E. *Burden of Proof for Administrative Determinations.* For purposes of administrative determinations under B., C., or D. above, the burden of proof is on the originating Department to show that continued classification is warranted within the terms of the Order.

F. *Availability of Declassified Material.* Upon a determination under B., C., or D. above that the requested material no longer warrants classification it shall be declassified and made promptly available to the requester, if not otherwise exempt from disclosure under Section 552(b) of Title 5 U.S.C. (Freedom of Information Act) or other provision of law.

G. *Classification Review Requests.* As required by Section 5(C) of the Order, a request for classification review must describe the document with sufficient particularity to enable the Department to identify it and obtain it with a reasonable amount of effort. Whenever a request is deficient in its description of the record sought, the requester should be asked to provide additional identifying information whenever possible. Before denying a request on the ground that it is unduly burdensome, the requester should be asked to limit his request to records that are reasonably obtainable. If none-the-less the requester does not describe the records sought with sufficient particularity, or the record requested cannot be obtained with a reasonable amount of effort, the requester shall be notified of the reasons why no action will be taken and of his right to appeal such decision.

IV Marking Requirements

A. *When Document or Other Material is Prepared.* At the time of origination, each document or other material containing classified in-

formation shall be marked with its assigned security classification and whether it is subject to or exempt from the General Declassification Schedule.

(1) For marking documents which are subject to the General Declassification Schedule, the following stamp shall be used:

(TOP SECRET, SECRET OR CONFIDENTIAL) CLASSIFIED
BY _____
SUBJECT TO GENERAL DECLASSIFICATION SCHEDULE OF EXECUTIVE ORDER 11652 AUTOMATICALLY DOWNGRADED AT TWO YEAR INTERVALS AND DECLASSIFIED ON DEC. 31 (insert year)

(2) For marking documents which are to be automatically declassified on a given event or date earlier than the General Declassification Schedule the following stamp shall be used:

(TOP SECRET, SECRET OR CONFIDENTIAL) CLASSIFIED
BY _____
AUTOMATICALLY DECLASSIFIED ON (effective date or event)

(3) For marking documents which are exempt from the General Declassification Schedule the following stamp shall be used:

(TOP SECRET, SECRET OR CONFIDENTIAL) CLASSIFIED
BY _____
EXEMPT FROM GENERAL DECLASSIFICATION SCHEDULE OF EXECUTIVE ORDER 11652 EXEMPTION CATEGORY (§ 5B (1), (2), (3), or (4)) AUTOMATICALLY DECLASSIFIED ON (effective date or event, if any)

Should the classifier inadvertently fail to mark a document with one of the foregoing stamps the document shall be deemed to be subject to the General Declassification Schedule. The person who signs or finally approves a document or other material containing classified information shall be deemed to be the classifier. If the classifier is other than such person he shall be identified on the stamp as indicated.

The "Restricted Data" and "Formerly Restricted Data" stamps (H. below) are, in themselves, evidence of exemption from the General Declassification Schedule.

B. *Overall and Page Marking of Documents.* The overall classification of a document, whether or not permanently bound, or any copy or reproduction thereof, shall be conspicuously marked or stamped at the top and bottom of the outside of the front cover (if any), on the title page (if any), on the first page, on the back page and on the outside of the back cover (if any). To the extent practicable each interior page of a document which is not permanently bound shall be conspicuously marked or stamped at the top and bottom according to its own content, including the designation "Unclassified" when appropriate.

C. *Paragraph Marking.* Whenever a classified document contains either more than one security classification category or unclassified information, each section, part or paragraph should be marked to the extent practicable to show its classification category or that it is unclassified.

D. *Material Other Than Documents.* If classified material cannot be marked, written notification of the information otherwise required in markings shall accompany such material.

E. *Transmittal Documents.* A transmittal document shall carry on it a prominent notation as to the highest classification of the information which is carried with it, and a legend showing the classification, if any, of the transmittal document standing alone.

F. *Wholly Unclassified Material Not Usually Marked.* Normally, unclassified material shall not be marked or stamped "Unclassified" unless the purpose of the marking is to indicate that a decision has been made not to classify it.

G. *Downgrading, Declassification and Upgrading Markings.* Whenever a change is made in the original classification or in the dates of downgrading or declassification of any classified information or material it shall be promptly and conspicuously marked to indicate the change, the authority for the action, the date of the action, and the identity of the person taking the action. In addition, all earlier classification markings shall be cancelled, if practicable, but in any event on the first page.

(1) *Limited Use of Posted Notice for Large Quantities of Material.* When the volume of information or material is such that prompt remarking of each classified item could not be accomplished without unduly interfering with operations, the custodian may attach downgrading, declassification or upgrading notices to the storage unit in lieu of the remarking otherwise required. Each notice shall indicate the change, the authority for the action, the date of the action, the identity of the person taking the action and the storage units to which it applies. When individual documents or other materials are withdrawn from such storage units they shall be promptly remarked in accordance with the change, or if the documents have been declassified, the old markings shall be cancelled.

(2) *Transfer of Stored Quantities Covered by Posted Notice.* When information or material subject to a posted downgrading, upgrading or declassification notice are withdrawn from one storage unit solely for transfer to another, or a storage unit containing such documents or other materials is transferred from one place to another, the transfer may be made without remarking if the notice is attached to or remains with each shipment.

H. *Additional Warning Notices.* In addition to the foregoing marking requirements, warning notices shall be prominently displayed on classified documents or materials as prescribed below. When display of these warning notices on the documents or other materials is not feasible, the warnings shall be included in the written notification of the assigned classification.

(1) *Restricted Data.* For classified information or material containing Restricted Data as defined in the Atomic Energy Act of 1954, as amended:

"RESTRICTED DATA"

This document contains Restricted Data as defined in the Atomic Energy Act of 1954. Its dissemination or disclosure to any unauthorized person is prohibited.

(2) *Formerly Restricted Data.* For classified information or material containing solely Formerly Restricted Data, as defined in Section 142.d., Atomic Energy Act of 1954, as amended:

"FORMERLY RESTRICTED DATA"

Unauthorized disclosure subject to Administrative and Criminal Sanctions. Handle as Restricted Data in Foreign Dissemination. Section 144.b., Atomic Energy Act, 1954.

(3) *Information Other Than Restricted Data or Formerly Restricted Data.* For classified information or material furnished to persons outside the Executive Branch of Government other than as described in (1) and (2) above:

"NATIONAL SECURITY INFORMATION"

Unauthorized Disclosure Subject to Criminal Sanctions.

(4) *Sensitive Intelligence Information.* For classified information or material relating to sensitive intelligence sources and methods, the following warning notice shall be used, in addition to and in conjunction with those prescribed in (1), (2), or (3), above, as appropriate:

"WARNING NOTICE—SENSITIVE INTELLIGENCE SOURCES AND METHODS INVOLVED"

V Protection and Transmission of Classified Information

A. *General.* Classified information or material may be used, held, or stored only where there are facilities or under conditions adequate to prevent unauthorized persons from gaining access to it. Whenever such information or material is not under the personal supervision of an authorized person, the methods set forth in *Appendix A* hereto shall be used to protect it. Whenever such information or material is transmitted outside the originating Department the requirements of *Appendix B* hereto shall be observed.

B. *Loss or Possible Compromise.* Any person who has knowledge of the loss or possible compromise of classified information shall immediately report the circumstances to a designated official of his Department or organization. In turn, the originating Department and any other interested Department shall be notified about the loss or possible compromise in order that a damage assessment may be conducted. An immediate inquiry shall be initiated by the Department in which the loss or compromise occurred for the purpose of taking corrective measures and appropriate administrative, disciplinary, or legal action.

VI Access and Accountability

A. *General Access Requirements.* Except as provided in B. and C. below, access to classified information shall be granted in accordance with the following:

(1) *Determination of Trustworthiness.* No person shall be given access to classified information or material unless a favorable determination has been made as to his trustworthiness. The determination of eligibility, referred to as a security clearance, shall be based on such investigations as the Department may require in accordance with the standards and criteria of E.O. 10450 and E.O. 10865 as appropriate.

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(2) *Determination of Need-to-Know.* In addition to a security clearance, a person must have a need for access to the particular classified information or material sought in connection with the performance of his official duties or contractual obligations. The determination of that need shall be made by officials having responsibility for the classified information or material.

(3) *Administrative Withdrawal of Security Clearance.* Each Department shall make provision for administratively withdrawing the security clearance of any person who no longer requires access to classified information or material in connection with the performance of his official duties or contractural obligations. Likewise, when a person no longer needs access to a particular security classification category, the security clearance shall be adjusted to the classification category still required for the performance of his duties and obligations. In both instances, such action shall be without prejudice to the person's eligibility for a security clearance should the need again arise.

B. *Access by Historical Researchers.* Persons outside the Executive Branch engaged in historical research projects may be authorized access to classified information or material provided that the head of the originating Department determines that:

(1) The project and access sought conform to the requirements of Section 12 of the Order.

(2) The information or material requested is reasonably accessible and can be located and compiled with a reasonable amount of effort.

(3) The historical researcher agrees to safeguard the information or material in a manner consistent with the Order and Directives thereunder.

(4) The historical researcher agrees to authorize a review of his notes and manuscript for the sole purpose of determining that no classified information or material is contained therein.

An authorization for access shall be valid for the period required but no longer than two years from the date of issuance unless renewed under regulations of the originating Department.

C. *Access by Former Presidential Appointees.* Persons who previously occupied policy making positions to which they were appointed by the President, other than those referred to in Section 11 of the Order, may be authorized access to classified information or material which they originated, reviewed, signed or received while in public office. Upon the request of any such former official, such information and material as he may identify shall be reviewed for declassification in accordance with the provisions of Section 5 of the Order.

D. *Consent of Originating Department to Dissemination by Recipient.* Except as otherwise provided by Section 102 of the National Security Act of 1947, 61 Stat. 495, 50 U.S.C. 403, classified information or material originating in one Department shall not be disseminated outside any other Department to which it has been made available without the consent of the originating Department.

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E. *Dissemination of Sensitive Intelligence Information.* Information or material bearing the notation "WARNING NOTICE—SENSITIVE INTELLIGENCE SOURCES AND METHODS INVOLVED" shall not be disseminated in any manner outside authorized channels without the permission of the originating Department and an assessment by the senior intelligence official in the disseminating Department as to the potential risk to the national security and to the intelligence sources and methods involved.

F. *Restraint on Special Access Requirements.* The establishment of special rules limiting access to, distribution and protection of classified information and material under Section 9 of the Order requires the specific prior approval of the head of a Department or his designee.

G. *Accountability Procedures.* Each Department shall prescribe such accountability procedures as are necessary to control effectively the dissemintaion of classified information or material. Particularly stringent controls shall be placed on information and material classified Top Secret.

(1) *Top Secret Control Officers.* Top Secret Control Officers shall be designated, as required, to receive, maintain current accountability records of, and dispatch Top Secret material.

(2) *Physical Inventory.* A physical inventory of all Top Secret material shall be made at least annually. As an exception, repositories storing large volumes of classified material, shall develop inventory lists or other finding aids.

(3) *Current Accountability.* Top Secret and Secret information and material shall be subject to such controls including current accountability records as the head of the Department may prescribe.

(4) *Restraint on Reproduction.* Documents or portions of documents containing Top Secret information shall not be reproduced without the consent of the originating office. All other classified material shall be reproduced sparingly and any stated prohibition against reproduction shall be strictly adhered to.

(5) *Restraint on Number of Copies.* The number of copies of documents containing classified information shall be kept to a minimum to decrease the risk of compromise and reduce storage costs.

VII Data Index System

Each Department originating classified information or material shall undertake to establish a data index system for Top Secret, Secret and Confidential information in selected categories approved by the Interagency Classification Review Committee as having sufficient historical or other value appropriate for preservation. The index system shall contain the following data for each document indexed: (a) Identity of classifier, (b) Department of origin, (c) Addressees, (d) Date of classification, (e) Subject/Area, (f) Classification category and whether subject to or exempt from the General Declassification Schedule, (g) If exempt, which exemption category is applicable, (h) Date or event set for declassification, and (i) File designation. Information and material shall be indexed into the system at the earliest practicable date during the course

of the calendar year in which it is produced and classified, or in any event no later than March 31st of the succeeding year. Each Department shall undertake to establish such a data index system no later than July 1, 1973, which shall index the selected categories of information and material produced and classified after December 31, 1972.

VIII Combat Operations

The provisions of the Order and this Directive with regard to dissemination, transmission, or safekeeping of classified information or material may be so modified in connection with combat or combat-related operations as the Secretary of Defense may by regulations prescribe.

IX Interagency Classification Review Committee

A. *Composition of Interagency Committee.* In accordance with Section 7 of the Order, an Interagency Classification Review Committee is established to assist the National Security Council in monitoring implementation of the Order. Its membership is comprised of senior representatives of the Departments of State, Defense, and Justice, the Atomic Energy Commission, the Central Intelligence Agency, the National Security Council staff, and a Chairman designated by the President.

B. *Meetings and Staff.* The Interagency Committee shall meet regularly, but no less frequently than on a monthly basis, and take such actions as are deemed necessary to insure uniform compliance with the Order and this Directive. The Chairman is authorized to appoint an Executive Director, and to maintain a permanent administrative staff.

C. *Interagency Committee's Functions.* The Interagency Committee shall carry out the duties assigned it by Section 7(A) of the Order. It shall place particular emphasis on overseeing compliance with and implementation of the Order and programs established thereunder by each Department. It shall seek to develop means to (a) prevent overclassification, (b) ensure prompt declassification in accord with the provision of the Order, (c) facilitate access to declassified material and (d) eliminate unauthorized disclosure of classified information.

D. *Classification Complaints.* Under such procedures as the Interagency Committee may prescribe, it shall consider and take action on complaints from persons within or without the government with respect to the general administration of the Order including appeals from denials by Departmental Committees or the Archivist of declassification requests.

X Departmental Implementation and Enforcement

A. *Action Programs.* Those Departments listed in Section 2 (A) and (B) of the Order shall insure that adequate personnel and funding are provided for the purpose of carrying out the Order and Directives thereunder.

B. *Departmental Committee.* All suggestions and complaints, including those regarding overclassification, failure to declassify, or delay in declassifying not otherwise resolved, shall be referred to the Departmental Committee for resolution. In addition, the Departmental Committee shall review all appeals of requests for records under Section 522 of Title 5

U.S.C. (Freedom of Information Act) when the proposed denial is based on their continued classification under the Order.

C. *Regulations and Reports.* Each Department shall submit its proposed implementing regulations of the Order and Directives thereunder to the Chairman of the Interagency Classification Review Committee for approval by the Committee. Upon approval such regulations shall be published in the FEDERAL REGISTER to the extent they affect the general public. Each Department shall also submit to the said Chairman (1) copies of the record lists required under Part I.D. hereof by July 1, 1972 and thereafter quarterly, (2) quarterly reports of Departmental Committee actions on classification review requests, classification abuses and unauthorized disclosures, and (3) provide progress reports on information accumulated in the data index system established under Part VII hereof and such other reports as said Chairman may find necessary for the Interagency Classification Review Committee to carry out its responsibilities.

D. *Administrative Enforcement.* The Departmental Committees shall have responsibility for recommending to the head of the respective Departments appropriate administrative action to correct abuse or violation of any provision of the Order or Directives thereunder, including notifications by warning letter, formal reprimand, and to the extent permitted by law, suspension without pay and removal. Upon receipt of such a recommendation the head of the Department concerned shall act promptly and advise the Departmental Committee of his action.

Publication and Effective Date: This Directive shall be published in the FEDERAL REGISTER and become effective June 1, 1972.

HENRY A. KISSINGER,
Assistant to the President for
National Security Affairs.

MAY 17, 1972.

APPENDIX A

PROTECTION OF CLASSIFIED INFORMATION

A. *Storage of Top Secret.* Top Secret information and material shall be stored in a safe or safe-type steel file container having a built in three-position dial-type combination lock, vault, or vault-type room, or other storage facility which meets the standards for Top Secret established under the provisions of (C) below, and which minimizes the possibility of unauthorized access to, or the physical theft of, such information or material.

B. *Storage of Secret or Confidential.* Secret and Confidential material may be stored in a manner authorized for Top Secret information and material, or in a container or vault which meets the standards for Secret or Confidential, as the case may be, established under the provisions of (C) below.

C. *Standards for Security Equipment.* The General Services Administration shall, in coordination with Departments originating classified information or material, establish and publish uniform standards, specifications and supply schedules for containers, vaults, alarm systems and associated security devices suitable for the storage and protection of all categories of classified information and material. Any Department may establish for use within such Department more stringent standards. Whenever new security equipment is procured, it shall be in conformance with the foregoing standards and specifications and shall, to the maximum extent practicable, be of the type designated on the Federal Supply Schedule, General Services Administration.

D. *Exception to Standards for Security Equipment.* As an exception to (C) above, Secret and Confidential material may also be stored in a steel filing cabinet having a built in, three-position, dial-type combination lock; or a steel filing cabinet equipped with a steel lock bar, provided it is secured by a GSA approved changeable combination padlock.

E. *Combinations.* Combinations to security equipment and devices shall be changed only by persons having appropriate security clearance, and shall be changed whenever such equipment is placed in use, whenever a person knowing the combination is transferred from the office to which the equipment is assigned, whenever a combination has been subjected to possible compromise, and at least once every year. Knowledge of combinations shall be limited to the minimum number of persons necessary for operating purposes. Records of combinations shall be classified no lower than the highest category of classified information or material authorized for storage in the security equipment concerned.

F. *Telecommunications Conversations.* Classified information shall not be revealed in telecommunications conversations, except as may be authorized under Appendix B with respect to the transmission of classified information over approved communications circuits or systems.

G. *Responsibilities of Custodians.* Custodians of classified material shall be responsible for providing protection and accountability for such material at all times and particularly for locking classified material in approved security equipment whenever it is not in use or under direct supervision of authorized persons. Custodians shall follow procedures which insure that unauthorized persons do not gain access to classified information or material by sight or sound, and classified information shall not be discussed with or in the presence of unauthorized persons.

APPENDIX B

TRANSMISSION OF CLASSIFIED INFORMATION

A. *Preparation and Receipting.* Classified information and material shall be enclosed in opaque inner and outer covers before transmitting. The inner cover shall be a sealed wrapper or envelope plainly marked with the assigned classification and address. The outer cover shall be sealed and addressed with no indication of the classification of its contents. A receipt shall be attached to or enclosed in the inner cover, except that Confidential material shall require a receipt only if the sender deems it necessary. The receipt shall identify the sender, addressee, and the document, but shall contain no classified information. It shall be signed by the recipient and returned to the sender.

B. *Transmission of Top Secret.* The transmission of Top Secret information and material shall be effected preferably by oral discussions in person between the officials concerned. Otherwise the transmission of Top Secret information and material shall be by specifically designated personnel, by State Department diplomatic pouch, by a messenger-courier system especially created for that purpose, over authorized communications circuits in encrypted form or by other means authorized by the National Security Council; except that in the case of information transmitted by the Federal Bureau of Investigation, such means of transmission may be used as are approved by the Director, Federal Bureau of Investigation, unless express reservation to the contrary is made in exceptional cases by the originating Department.

C. *Transmission of Secret.* The transmission of Secret material shall be effected in the following manner.

(1) *The Fifty States, District of Columbia, Puerto Rico.* Secret information and material may be transmitted within and between the forty-eight contiguous states and District of Columbia, or wholly within the State of Hawaii, the State of Alaska, or the Commonwealth of Puerto Rico by one of the means authorized for Top Secret information and material, the United States Postal Service registered mail and protective services provided by the United States air or surface commercial carriers under such conditions as may be prescribed by the head of the Department concerned.

(2) *Other Areas, Vessels, Military Postal Services, Aircraft.* Secret information and material may be transmitted from or to or within areas other than those specified in (1) above, by one of the means established for Top Secret information and material, captains or masters of vessels of United States registry under contract to a Department of the Executive Branch, United States registered mail through Army, Navy or Air Force Postal Service facilities provided that material does not at any time pass out of United States citizen control and does not pass through a foreign postal system, and commercial aircraft under charter to the United States and military or other government aircraft.

(3) *Canadian Government Installations.* Secret information and material may be transmitted between United States Government or Canadian Government installations, or both, in the forty-eight contiguous states, Alaska, the District of Columbia and Canada by United States and Canadian registered mail with registered mail receipt.

(4) *Special Cases.* Each Department may authorize the use of the United States Postal Service registered mail outside the forty-eight contiguous states, the District of Columbia, the State of Hawaii, the State of Alaska, and the Commonwealth of Puerto Rico if warranted by security conditions and essential operational requirements provided that the material does not at any time pass out of United States Government and United States citizen control and does not pass through a foreign postal system.

D. *Transmittal of Confidential.* Confidential information and material shall be transmitted within the forty-eight contiguous states and the District of Columbia, or wholly within Alaska, Hawaii, the Commonwealth of Puerto Rico, or a United States possession, by one of the means established for higher classifications, or by certified or first class mail. Outside these areas, Confidential information and material shall be transmitted in the same manner as authorized for higher classifications.

E. *Alternative Transmission of Confidential.* Each Department having authority to classify information or material as "Confidential" may issue regulations authorizing alternative or additional methods for the transmission of material classified "Confidential" outside of the Department. In the case of material originated by another agency, the method of transmission must be at least as secure as the transmission procedures imposed by the originator.

F. *Transmission Within a Department.* Department regulations governing the preparation and transmission of classified information within a Department shall ensure a degree of security equivalent to that prescribed above for transmission outside the Department.

[FR Doc.72-7713 Filed 5-17-72;5:04 pm]

Title 3—The President

EXECUTIVE ORDER 11652

Classification and Declassification of National Security Information and Material

The interests of the United States and its citizens are best served by making information regarding the affairs of Government readily available to the public. This concept of an informed citizenry is reflected in the Freedom of Information Act and in the current public information policies of the executive branch.

Within the Federal Government there is some official information and material which, because it bears directly on the effectiveness of our national defense and the conduct of our foreign relations, must be subject to some constraints for the security of our Nation and the safety of our people and our allies. To protect against actions hostile to the United States, of both an overt and covert nature, it is essential that such official information and material be given only limited dissemination.

This official information or material, referred to as classified information or material in this order, is expressly exempted from public disclosure by Section 552(b)(1) of Title 5, United States Code. Wrongful disclosure of such information or material is recognized in the Federal Criminal Code as providing a basis for prosecution.

To ensure that such information and material is protected, but only to the extent and for such period as is necessary, this order identifies the information to be protected, prescribes classification, downgrading, declassification and safeguarding procedures to be followed, and establishes a monitoring system to ensure its effectiveness.

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, it is hereby ordered:

SECTION 1. *Security Classification Categories.* Official information or material which requires protection against unauthorized disclosure in the interest of the national defense or foreign relations of the United States (hereinafter collectively termed "national security") shall be classified in one of three categories, namely "Top Secret," "Secret," or "Confidential," depending upon the degree of its significance to national security. No other categories shall be used to identify official information or material as requiring protection in the interest of national security, except as otherwise expressly provided by statute. These classification categories are defined as follows:

(A) *"Top Secret."* "Top Secret" refers to that national security information or material which requires the highest degree of protection. The test for assigning "Top Secret" classification shall be whether its unauthorized disclosure could reasonably be expected to cause exceptionally grave damage to the national security. Examples of "exceptionally grave damage" include armed hostilities against the United States or its allies; disruption of foreign relations vitally affecting the

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national security; the compromise of vital national defense plans or complex cryptologic and communications intelligence systems; the revelation of sensitive intelligence operations; and the disclosure of scientific or technological developments vital to national security. This classification shall be used with the utmost restraint.

(B) *"Secret."* "Secret" refers to that national security information or material which requires a substantial degree of protection. The test for assigning "Secret" classification shall be whether its unauthorized disclosure could reasonably be expected to cause serious damage to the national security. Examples of "serious damage" include disruption of foreign relations significantly affecting the national security; significant impairment of a program or policy directly related to the national security; revelation of significant military plans or intelligence operations; and compromise of significant scientific or technological developments relating to national security. The classification "Secret" shall be sparingly used.

(C) *"Confidential."* "Confidential" refers to that national security information or material which requires protection. The test for assigning "Confidential" classification shall be whether its unauthorized disclosure could reasonably be expected to cause damage to the national security.

SEC. 2. *Authority to Classify.* The authority to originally classify information or material under this order shall be restricted solely to those offices within the executive branch which are concerned with matters of national security, and shall be limited to the minimum number absolutely required for efficient administration. Except as the context may otherwise indicate, the term "Department" as used in this order shall include agency or other governmental unit.

(A) The authority to originally classify information or material under this order as "Top Secret" shall be exercised only by such officials as the President may designate in writing and by:

(1) The heads of the Departments listed below;

(2) Such of their senior principal deputies and assistants as the heads of such Departments may designate in writing; and

(3) Such heads and senior principal deputies and assistants of major elements of such Departments, as the heads of such Departments may designate in writing.

Such offices in the Executive Office of the President as the President may designate in writing
Central Intelligence Agency
Atomic Energy Commission
Department of State
Department of the Treasury
Department of Defense
Department of the Army
Department of the Navy
Department of the Air Force
United States Arms Control and Disarmament Agency

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Department of Justice
National Aeronautics and Space Administration
Agency for International Development

(B) The authority to originally classify information or material under this order as "Secret" shall be exercised only by:

(1) Officials who have "Top Secret" classification authority;

(2) Such subordinates as officials with "Top Secret" classification authority under (A) (1) and (2) above may designate in writing; and

(3) The heads of the following named Departments and such senior principal deputies or assistants as they may designate in writing.

Department of Transportation
Federal Communications Commission
Export-Import Bank of the United States
Department of Commerce
United States Civil Service Commission
United States Information Agency
General Services Administration
Department of Health, Education, and Welfare
Civil Aeronautics Board
Federal Maritime Commission
Federal Power Commission
National Science Foundation
Overseas Private Investment Corporation

(C) The authority to originally classify information or material under this order as "Confidential" may be exercised by officials who have "Top Secret" or "Secret" classification authority and such officials as they may designate in writing.

(D) Any Department not referred to herein and any Department or unit established hereafter shall not have authority to originally classify information or material under this order, unless specifically authorized hereafter by an Executive order.

SEC. 3. *Authority to Downgrade and Declassify.* The authority to downgrade and declassify national security information or material shall be exercised as follows:

(A) Information or material may be downgraded or declassified by the official authorizing the original classification, by a successor in capacity or by a supervisory official of either.

(B) Downgrading and declassification authority may also be exercised by an official specifically authorized under regulations issued by the head of the Department listed in Sections 2(A) or (B) hereof.

(C) In the case of classified information or material officially transferred by or pursuant to statute or Executive order in conjunction with a transfer of function and not merely for storage purposes, the receiving Department shall be deemed to be the originating Department for all purposes under this order including downgrading and declassification.

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(D) In the case of classified information or material not officially transferred within (C) above, but originated in a Department which has since ceased to exist, each Department in possession shall be deemed to be the originating Department for all purposes under this order. Such information or material may be downgraded and declassified by the Department in possession after consulting with any other Departments having an interest in the subject matter.

(E) Classified information or material transferred to the General Services Administration for accession into the Archives of the United States shall be downgraded and declassified by the Archivist of the United States in accordance with this order, directives of the President issued through the National Security Council and pertinent regulations of the Departments.

(F) Classified information or material with special markings, as described in Section 8, shall be downgraded and declassified as required by law and governing regulations.

SEC. 4. *Classification.* Each person possessing classifying authority shall be held accountable for the propriety of the classifications attributed to him. Both unnecessary classification and over-classification shall be avoided. Classification shall be solely on the basis of national security considerations. In no case shall information be classified in order to conceal inefficiency or administrative error, to prevent embarrassment to a person or Department, to restrain competition or independent initiative, or to prevent for any other reason the release of information which does not require protection in the interest of national security. The following rules shall apply to classification of information under this order:

(A) *Documents in General.* Each classified document shall show on its face its classification and whether it is subject to or exempt from the General Declassification Schedule. It shall also show the office of origin, the date of preparation and classification and, to the extent practicable, be so marked as to indicate which portions are classified, at what level, and which portions are not classified in order to facilitate excerpting and other use. Material containing references to classified materials, which references do not reveal classified information, shall not be classified.

(B) *Identification of Classifying Authority.* Unless the Department involved shall have provided some other method of identifying the individual at the highest level that authorized classification in each case, material classified under this order shall indicate on its face the identity of the highest authority authorizing the classification. Where the individual who signs or otherwise authenticates a document or item has also authorized the classification, no further annotation as to his identity is required.

(C) *Information or Material Furnished by a Foreign Government or International Organization.* Classified information or material furnished to the United States by a foreign government or international organization shall either retain its original classification or be assigned a United States classification. In either case, the classification shall assure a degree of protection equivalent to that required by the government or international organization which furnished the information or material.

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(D) *Classification Responsibilities.* A holder of classified information or material shall observe and respect the classification assigned by the originator. If a holder believes that there is unnecessary classification, that the assigned classification is improper, or that the document is subject to declassification under this order, he shall so inform the originator who shall thereupon re-examine the classification.

SEC. 5. *Declassification and Downgrading.* Classified information and material, unless declassified earlier by the original classifying authority, shall be declassified and downgraded in accordance with the following rules:

(A) *General Declassification Schedule.* (1) *"Top Secret."* Information or material originally classified "Top Secret" shall become automatically downgraded to "Secret" at the end of the second full calendar year following the year in which it was originated, downgraded to "Confidential" at the end of the fourth full calendar year following the year in which it was originated, and declassified at the end of the tenth full calendar year following the year in which it was originated.

(2) *"Secret."* Information and material originally classified "Secret" shall become automatically downgraded to "Confidential" at the end of the second full calendar year following the year in which it was originated, and declassified at the end of the eighth full calendar year following the year in which it was originated.

(3) *"Confidential."* Information and material originally classified "Confidential" shall become automatically declassified at the end of the sixth full calendar year following the year in which it was originated.

(B) *Exemptions from General Declassification Schedule.* Certain classified information or material may warrant some degree of protection for a period exceeding that provided in the General Declassification Schedule. An official authorized to originally classify information or material "Top Secret" may exempt from the General Declassification Schedule any level of classified information or material originated by him or under his supervision if it falls within one of the categories described below. In each case such official shall specify in writing on the material the exemption category being claimed and, unless impossible, a date or event for automatic declassification. The use of the exemption authority shall be kept to the absolute minimum consistent with national security requirements and shall be restricted to the following categories:

(1) Classified information or material furnished by foreign governments or international organizations and held by the United States on the understanding that it be kept in confidence.

(2) Classified information or material specifically covered by statute, or pertaining to cryptography, or disclosing intelligence sources or methods.

(3) Classified information or material disclosing a system, plan, installation, project or specific foreign relations matter the continuing protection of which is essential to the national security.

(4) Classified information or material the disclosure of which would place a person in immediate jeopardy.

(C) *Mandatory Review of Exempted Material.* All classified information and material originated after the effective date of this order which is exempted under (B) above from the General Declassification Schedule shall be subject to a classification review by the originating Department at any time after the expiration of ten years from the date of origin provided:

(1) A Department or member of the public requests a review;

(2) The request describes the record with sufficient particularity to enable the Department to identify it; and

(3) The record can be obtained with only a reasonable amount of effort.

Information or material which no longer qualifies for exemption under (B) above shall be declassified. Information or material continuing to qualify under (B) shall be so marked and, unless impossible, a date for automatic declassification shall be set.

(D) *Applicability of the General Declassification Schedule to Previously Classified Material.* Information or material classified before the effective date of this order and which is assigned to Group 4 under Executive Order No. 10501, as amended by Executive Order No. 10964, shall be subject to the General Declassification Schedule. All other information or material classified before the effective date of this order, whether or not assigned to Groups 1, 2, or 3 of Executive Order No. 10501, as amended, shall be excluded from the General Declassification Schedule. However, at any time after the expiration of ten years from the date of origin it shall be subject to a mandatory classification review and disposition under the same conditions and criteria that apply to classified information and material created after the effective date of this order as set forth in (B) and (C) above.

(E) *Declassification of Classified Information or Material After Thirty Years.* All classified information or material which is thirty years old or more, whether originating before or after the effective date of this order, shall be declassified under the following conditions:

(1) All information and material classified after the effective date of this order shall, whether or not declassification has been requested, become automatically declassified at the end of thirty full calendar years after the date of its original classification except for such specifically identified information or material which the head of the originating Department personally determines in writing at that time to require continued protection because such continued protection is essential to the national security or disclosure would place a person in immediate jeopardy. In such case, the head of the Department shall also specify the period of continued classification.

(2) All information and material classified before the effective date of this order and more than thirty years old shall be systematically reviewed for declassification by the Archivist of the United States by the end of the thirtieth full calendar year following the year in which it was

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originated. In his review, the Archivist will separate and keep protected only such information or material as is specifically identified by the head of the Department in accordance with (E)(1) above. In such case, the head of the Department shall also specify the period of continued classification.

(F) *Departments Which Do Not Have Authority For Original Classification.* The provisions of this section relating to the declassification of national security information or material shall apply to Departments which, under the terms of this order, do not have current authority to originally classify information or material, but which formerly had such authority under previous Executive orders.

SEC. 6. *Policy Directives on Access, Marking, Safekeeping, Accountability, Transmission, Disposition and Destruction of Classified Information and Material.* The President acting through the National Security Council shall issue directives which shall be binding on all Departments to protect classified information from loss or compromise. Such directives shall conform to the following policies:

(A) No person shall be given access to classified information or material unless such person has been determined to be trustworthy and unless access to such information is necessary for the performance of his duties.

(B) All classified information and material shall be appropriately and conspicuously marked to put all persons on clear notice of its classified contents.

(C) Classified information and material shall be used, possessed, and stored only under conditions which will prevent access by unauthorized persons or dissemination to unauthorized persons.

(D) All classified information and material disseminated outside the executive branch under Executive Order No. 10865 or otherwise shall be properly protected.

(E) Appropriate accountability records for classified information shall be established and maintained and such information and material shall be protected adequately during all transmissions.

(F) Classified information and material no longer needed in current working files or for reference or record purposes shall be destroyed or disposed of in accordance with the records disposal provisions contained in Chapter 33 of Title 44 of the United States Code and other applicable statutes.

(G) Classified information or material shall be reviewed on a systematic basis for the purpose of accomplishing downgrading, declassification, transfer, retirement and destruction at the earliest practicable date.

SEC. 7. *Implementation and Review Responsibilities.* (A) The National Security Council shall monitor the implementation of this order. To assist the National Security Council, an Interagency Classification Review Committee shall be established, composed of representatives of the Departments of State, Defense and Justice, the Atomic Energy Commission, the Central Intelligence Agency and the National

Security Council Staff and a Chairman designated by the President. Representatives of other Departments in the executive branch may be invited to meet with the Committee on matters of particular interest to those Departments. This Committee shall meet regularly and on a continuing basis shall review and take action to ensure compliance with this order, and in particular:

(1) The Committee shall oversee Department actions to ensure compliance with the provisions of this order and implementing directives issued by the President through the National Security Council.

(2) The Committee shall, subject to procedures to be established by it, receive, consider and take action on suggestions and complaints from persons within or without the government with respect to the administration of this order, and in consultation with the affected Department or Departments assure that appropriate action is taken on such suggestions and complaints.

(3) Upon request of the Committee Chairman, any Department shall furnish to the Committee any particular information or material needed by the Committee in carrying out its functions.

(B) To promote the basic purposes of this order, the head of each Department originating or handling classified information or material shall:

(1) Prior to the effective date of this order submit to the Interagency Classification Review Committee for approval a copy of the regulations it proposes to adopt pursuant to this order.

(2) Designate a senior member of his staff who shall ensure effective compliance with and implementation of this order and shall also chair a Departmental committee which shall have authority to act on all suggestions and complaints with respect to the Department's administration of this order.

(3) Undertake an initial program to familiarize the employees of his Department with the provisions of this order. He shall also establish and maintain active training and orientation programs for employees concerned with classified information or material. Such programs shall include, as a minimum, the briefing of new employees and periodic reorientation during employment to impress upon each individual his responsibility for exercising vigilance and care in complying with the provisions of this order. Additionally, upon termination of employment or contemplated temporary separation for a sixty-day period or more, employees shall be debriefed and each reminded of the provisions of the Criminal Code and other applicable provisions of law relating to penalties for unauthorized disclosure.

(C) The Attorney General, upon request of the head of a Department, his duly designated representative, or the Chairman of the above described Committee, shall personally or through authorized representatives of the Department of Justice render an interpretation of this order with respect to any question arising in the course of its administration.

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SEC. 8. *Material Covered by the Atomic Energy Act.* Nothing in this order shall supersede any requirements made by or under the Atomic Energy Act of August 30, 1954, as amended. "Restricted Data," and material designated as "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 the regulations of the Atomic Energy Commission.

SEC. 9. *Special Departmental Arrangements.* The originating Department or other appropriate authority may impose, in conformity with the provisions of this order, special requirements with respect to access, distribution and protection of classified information and material, including those which presently relate to communications intelligence, intelligence sources and methods and cryptography.

SEC. 10. *Exceptional Cases.* In an exceptional case when a person or Department not authorized to classify information originates information which is believed to require classification, such person or Department shall protect that information in the manner prescribed by this order. Such persons or Department shall transmit the information forthwith, under appropriate safeguards, to the Department having primary interest in the subject matter with a request that a determination be made as to classification.

SEC. 11. *Declassification of Presidential Papers.* The Archivist of the United States shall have authority to review and declassify information and material which has been classified by a President, his White House Staff or special committee or commission appointed by him and which the Archivist has in his custody at any archival depository, including a Presidential Library. Such declassification shall only be undertaken in accord with: (i) the terms of the donor's deed of gift, (ii) consultations with the Departments having a primary subject-matter interest, and (iii) the provisions of Section 5.

SEC. 12. *Historical Research and Access by Former Government Officials.* The requirement in Section 6(A) that access to classified information or material be granted only as is necessary for the performance of one's duties shall not apply to persons outside the executive branch who are engaged in historical research projects or who have previously occupied policy-making positions to which they were appointed by the President; *Provided,* however, that in each case the head of the originating Department shall:

(i) determine that access is clearly consistent with the interests of national security; and

(ii) take appropriate steps to assure that classified information or material is not published or otherwise compromised.

Access granted a person by reason of his having previously occupied a policy-making position shall be limited to those papers which the former official originated, reviewed, signed or received while in public office.

SEC. 13. *Administrative and Judicial Action.* (A) Any officer or employee of the United States who unnecessarily classifies or over-

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classifies information or material shall be notified that his actions are in violation of the terms of this order or of a directive of the President issued through the National Security Council. Repeated abuse of the classification process shall be grounds for an administrative reprimand. In any case where the Departmental committee or the Interagency Classification Review Committee finds that unnecessary classification or overclassification has occurred, it shall make a report to the head of the Department concerned in order that corrective steps may be taken.

(B) The head of each Department is directed to take prompt and stringent administrative action against any officer or employee of the United States, at any level of employment, determined to have been responsible for any release or disclosure of national security information or material in a manner not authorized by or under this order or a directive of the President issued through the National Security Council. Where a violation of criminal statutes may be involved, Departments will refer any such case promptly to the Department of Justice.

SEC. 14. *Revocation of Executive Order No. 10501.* Executive Order No. 10501 of November 5, 1953, as amended by Executive Orders No. 10816 of May 8, 1959, No. 10901 of January 11, 1961, No. 10964 of September 20, 1961, No. 10985 of January 15, 1962, No. 11097 of March 6, 1963 and by Section 1(a) of No. 11382 of November 28, 1967, is superseded as of the effective date of this order.

SEC. 15. *Effective date.* This order shall become effective on June 1, 1972.

Richard Nixon

THE WHITE HOUSE,
March 8, 1972.

[FR Doc.72-3782 Filed 3-9-72; 11:01 am]

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presidential documents

[3195-01]

Title 3—The President

Executive Order 12065 June 28, 1978

National Security Information

By the authority vested in me as President by the Constitution and laws of the United States of America, in order to balance the public's interest in access to Government information with the need to protect certain national security information from disclosure, it is hereby ordered as follows

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SECTION 1. ORIGINAL CLASSIFICATION.

1-1. *Classification Designation.*

1-101. Except as provided in the Atomic Energy Act of 1954, as amended, this Order provides the only basis for classifying information. Information may be classified in one of the three designations listed below. If there is reasonable doubt which designation is appropriate, or whether the information should be classified at all, the less restrictive designation should be used, or the information should not be classified.

1-102. "Top Secret" shall be applied only to information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security.

1-103. "Secret" shall be applied only to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security.

1-104. "Confidential" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause identifiable damage to the national security.

1-2. *Classification Authority.*

1-201. *Top Secret.* Authority for original classification of information as Top Secret may be exercised only by the President, by such officials as the President may designate by publication in the FEDERAL REGISTER, by the agency heads listed below, and by officials to whom such authority is delegated in accordance with Section 1-204:

The Secretary of State
The Secretary of the Treasury
The Secretary of Defense
The Secretary of the Army
The Secretary of the Navy
The Secretary of the Air Force
The Attorney General
The Secretary of Energy
The Chairman, Nuclear Regulatory Commission
The Director, Arms Control and Disarmament Agency
The Director of Central Intelligence
The Administrator, National Aeronautics and Space Administration
The Administrator of General Services (delegable only to the Director, Federal Preparedness Agency and to the Director, Information Security Oversight Office)

1-202. *Secret.* Authority for original classification of information as Secret may be exercised only by such officials as the President may designate by publication in the FEDERAL REGISTER, by the agency heads listed below, by officials who have Top Secret classification authority, and by officials to whom such authority is delegated in accordance with Section 1-204:

The Secretary of Commerce
The Secretary of Transportation
The Administrator, Agency for International Development
The Director, International Communication Agency

1-203. *Confidential.* Authority for original classification of information as Confidential may be exercised only by such officials as the President may designate by publication in the FEDERAL REGISTER, by the agency heads listed below, by officials who have Top Secret or Secret classification authority, and by officials to whom such authority is delegated in accordance with Section 1-204:

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The President and Chairman, Export-Import Bank of the United States
The President and Chief Executive Officer, Overseas Private Investment Corporation

1-204. *Limitations on Delegation of Classification Authority.*

(a) Authority for original classification of information as Top Secret may be delegated only to principal subordinate officials who have a frequent need to exercise such authority as determined by the President or by agency heads listed in Section 1-201.

(b) Authority for original classification of information as Secret may be delegated only to subordinate officials who have a frequent need to exercise such authority as determined by the President, by agency heads listed in Sections 1-201 and 1-202, and by officials with Top Secret classification authority.

(c) Authority for original classification of information as Confidential may be delegated only to subordinate officials who have a frequent need to exercise such authority as determined by the President, by agency heads listed in Sections 1-201, 1-202, and 1-203, and by officials with Top Secret classification authority.

(d) Delegated original classification authority may not be redelegated.

(e) Each delegation of original classification authority shall be in writing by name or title of position held.

(f) Delegations of original classification authority shall be held to an absolute minimum. Periodic reviews of such delegations shall be made to ensure that the officials so designated have demonstrated a continuing need to exercise such authority.

1-205. *Exceptional Cases.* When an employee or contractor of an agency that does not have original classification authority originates information believed to require classification, the information shall be protected in the manner prescribed by this Order and implementing directives. The information shall be transmitted promptly under appropriate safeguards to the agency which has appropriate subject matter interest and classification authority. That agency shall decide within 30 days whether to classify that information. If it is not clear which agency should get the information, it shall be sent to the Director of the Information Security Oversight Office established in Section 5-2 for a determination.

1-3. *Classification Requirements.*

1-301. Information may not be considered for classification unless it concerns:

(a) military plans, weapons, or operations;

(b) foreign government information;

(c) intelligence activities, sources or methods;

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

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

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

(g) other categories of information which are related to national security and which require protection against unauthorized disclosure as determined by the President, by a person designated by the President pursuant to Section 1-201, or by an agency head.

1-302. Even though information is determined to concern one or more of the criteria in Section 1-301, it may not be classified unless an original classification authority also determines that its unauthorized disclosure reasonably could be expected to cause at least identifiable damage to the national security.

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1-303. Unauthorized disclosure of foreign government information or the identity of a confidential foreign source is presumed to cause at least identifiable damage to the national security.

1-304. Each determination under the criterion of Section 1-301(g) shall be reported promptly to the Director of the Information Security Oversight Office.

1-4. *Duration of Classification.*

1-401. Except as permitted in Section 1-402, at the time of the original classification each original classification authority shall set a date or event for automatic declassification no more than six years later.

1-402. Only officials with Top Secret classification authority and agency heads listed in Section 1-2 may classify information for more than six years from the date of the original classification. This authority shall be used sparingly. In such cases, a declassification date or event, or a date for review, shall be set. This date or event shall be as early as national security permits and shall be no more than twenty years after original classification, except that for foreign government information the date or event may be up to thirty years after original classification.

1-5. *Identification and Markings.*

1-501. At the time of original classification, the following shall be shown on the face of paper copies of all classified documents:

(a) the identity of the original classification authority;

(b) the office of origin;

(c) the date or event for declassification or review; and

(d) one of the three classification designations defined in Section 1-1.

1-502. Documents classified for more than six years shall also be marked with the identity of the official who authorized the prolonged classification. Such documents shall be annotated with the reason the classification is expected to remain necessary, under the requirements of Section 1-3, despite the passage of time. The reason for the prolonged classification may be stated by reference to criteria set forth in agency implementing regulations. These criteria shall explain in narrative form the reason the information needs to be protected beyond six years. If the individual who signs or otherwise authenticates a document also is authorized to classify it, no further annotation of identity is required.

1-503. Only the designations prescribed by this Order may be used to identify classified information. Markings such as "For Official Use Only" and "Limited Official Use" may not be used for that purpose. Terms such as "Conference" or "Agency" may not be used in conjunction with the classification designations prescribed by this Order; e.g., "Agency Confidential" or "Conference Confidential."

1-504. In order to facilitate excerpting and other uses, each classified document shall, by marking or other means, indicate clearly which portions are classified, with the applicable classification designation, and which portions are not classified. The Director of the Information Security Oversight Office may, for good cause, grant and revoke waivers of this requirement for specified classes of documents or information.

1-505. Foreign government information shall either retain its original classification designation or be assigned a United States classification designation that shall ensure a degree of protection equivalent to that required by the entity that furnished the information.

1-506. Classified documents that contain or reveal information that is subject to special dissemination and reproduction limitations authorized by

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this Order shall be marked clearly so as to place the user on notice of the restrictions.

1-6. *Prohibitions.*

1-601. Classification may not be used to conceal violations of law, inefficiency, or administrative error, to prevent embarrassment to a person, organization or agency, or to restrain competition.

1-602. Basic scientific research information not clearly related to the national security may not be classified.

1-603. A product of non-government research and development that does not incorporate or reveal classified information to which the producer or developer was given prior access may not be classified under this Order until and unless the government acquires a proprietary interest in the product. This Order does not affect the provisions of the Patent Secrecy Act of 1952 (35 U.S.C. 181-188).

1-604. References to classified documents that do not disclose classified information may not be classified or used as a basis for classification.

1-605. Classification may not be used to limit dissemination of information that is not classifiable under the provisions of this Order or to prevent or delay the public release of such information.

1-606. No document originated on or after the effective date of this Order may be classified after an agency has received a request for the document under the Freedom of Information Act or the Mandatory Review provisions of this Order (Section 3-5), unless such classification is consistent with this Order and is authorized by the agency head or deputy agency head. Documents originated before the effective date of this Order and subject to such a request may not be classified unless such classification is consistent with this Order and is authorized by the senior official designated to oversee the agency information security program or by an official with Top Secret classification authority. Classification authority under this provision shall be exercised personally, on a document-by-document basis.

1-607. Classification may not be restored to documents already declassified and released to the public under this Order or prior Orders.

SECTION 2. DERIVATIVE CLASSIFICATION.

2-1. *Use of Derivative Classification.*

2-101. Original classification authority shall not be delegated to 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.

2-102. Persons who apply such derivative classification markings shall:

(a) respect original classification decisions;

(b) verify the information's current level of classification so far as practicable before applying the markings; and

(c) carry forward to any newly created documents the assigned dates or events for declassification or review and any additional authorized markings, in accordance with Sections 2-2 and 2-301 below. A single marking may be used for documents based on multiple sources.

2-2. *Classification Guides.*

2-201. Classification guides used to direct derivative classification shall specifically identify the information to be classified. Each classification guide shall specifically indicate how the designations, time limits, markings, and other requirements of this Order are to be applied to the information.

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2-202. Each such guide shall be approved personally and in writing by an agency head listed in Section 1-2 or by an official with Top Secret classification authority. Such approval constitutes an original classification decision.

2-3. *New Material.*

2-301. New material that derives its classification from information classified on or after the effective date of this Order shall be marked with the declassification date or event, or the date for review, assigned to the source information.

2-302. New material that derives its classification from information classified under prior Orders shall be treated as follows:

(a) If the source material bears a declassification date or event twenty years or less from the date of origin, that date or event shall be carried forward on the new material.

(b) If the source material bears no declassification date or event or is marked for declassification beyond twenty years, the new material shall be marked with a date for review for declassification at twenty years from the date of original classification of the source material.

(c) If the source material is foreign government information bearing no date or event for declassification or is marked for declassification beyond thirty years, the new material shall be marked for review for declassification at thirty years from the date of original classification of the source material.

SECTION 3. DECLASSIFICATION AND DOWNGRADING.

3-1. *Declassification Authority.*

3-101. The authority to declassify or downgrade information classified under this or prior Orders shall be exercised only as specified in Section 3-1.

3-102. Classified information may be declassified or downgraded by the official who authorized the original classification if that official is still serving in the same position, by a successor, or by a supervisory official of either.

3-103. Agency heads named in Section 1-2 shall designate additional officials at the lowest practicable echelons to exercise declassification and downgrading authority.

3-104. 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 National Security Council. The information shall remain classified until the appeal is decided or until one year from the date of the Director's decision, whichever occurs first.

3-105. The provisions of this Order relating to declassification shall also apply to agencies which, under the terms of this Order, do not have original classification authority but which had such authority under prior Orders.

3-2. *Transferred Information.*

3-201. For classified information transferred in conjunction with a transfer of functions—not merely for storage purposes—the receiving agency shall be deemed to be the originating agency for all purposes under this Order.

3-202. For classified information not transferred in accordance with Section 3-201, but originated in an agency which has ceased to exist, each agency in possession shall be deemed to be the originating agency for all purposes under this Order. Such information may be declassified or downgraded by the agency in possession after consulting with any other agency having an interest in the subject matter.

3-203. Classified information transferred to the General Services Administration for accession into the Archives of the United States shall be declassi

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fied or downgraded by the Archivist of the United States in accordance with this Order, the directives of the Information Security Oversight Office, and the agency guidelines.

3-204. After the termination of a Presidential administration, the Archivist of the United States shall review and declassify or downgrade all information classified by the President, the White House Staff, committees or commissions appointed by the President, or others acting on the President's behalf. Such declassification shall only be undertaken in accordance with the provisions of Section 3-504.

3-3. *Declassification Policy.*

3-301. Declassification of classified information shall be given emphasis comparable to that accorded classification. Information classified pursuant to this and prior Orders shall be declassified as early as national security considerations permit. Decisions concerning declassification shall be based on the loss of the information's sensitivity with the passage of time or on the occurrence of a declassification event.

3-302. When information is reviewed for declassification pursuant to this Order or the Freedom of Information Act, it shall be declassified unless the declassification authority established pursuant to Section 3-1 determines that the information continues to meet the classification requirements prescribed in Section 1-3 despite the passage of time.

3-303. It is presumed that information which continues to meet the classification requirements in Section 1-3 requires continued protection. In some 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, a senior agency official with responsibility for processing Freedom of Information Act requests or Mandatory Review requests under this Order, an official with Top Secret classification authority, or the Archivist of the United States in the case of material covered in Section 3-503. That official will determine whether the public interest in disclosure outweighs the damage to national security that might reasonably be expected from disclosure.

3-4. *Systematic Review for Declassification.*

3-401. Classified information constituting permanently valuable records of the Government, as defined by 44 U.S.C. 2103, and information in the possession and control of the Administrator of General Services, pursuant to 44 U.S.C. 2107 or 2107 note, shall be reviewed for declassification as it becomes twenty years old. Agency heads listed in Section 1-2 and officials designated by the President pursuant to Section 1-201 of this Order may extend classification beyond twenty years, but only in accordance with Sections 3-3 and 3-402. This authority may not be delegated. When classification is extended beyond twenty years, a date no more than ten years later shall be set for declassification or for the next review. That date shall be marked on the document. Subsequent reviews for declassification shall be set at no more than ten year intervals. The Director of the Information Security Oversight Office may extend the period between subsequent reviews for specific categories of documents or information.

3-402. Within 180 days after the effective date of this Order, the agency heads listed in Section 1-2 and the heads of agencies which had original classification authority under prior orders shall, after consultation with the Archivist of the United States and review by the Information Security Oversight Office, issue and maintain guidelines for systematic review covering twenty-year old classified information under their jurisdiction. These guide-

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lines shall state specific, limited categories of information which, because of their national security sensitivity, should not be declassified automatically but should be reviewed item-by-item to determine whether continued protection beyond twenty years is needed. These guidelines shall be authorized for use by the Archivist of the United States and may, upon approval of the issuing authority, be used by any agency having custody of the information. All information not identified in these guidelines as requiring review and for which a prior automatic declassification date has not been established shall be declassified automatically at the end of twenty years from the date of original classification.

3-403. Notwithstanding Sections 3-401 and 3-402, the Secretary of Defense may establish special procedures for systematic review and declassification of classified cryptologic information, and the Director of Central Intelligence may establish special procedures for systematic review and declassification of classified information concerning the identities of clandestine human agents. These procedures shall be consistent, so far as practicable, with the objectives of Sections 3-401 and 3-402. Prior to implementation, they shall be reviewed and approved by the Director of the Information Security Oversight Office and, with respect to matters pertaining to intelligence sources and methods, by the Director of Central Intelligence. Disapproval of procedures by the Director of the Information Security Oversight Office may be appealed to the National Security Council. In such cases, the procedures shall not be implemented until the appeal is decided.

3-404. Foreign government information shall be exempt from automatic declassification and twenty year systematic review. Unless declassified earlier, such information shall be reviewed for declassification thirty years from its date of origin. Such review shall be in accordance with the provisions of Section 3-3 and with guidelines developed by agency heads in consultation with the Archivist of the United States and, where appropriate, with the foreign government or international organization concerned. These guidelines shall be authorized for use by the Archivist of the United States and may, upon approval of the issuing authority, be used by any agency having custody of the information.

3-405. Transition to systematic review at twenty years shall be implemented as rapidly as practicable and shall be completed no more than ten years from the effective date of this Order.

3-5. *Mandatory Review for Declassification.*

3-501. Agencies shall establish a mandatory review procedure to handle requests by a member of the public, by a government employee, or by an agency, to declassify and release information. This procedure shall apply to information classified under this Order or prior Orders. Except as provided in Section 3-503, upon such a request the information shall be reviewed for possible declassification, provided the request reasonably describes the information. Requests for declassification under this provision shall be acted upon within 60 days. After review, the information or any reasonably segregable portion thereof that no longer requires protection under this Order shall be declassified and released unless withholding is otherwise warranted under applicable law.

3-502. Requests for declassification which are submitted under the provisions of the Freedom of Information Act shall be processed in accordance with the provisions of that Act.

3-503. Information less than ten years old which was originated by the President, by the White House Staff, or by committees or commissions appointed by the President, or by others acting on behalf of the President, including such information in the possession and control of the Administrator

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of General Services pursuant to 44 U.S.C. 2107 or 2107 note, is exempted from the provisions of Section 3-501. Such information over ten years old shall be subject to mandatory review for declassification. Requests for mandatory review shall be processed in accordance with procedures developed by the Archivist of the United States. These procedures shall provide for consultation with agencies having primary subject matter interest. Any decision by the Archivist may be appealed to the Director of the Information Security Oversight Office. Agencies with primary subject matter interest shall be notified promptly of the Director's decision on such appeals and may further appeal to the National Security Council through the process set forth in Section 3-104.

3-504. Requests for declassification of classified documents originated by an agency but in the possession and control of the Administrator of General Services, pursuant to 44 U.S.C. 2107 or 2107 note, shall be referred by the Archivist to the agency of origin for processing in accordance with Section 3-501 and for direct response to the requestor. The Archivist shall inform requestors of such referrals.

3-505. No agency in possession of a classified document may, in response to a request for the document made under the Freedom of Information Act or this Order's Mandatory Review provision, refuse to confirm the existence or non-existence of the document, unless the fact of its existence or non-existence would itself be classifiable under this Order.

3-6. *Downgrading.*

3-601. Classified information that is marked for automatic downgrading is downgraded accordingly without notification to holders.

3-602. Classified information that is not marked for automatic downgrading may be assigned a lower classification designation by the originator or by other authorized officials when such downgrading is appropriate. Notice of downgrading shall be provided to holders of the information to the extent practicable.

SECTION 4. SAFEGUARDING.

4-1. *General Restrictions on Access.*

4-101. No person may be given access to classified information unless that person has been determined to be trustworthy and unless access is necessary for the performance of official duties.

4-102. All classified information shall be marked conspicuously to put users on notice of its current classification status and, if appropriate, to show any special distribution or reproduction restrictions authorized by this Order.

4-103. Controls shall be established by each agency to ensure that classified information is used, processed, stored, reproduced, and transmitted only under conditions that will provide adequate protection and prevent access by unauthorized persons.

4-104. Classified information no longer needed in current working files or for reference or record purposes shall be processed for appropriate disposition in accordance with the provisions of Chapters 21 and 33 of Title 44 of the United States Code, which governs disposition of Federal records.

4-105. Classified information disseminated outside the Executive branch shall be given protection equivalent to that afforded within the Executive branch.

4-2. *Special Access Programs.*

4-201. Agency heads listed in Section 1-201 may create special access programs to control access, distribution, and protection of particularly sensitive information classified pursuant to this Order or prior Orders. Such pro-

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grams may be created or continued only by written direction and only by those agency heads and, for matters pertaining to intelligence sources and methods, by the Director of Central Intelligence. Classified information in such programs shall be declassified according to the provisions of Section 3.

4-202. Special access programs may be created or continued only on a specific showing that:

(a) normal management and safeguarding procedures are not sufficient to limit need-to-know or access;

(b) the number of persons who will need access will be reasonably small and commensurate with the objective of providing extra protection for the information involved; and

(c) the special access controls balance the need to protect the information against the full spectrum of needs to use the information.

4-203. All special access programs shall be reviewed regularly and, except those required by treaty or international agreement, shall terminate automatically every five years unless renewed in accordance with the procedures in Section 4-2.

4-204. Within 180 days after the effective date of this Order, agency heads shall review all existing special access programs under their jurisdiction and continue them only in accordance with the procedures in Section 4-2. Each of those agency heads shall also establish and maintain a system of accounting for special access programs. The Director of the Information Security Oversight Office shall have non-delegable access to all such accountings.

4-3. *Access by Historical Researchers and Former Presidential Appointees.*

4-301. The requirement in Section 4-101 that access to classified information may be granted only as is necessary for the performance of official duties may be waived as provided in Section 4-302 for persons who:

(a) are engaged in historical research projects, or

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

4-302. Waivers under Section 4-301 may be granted only if the agency with jurisdiction over the information:

(a) makes a written determination that access is consistent with the interests of national security;

(b) takes appropriate steps to ensure that access is limited to specific categories of information over which that agency has classification jurisdiction;

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

4-4. *Reproduction Controls.*

4-401. Top Secret documents may not be reproduced without the consent of the originating agency unless otherwise marked by the originating office.

4-402. Reproduction of Secret and Confidential documents may be restricted by the originating agency.

4-403. Reproduced copies of classified documents are subject to the same accountability and controls as the original documents.

4-404. Records shall be maintained by all agencies that reproduce paper copies of classified documents to show the number and distribution of reproduced copies of all Top Secret documents, of all documents covered by special access programs distributed outside the originating agency, and of all Secret and all Confidential documents which are marked with special dissemination and reproduction limitations in accordance with Section 1-506.

4-405. Sections 4-401 and 4-402 shall not restrict the reproduction of documents for the purpose of facilitating review for declassification. However,

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such reproduced documents that remain classified after review must be destroyed after they are used.

SECTION 5. IMPLEMENTATION AND REVIEW.

5-1. *Oversight.*

5-101. The National Security Council may review all matters with respect to the implementation of this Order and shall provide overall policy direction for the information security program.

5-102. The Administrator of General Services shall be responsible for implementing and monitoring the program established pursuant to this Order. This responsibility shall be delegated to an Information Security Oversight Office.

5-2. *Information Security Oversight Office.*

5-201. The Information Security Oversight Office shall have a full-time Director appointed by the Administrator of General Services subject to approval by the President. The Administrator also shall have authority to appoint a staff for the Office.

5-202. The Director shall:

(a) oversee agency actions to ensure compliance with this Order and implementing directives;

(b) consider and take action on complaints and suggestions from persons within or outside the Government with respect to the administration of the information security program, including appeals from decisions on declassification requests pursuant to Section 3-503;

(c) exercise the authority to declassify information provided by Sections 3-104 and 3-503;

(d) develop, in consultation with the agencies, and promulgate, subject to the approval of the National Security Council, directives for the implementation of this Order which shall be binding on the agencies;

(e) report annually to the President through the Administrator of General Services and the National Security Council on the implementation of this Order;

(f) review all agency implementing regulations and agency guidelines for systematic declassification review. The Director shall require any regulation or guideline to be changed if it is not consistent with this Order or implementing directives. Any such decision by the Director may be appealed to the National Security Council. The agency regulation or guideline shall remain in effect until the appeal is decided or until one year from the date of the Director's decision, whichever occurs first.

(g) exercise case-by-case classification authority in accordance with Section 1-205 and review requests for original classification authority from agencies or officials not granted original classification authority under Section 1-2 of this Order; and

(h) have the authority to conduct on-site reviews of the information security program of each agency that handles classified information and to require of each agency such reports, information, and other cooperation as necessary to fulfill his responsibilities. If such reports, inspection, or access to specific categories of classified information would pose an exceptional national security risk, the affected agency head may deny access. The Director may appeal denials to the National Security Council. The denial of access shall remain in effect until the appeal is decided or until one year from the date of the denial, whichever occurs first.

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5-3. *Interagency Information Security Committee.*

5-301. There is established an Interagency Information Security Committee which shall be chaired by the Director and shall be comprised of representatives of the Secretaries of State, Defense, Treasury, and Energy, the Attorney General, the Director of Central Intelligence, the National Security Council, the Domestic Policy Staff, and the Archivist of the United States.

5-302. Representatives of other agencies may be invited to meet with the Committee on matters of particular interest to those agencies.

5-303. The Committee shall meet at the call of the Chairman or at the request of a member agency and shall advise the Chairman on implementation of this order.

5-4. *General Responsibilities.*

5-401. A copy of any information security regulation and a copy of any guideline for systematic declassification review which has been adopted pursuant to this Order or implementing directives, shall be submitted to the Information Security Oversight Office. To the extent practicable, such regulations and guidelines should be unclassified.

5-402. Unclassified regulations that establish agency information security policy and unclassified guidelines for systematic declassification review shall be published in the FEDERAL REGISTER.

5-403. Agencies with original classification authority shall promulgate guides for security classification that will facilitate the identification and uniform classification of information requiring protection under the provisions of this Order.

5-404. Agencies which originate or handle classified information shall:

(a) designate a senior agency official to conduct an active oversight program to ensure effective implementation of this Order;

(b) designate a senior agency official to chair an agency committee with authority to act on all suggestions and complaints with respect to the agency's administration of the information security program;

(c) establish a process to decide appeals from denials of declassification requests submitted pursuant to Section 3-5;

(d) establish a program to familiarize agency and other personnel who have access to classified information with the provisions of this Order and implementing directives. This program shall impress upon agency personnel their responsibility to exercise vigilance in complying with this Order. The program shall encourage agency personnel to challenge, through Mandatory Review and other appropriate procedures, those classification decisions they believe to be improper;

(e) promulgate guidelines for systematic review in accordance with Section 3-402;

(f) establish procedures to prevent unnecessary access to classified information, including procedures which require that a demonstrable need for access to classified information is established before initiating administrative clearance procedures, and which ensure that the number of people granted access to classified information is reduced to and maintained at the minimum number that is consistent with operational requirements and needs; and

(g) ensure that practices for safeguarding information are systematically reviewed and that those which are duplicative or unnecessary are eliminated.

5-405. Agencies shall submit to the Information Security Oversight Office such information or reports as the Director of the Office may find necessary to carry out the Office's responsibilities.

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5-5. *Administrative Sanctions.*

5-501. If the Information Security Oversight Office finds that a violation of this Order or any implementing directives may have occurred, it shall make a report to the head of the agency concerned so that corrective steps may be taken.

5-502. Officers and employees of the United States Government shall be subject to appropriate administrative sanctions if they:

(a) knowingly and willfully classify or continue the classification of information in violation of this Order or any implementing directives; or

(b) knowingly, willfully and without authorization disclose information properly classified under this Order or prior Orders or compromise properly classified information through negligence; or

(c) knowingly and willfully violate any other provision of this Order or implementing directive.

5-503. Sanctions may include reprimand, suspension without pay, removal, termination of classification authority, or other sanction in accordance with applicable law and agency regulations.

5-504. Agency heads shall ensure that appropriate and prompt corrective action is taken whenever a violation under Section 5-502 occurs. The Director of the Information Security Oversight Office shall be informed when such violations occur.

5-505. Agency heads shall report to the Attorney General evidence reflected in classified information of possible violations of Federal criminal law by an agency employee and of possible violations by any other person of those Federal criminal laws specified in guidelines adopted by the Attorney General.

SECTION 6. GENERAL PROVISIONS.

6-1. *Definitions.*

6-101. "Agency" has the meaning defined in 5 U.S.C. 552(e).

6-102. "Classified information" means information or material, herein collectively termed information, that is owned by, produced for or by, or under the control of, the United States Government, and that has been determined pursuant to this Order or prior Orders to require protection against unauthorized disclosure, and that is so designated.

6-103. "Foreign government information" means information that has been provided to the United States in confidence by, or produced by the United States pursuant to a written joint arrangement requiring confidentiality with, a foreign government or international organization of governments.

6-104. "National security" means the national defense and foreign relations of the United States.

6-105. "Declassification event" means an event which would eliminate the need for continued classification.

6-2. *General.*

6-201. Nothing in this Order shall supersede any requirement made by or under the Atomic Energy Act of 1954, as amended. "Restricted Data" and information designated as "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 pursuant thereto.

6-202. The Attorney General, upon request by the head of an agency, his duly designated representative, or the Director of the Information Security Oversight Office, shall personally or through authorized representatives of the Department of Justice render an interpretation of this Order with respect to any question arising in the course of its administration.

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6-203. Executive Order No. 11652 of March 8, 1972, as amended by Executive Order No. 11714 of April 24, 1973, and as further amended by Executive Order No. 11862 of June 11, 1975, and the National Security Council Directive of May 17, 1972 (3 CFR 1085 (1971-75 Comp.)) are revoked.

6-204. This Order shall become effective on December 1, 1978, except that the functions of the Information Security Oversight Office specified in Sections 5-202(d) and 5-202(f) shall be effective immediately and shall be performed in the interim by the Interagency Classification Review Committee established pursuant to Executive Order No. 11652.

Jimmy Carter

THE WHITE HOUSE,
June 28, 1978.

[FR Doc. 78-18505 Filed 6-29-78; 4:18 pm]

EDITORIAL NOTE: The President's statement of June 29, 1978, on issuing Executive Order 12065, is printed in the Weekly Compilation of Presidential Documents (vol. 14, No. 26).