

FBI Exempt From Order Declassifying Secrets

By **GEORGE LARDNER JR.**
Washington Post Staff Writer

When President Clinton announced three years ago that he was ordering automatic declassification of millions of the government's oldest secrets, he didn't mention the blanket exemption for the FBI.

"We knew it was somewhat risky," Steven Garfinkel, director of the government's Information Security Oversight Office, said of the arrangement, "but at the same time we were very anxious to get the executive order signed by the president."

FBI officials defended the previously undisclosed exemption, saying it was essential because of the mammoth size of its files—6.5 million cubic feet—where both classified and unclassified records are mingled together, often without any "Top Secret," "Secret" or "Confidential" labels to show which ones were supposed to deal

with national security. Everything from the bureau's oldest foreign counterintelligence files to musty stolen car and bank robbery records is covered.

No other government agency—not the CIA or even the super-secret National Security Agency—won such a pass. In fact, officials said, these agencies are still waiting for Clinton to give formal approval to narrower exemptions for them. "It sounds like we pulled a real coup," one FBI agent said.

When he signed the order in 1995, the president promised it would "lift the veil on millions of existing documents, keep a great many future documents from ever being classified, and still maintain necessary controls over information that legitimately needs to be guarded in the interests of national security."

Clinton's decree was widely hailed as

See SECRETS, A21, Col. 1

the most significant step in reducing government secrecy since the beginning of the Cold War. It put limits on the classification of new documents and prescribed sanctions for violations of the order, but the automatic declassification of old records by 2000 was the centerpiece.

The plan envisioned exemptions for the government's most sensitive records, such as the millions of pages detailing the CIA's covert actions, but these were to be granted after a complex process that calls for "a specific date or event" when the exemptions are to end. Only the FBI was given blanket immunity without any cutoff date.

The arrangement first came to light in court papers last month and was laid out in detail in a memo obtained by The Washington Post last week under the Freedom of Information Act.

Informed of the special treatment accorded the FBI, critics of government secrecy said in recent interviews that the exemption was legally questionable because it has no cutoff date and because the FBI used federal privacy law rather than any national security concerns to justify it.

"I never heard of this before," said Kate Martin, who took part in discussions leading up to the order as director of the Center for National Security Studies, a civil rights advocacy group. "Everybody was, under the impression that the executive order applied to the FBI. Now it turns out that the key provision doesn't."

One of the main signatories to the plan, Garfinkel said it was "a negotiated agreement whereby the FBI would get a very broad exemption [from the automatic declassification rule] in return for a very broad commitment" to review and declassify its old records on a document-by-document basis.

FBI officials insist they are making progress on that score, having declassified "hundreds of thousands of pages" since Clinton's order went into effect, and they predict "enormous" strides in the months ahead with a projected quadrupling of their declassification staff.

Among the records declassified so far are more than 40,000 pages from the Bureau's "anti-riot" files from the 1960s and '70s on the Black Panther Party, the American Indian Movement, Students for a Democratic Society and anti-war protests including the tumult at the 1968 Democratic National Convention.

"Director [Louis J.] Freeh is absolutely committed to the spirit of the executive order and to declassifying documents as fast as our resources permit," said Assis-

tant FBI Director John E. Collingwood. In addition, Collingwood said he recently initiated bulk declassification of many records despite the exemption.

Garfinkel remains to be convinced. He said that in the two fiscal years since Clinton signed the order the FBI actually declassified a "very minuscule" amount of records that are 25 years old or more—less than 200,000 pages. "Right now the jury is still out on whether the results are going to justify this broad exception," he said.

Washington lawyer James Lesar said he discovered the deal last month in the course of litigation against the FBI for records on three women involved in left-wing causes dating back to the 1930s.

To counter his efforts, the Justice Department presented him with an Oct. 12, 1995, "Memorandum for the President" from Attorney General Janet Reno. It states that "the automatic release of records in the FBI's Central Records System and Electronic Surveillance Indices would almost invariably violate the Privacy Act of 1974. Accordingly . . . these two records systems are exempt from the automatic declassification provisions of Executive Order 12958."

"It's preposterous," Lesar said. "This covers hundreds of millions of pages that have nothing to do with national security at all—every piece of paper they've got, except maybe payroll records. FBI field office records would be covered, too. They're included in the Central Records System. What the FBI has done is take away with the right hand what the left hand has given."

There remains some uncertainty about how and why the special arrangement for the FBI came about. Lesar's lawsuit turned up the memo from Reno to Clinton summarizing the deal, but when told of it, one former NSC staffer said he never saw it and called it "inconsistent with our understanding" with the bureau when the order was signed.

"The understanding was that there was a distinction between making something public and removing any classification from it," said former NSC staff member Morton Halperin. "These files were not going to be automatically put in a public library after 25 years. They would still be subject to law enforcement and privacy reviews. So therefore this [automatic declassification] was not a big threat to them."

White House press secretary Michael McCurry was not familiar with details, but he said the FBI "had the chop" on the executive order at the Justice Department, meaning that determined resistance from

the bureau could have prevented its issuance.

"Of course, the president can overrule any department or agency," McCurry said. "But it's almost a veto."

Clinton signed the executive order on April 17, 1995. It was a major reform, to be accomplished over a five-year period. Previously, documents remained classified indefinitely. But the fine print of the order provided for nine seemingly narrow exceptions to the automatic declassification process. It gave agency heads the authority to hold back "specific information" that would, for instance, "assist in the development or use of weapons of mass destruction," compromise a "a human intelligence

"Everybody was under the impression that the executive order applied to the FBI. Now it turns out that the key provision doesn't."

—Kate Martin,
director of Center for National Security Studies

source" in a way that would "clearly and demonstrably damage" national security or "violate a statute, treaty or international agreement."

The FBI's blanket exemption was officially confirmed a few months later in a memorandum of understanding signed by Freeh on July 25, 1995. But Garfinkel, who signed it six days later, said the matter had actually been settled before Clinton issued the executive order. "This executive order was ready to go six months earlier than the president's issuance of it, but it took those last six months to negotiate with Justice over the provisions of the order and the impact on the FBI," Garfinkel said.

Obtained last week under the Freedom of Information Act, the two-page memo was reviewed and "concluded in" by Clinton's national security adviser at the time, Anthony Lake, "on behalf of the President." It appears to equate "automatic declassification" with "automatic release."

"This agreement," the memo says, "is based upon the parties' [Freeh and Garfinkel] determination that the Privacy Act would preclude substantially the automatic release [emphasis supplied]

of declassified information contained [in the bureau's two main records systems]; that due to the nature of these filing systems, there is a relatively small proportion of classified information which is contained throughout voluminous records; that it is impractical to review all such records within the [five-year] time period specified in the new Order; and that substantial harm to the national security could result from the inadvertent *automatic declassification* [emphasis supplied] of certain information contained in those systems."

Garfinkel noted that the FBI has a special problem when it comes to declassifying documents: Very few of its older files are marked "Top Secret," "Secret," or "Confidential," even when they should have been.

"Until the death of J. Edgar Hoover [in 1972], they never marked anything as classified," Garfinkel said. "Hoover always took the position that their files were closed. It wasn't until the Freedom of Information Act amendments of 1974 that FBI files became subject to legal demands for disclosure. As a result, FBI declassifiers now may be setting aside some old records as classified even as they are declassifying others.

Declassification, moreover, does not mean disclosure. But it does mean, as Garfinkel put it, that unclassified records are "held hostage" to the process. The "anti-riot" files on dissident groups from the 1960s illustrate both points. It took the FBI's review team 18 months to go through the "New Left" and related documents, declassify 42,119 pages and decide that another 11,993 needed to remain partly or wholly classified.

There were almost 200,000 more pages that were "unclassified." The entire 264,000-page package was delivered to the National Archives last September, but that doesn't mean it is publicly available yet. Since these are "law enforcement" records, Archives officials say, they must still be reviewed at the Archives, page by page, to determine if public disclosure would constitute "an unwarranted invasion of personal privacy," reveal the "the identity of a confidential source," or run afoul of other exemptions set out in the Freedom of Information Act.

It is this second review that Lesar and other critics say should have thwarted the FBI's blanket exemption. "It's dishonest for them to assert national security shields when their legitimate interests

are privacy and law enforcement concerns and those are still protected," Martin said.

In return for the exemption, Freeh promised to set up the historical review team with a staff of 14 people and make the files concerning "possible violations of the anti-riot provisions of the Civil Rights Act of 1968" their first priority. Collingwood said the staff has now grown to 22 and will increase by as many as 55 more later this year when the FBI's work compiling records on President John F. Kennedy's assassination is completed.

"This is a huge project," Collingwood said. In addition to the "anti-riot" files, it has declassified records more than 25 years old on bank robberies, unlawful flights to avoid prosecution, interstate thefts and fingerprint matters. And it has decided it can submit about 150 other categories to automatic or bulk declassification because they rarely contain classified information.

"We are actually quite proud of this," Collingwood said, "and our quarterly reports show we're getting progressively better." In the first half of fiscal 1998, the FBI says it reviewed almost 460,000 pages under the executive order, sifted through another 380,000 pages in response to the Freedom of Information Act and other requests and "declassified" 532,000—although many of them were records that were never classified to begin with.

It is still only a small dent in the mountain. The bureau has 6.5 million cubic feet of records, a staggering volume that Collingwood said includes everything from laboratory specimens to trial exhibits. "My guess is that half of it is paper," he said.

Even so, archivists say, that would translate into 7.8 billion pages. Collingwood said no more than 10 percent, probably closer to 5 percent, is classified, and most of the records at FBI headquarters are duplicative of files in FBI field offices, which are almost as voluminous. But with all those caveats, that would still amount to at least 207 million pages, a total he finds difficult to accept.

"We don't know precisely how many classified documents we have, but nobody here thinks it's in the hundreds of millions," Collingwood said. Whatever the count, no one knows how many are more than 25 years old and no one can tell how much older they'll be before they see the light of day.