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NATIONAL SECURITY AGENCY
CENTRAL SECURITY SERVICE
FORT GEORGE G. MEADE, MARYLAND 20755

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Legal 3

MEMORANDUM FOR THE GENERAL COUNSEL, CENTRAL INTELLIGENCE AGENCY

SUBJECT: Recommendations for Changes to Executive Order 12065,
"National Security Information"

1. This memorandum is in response to your request, based on the 13 February 1981 memorandum from the Counsellor to the President, for proposed changes to Executive Order 12065. We have conducted a comprehensive review of Executive Order 12065 to include a comparison with the previous executive order on classification of national security information, E.O. 11652, and recommendations for changes. A copy of that review is attached.
2. Executive Order 12065 which replaced Executive Order 11652 contained significant changes in the policy and procedures used to classify information. In general, Executive Order 11652 provided a stronger basis for maintaining the classification of information that required protection in the interests of national security and for defending such classification when it was challenged administratively or judicially. E.O. 11652 provided specific protections and exemptions for cryptologic and communications intelligence information that enhanced our ability to properly protect such information. E.O. 12065 did not contain specific protections for such information. It is our recommendation that those specific protections contained in E.O. 11652 be restored. Several issues deserve special attention and are summarized here.
3. E.O. 12065, although entitled "National Security Information," is perceived as a weak basis for the classification of information requiring protection in the interest of national security because of an over-emphasis on limitations to classification of information, negatively worded authorizations, and frequent mention of policy related to the Freedom of Information Act that weakens protections available under that Act. It would be very useful to reword the Order to provide a more positive emphasis on the need to protect information in the interest of national security. For example, paragraph 1-101 should be rewritten to eliminate the limitation in the first sentence that the Order provides the only basis for classification of information, and to replace the second sentence to provide that where there is reasonable doubt as to the need for classification, the information should be protected at the higher classification or should be classified until a determination is made as to the appropriate level of classification or the need for any classification. Likewise, paragraph 1-104 should be modified to delete the term "identifiable". The following is a suggested rewording of paragraph 1-101:

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"1-101. Information or material that requires protection against unauthorized disclosure in the interest of national security shall be classified in one of the three categories listed below. Information and material should be protected at an appropriate level of classification until a final determination is made as to the need for protection and the level of required protection. No other categories of classification shall be used to identify information or material as requiring protection in the interest of national security, except as otherwise provided by statute."

4. Paragraph 1-301 contains a list of the categories of information that may be considered for classification and an exclusion for information other than that related to the national security as designated by the President or a person designated by the President. Although we would prefer to have the list deleted, if the list is retained, the category of "cryptologic activities, sources, methods, and materials" should be added to it. E.O. 11652 specifically provided for the classification of this category of information. Although E.O. 12065 provides for protection of intelligence activities, sources and methods, no specific protection is provided for cryptographic and communications security matters. It is especially important, if such categories are listed, to include this category because of the need to prove authorization for such a classification in FOIA and other litigation.

5. Paragraph 1-607 provides that classification may not be restored to documents already declassified and released to the public. This paragraph has raised significant concerns particularly as to inadvertent declassification actions, or cases involving mistakes or failure to classify. The Progressive case illustrates the problem raised by this paragraph. Department of Defense procedures permitted the recall and reclassification or classification of documents, provided public exposure could be minimized. The paragraph should be deleted.

6. Paragraph 3-303 contains the so-called balancing test for classified information that is the subject of a Freedom of Information Act request. We strongly endorse the earlier comments of the CIA General Counsel that this paragraph be deleted. In addition, we believe that paragraph 3-505, which precludes the use of a non-confirmation response to an FOIA request with certain exceptions, should be reworded to provide an affirmative authorization to use such responses where warranted. The following is a suggested rewording of paragraph 3-505:

"3-505. An agency in possession of classified information or material may, in response to a request for records under the Freedom of Information Act or this Order's Mandatory Review provision, refuse to confirm or deny the existence or non-existence of the information or material, when the fact of its existence or non-existence would itself be classifiable or would reveal an intelligence activity or source."

7. Section 3-4 contains a requirement for systematic review of classified information after twenty years. There is ample evidence that this requirement is ill-founded and represents a costly administrative burden that provides no benefit to the public. A recent General Accounting Office report has provided further evidence of the high cost and lack of benefit relative to this provision and contains a recommendation that the requirement be changed. Our recommendation is that the twenty year review period be replaced with a thirty year review period and that intelligence agency heads be permitted to extend classification of intelligence and cryptologic information beyond thirty years on an information category basis vice a document-by-document basis for a flexible further review period dependent upon the category of information to be protected.

8. Section 4-2, which deals with special access programs, should be replaced with language identical to that contained in section 9 of E.O. 11652 suitably modified to include appropriate categories of Defense military information. The following is a suggested rewording of section 4.2:

"Section 4.2. The originating Department or other appropriate authority may establish, consistent with the provisions of this Order, special requirements with respect to access, control, distribution, and protection of classified information and material, including those which presently relate to signals intelligence, intelligence sources and methods, cryptography, and defense plans."

9. Section 4-4, which establishes strict reproduction and dissemination controls for specified categories of classified paper documents, should be modified to, at a minimum, exclude categories of classified information subject to special access controls. Much of this information, such as signals intelligence, is handled in automated systems, both through the intelligence production and dissemination cycle, and in permanent records systems available to the Intelligence Community and intelligence

customers. The imposition of traditional registry, reproduction, and inventory controls on such information is both impractical and very costly.

10. A new section should be added to the modified order to provide for the continued protection of classified information provided to the Judicial Branch in connection with litigation or introduced into evidence in a protected status. Section 8 of the Classified Information Procedures Act, Public Law 96-456, provides a model for such a provision. The following is a suggested wording for such a section:

"Section _____. Information and materials provided to courts in connection with litigation shall be provided continued protection. Information and materials required by a court to be introduced into evidence with appropriate protections may retain their classification status."

11. Finally, there remains concern that it is presently impossible to determine whether a public disclosure of sensitive information was officially authorized and measures taken to assure the proper protection of intelligence sources and methods. It would be useful to consider the addition to the modified order of a provision that would require consultation with the agency that originated the information proposed for disclosure prior to the disclosure of the information.


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General Counsel

Encl:
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