

THE WHITE HOUSE  
WASHINGTON

July 20, 1977

## MEMORANDUM FOR

PRM/NSC-29 AD HOC COMMITTEE  
MEMBERS

## FROM:

ROBERT GATES *RG*  
RICHARD NEUSTADT *RN*

## SUBJECT:

Balancing Test

Interest was expressed at the Ad Hoc Committee meeting last week in obtaining the views of Mr. Jeffrey Axelrad, Chief of Justice's Information and Privacy Section, Civil Division, concerning the adoption of a "balancing test" in the new Executive Order. Mr. Axelrad's personal views are presented in the attached memorandum, which is forwarded for your information.

Mr. Axelrad's comments have been offered with the understanding that they are not to be regarded as the official Justice Department position on this issue.

Attachment

on file GSA release  
instructions apply



UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

July 20, 1977

Address Reply to the  
Division Indicated  
and Refer to Initials and Number

Dr. Robert Gates  
National Security Counsel Staff

Mr. Richard Neustadt  
Domestic Policy Staff  
The White House

Dear Dr. Gates and Mr. Neustadt:

This confirms my July 19, 1977 conversation with Gary Barron of your office. Mr. Barron advises that a proposal is under consideration to include in a revised Executive Order on the classification of documents a provision to the effect that the classifying official shall balance the Public's need to know against the national security concerns under consideration. Mr. Barron inquired as to my opinion of the effect of adoption of this proposal. In my opinion, the proposal would be hopelessly impracticable to administer. More specifically, I doubt whether the Courts would conclude that an Executive Order including such a provision would specifically authorize any material to be kept secret within the meaning of 5 U.S.C. §552(b)(1)(A). Additionally, the scope of litigation under the FOIA, in particular 5 U.S.C. §552(b)(1)(B), would be broadened. I believe that the inclusion of such a provision would enable plaintiffs to generally test the desirability of any particular course chosen in the interest of national security. At best, the proceedings, including discovery proceedings, would be complex and difficult to keep within confined channels. At worst, and it is a real possibility, the provisions would enable our Nation's foreign policy and defense policy to be set by FOIA plaintiffs and by District Court judges, rather than by the Executive Branch.

It is my understanding that you are continuing to consider this matter and will discuss this with other persons within the Department of Justice.

Sincerely,

Jeffrey Axelrad  
Chief, Information & Privacy Section  
Civil Division

JA:sv



INTERAGENCY CLASSIFICATION REVIEW COMMITTEE

WASHINGTON, D.C. 20408

ISSUE: THE EXAMINATION OF THE ROLE AND EFFECTIVENESS OF  
THE INTERAGENCY CLASSIFICATION REVIEW COMMITTEE

DISCUSSION:

The Interagency Classification Review Committee (ICRC) was established pursuant to Executive Order 11652 and its implementing National Security Council Directive. The Committee was established to assist the NSC in monitoring the implementation of the Order and was specifically charged with: (a) overseeing Departmental actions to ensure compliance with the Order and implementing directives, (b) receiving and acting on complaints or suggestions from within or without the government regarding the administration of the Order, including appeals from denials of declassification requests, and (c) developing means to prevent overclassification, ensure prompt declassification and access to declassified material, and eliminate unauthorized disclosures.

Committee membership includes representatives of the Departments of State, Defense and Justice, the Archivist of the United States, the Central Intelligence Agency, the Energy Research and Development Administration and the National Security Council staff. Dr. James B. Rhoads, Archivist of the United States, was appointed by the President as Acting Chairman in April 1973. The ICRC is authorized a permanent staff of eight personnel including the Executive Director. The staff draws its support, including budgetary funding (\$173,600 for FY 77), from the General Services Administration through the National Archives and Records Service.

In meeting its monitorship responsibilities, the ICRC has relied primarily on a system of quarterly oversight reports from all Departments granted original classification authority and on a system of detailed on-site program reviews of Departmental implementation. ICRC program reviews entail in-depth analysis of all facets of classification, declassification and safeguarding procedures within Departments. During 1976 reviews were conducted in over 50 Departments. It is projected that over 200 reviews will be conducted in 1977. After-action reports are prepared for each formal review and a copy is provided to the senior official responsible for the program in each reviewed Department along with specific ICRC recommendations for program improvement.

Significant progress has been achieved in restoring a balance between public access to information regarding the affairs of Government and protection of official information in the interest of national security. While much of the credit for this success must be given to the

progressive actions taken by Departments, recognition must also be given to the fact that many of the actions were in response to ICRC oversight and reporting requirements. Examples of progress achieved as presented in the Committee's annual progress report to the President include: (a) classification authority reduction from over 59,000 personnel to under 14,000; (b) a 65 percent reduction in unauthorized disclosures in CY 1976; (c) the granting in full or in part of 86 percent of all requests for declassification review; (d) a 22 percent greater use of the Confidential category as compared with the use of the more restrictive Secret and Top Secret categories; (e) limiting exemptions from the automatic declassification provisions to less than 25 percent of the information classified in most Departments; (f) the declassification of nearly 200 million pages of official records under the NARS declassification program since 1972, and the declassification of millions of pages under separate Departmental programs; (g) demonstrated public confidence in the executive branch declassification and appeal programs by a 1400 percent increase in the number of requests for declassification review -- further substantiated by the fact that only 3 percent of the requests have been appealed to Departmental Review Committees and less than 0.6 percent have reached the ICRC appeal level; (h) impressive gains made by Departments in the reduction of classified inventories; and (i) vast improvements made by Departments in their monitorship and inspection systems and in the development and use of security education courses and materials.

Still, much remains to be done to ensure more effective implementation. The efforts of the oversight body can be enhanced by certain actions. For example, the ICRC has had an Acting Chairman for over 4 years despite repeated recommendations by the Committee to the NSC that a permanent Chairman be appointed. The appointment of a Chairman of national stature would publicly demonstrate a commitment at the highest levels to the laudable goal of openness. Similarly, the effectiveness of the oversight body would be enhanced by the re-affirmation of the status of the body as an arm of the President. Prior to September 1973, the Committee staff was physically located in the Old Executive Office Building and the Executive Director was a member of the Domestic Council. In 1973, the staff was transferred both physically and administratively to the National Archives. This downgrading of the chain of authority from the White House or NSC has had a detrimental effect on the Committee and its work as well as on the effectiveness of the Executive Director in his relationships with Departments. The effectiveness of the Committee has also been impeded by a lack of sufficient staff personnel to carry out the Committee's extensive responsibilities. Until late 1975, the entire staff consisted of only three personnel, including the Executive Director. In August 1975, a senior program analyst was added and in 1976, four additional members joined the staff. It was only after the latter expansion of the staff that the detailed program reviews, which have become the core of the Committee's monitorship program, could be undertaken.

In considering the role and effectiveness of the ICRC, the work group examined the following significant factors:

- (a) The degree of independence of the body, or at least the appearance of independence from the perspective of the public.
- (b) The location of the oversight body within the executive hierarchy and its apparent degree of authority.
- (c) The composition of the oversight body and the ability of Committee members to make independent decisions.
- (d) Whether the oversight body should continue to accept and act on appeals.
- (e) Where overall monitorship responsibility should be placed.
- (f) The degree to which the oversight body should monitor or be involved in suggestions or complaints regarding executive branch administration of the Freedom of Information Act, as amended.
- (g) Whether the functions currently performed by the ICRC could be handled as effectively by an advisory Board or a separate office.
- (h) What additional functions should be assigned to the oversight body.

OPTIONS:

- 1. Abolish the ICRC. Establish in its place a new oversight office in the Executive Office of the President with overall monitorship responsibility for the Information Security Program. The office shall be headed by a full-time Director and a Deputy Director or a three member board appointed by the President. The Director shall report to the President. He shall also chair an interdepartmental committee comprised of current ICRC membership which committee shall act in an advisory capacity to the Director. The office shall be charged with responsibility for all functions now assigned to the ICRC plus responsibility for acting on those FOIA appeals above the Departmental level involving the b(1) exemption submitted to the oversight office voluntarily by requesters. All interested Departments will have the opportunity to be heard on any matter before this office.
- 1a. Identical to Option 1 except that overall monitorship responsibility is placed in the Office of the Vice President.

ADVANTAGES:

- a. This course of action presents the appearance of an independent body.
- b. This option raises the oversight function to the Presidential level.

- c. This course of action eliminates many of the delays associated with committee action and will permit more rapid monitorship actions.
- d. This option does not do violence to current reorganization plans for the Executive Office of the President.
- e. This course of action creates an oversight body which is independent of classification authorities.
- f. This option retains an interagency forum for the exchange of views and ideas on security information.
- g. This option allows the oversight body to continue to draw on Departmental expertise.
- h. This course of action continues to provide an executive branch appeal level above the Departmental level and actually increases the responsibility of the oversight body by providing that FOIA appeals involving the b(1) exemption shall also be heard.

DISADVANTAGES:

- a. Adoption of this course of action will require a significant increase in the size of the oversight staff, and consequently, in the White House staff, in order to handle and process the anticipated significant increase in the number of FOIA appeals.
- b. This course of action places the final decision on appeals with an oversight body rather than with the head of the Department.
- c. In all probability, the majority of the effort of the oversight office will be involved in the processing of appeals rather than on substantive policy and monitorship matters.
- d. Adoption of this course of action will slightly increase the size of the Executive Office of the President.
- e. This course of action would remove a national security related function from the responsibility of the Assistant to the President for National Security Affairs.

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Abolish the ICRC. In its place, establish an independent oversight office in the Executive Office of the President which shall have overall policy, implementation and monitorship responsibilities for the Information Security Program. The oversight office shall be headed by a full-time Director and Deputy Director appointed by the President. The Director of the office shall report to the President. He shall also chair an interdepartmental committee comprised of current ICRC membership which committee shall act in an advisory capacity to the Director. Functions of the new office shall be identical to those currently assigned to the ICRC except that those pertaining to the hearing of appeals shall be eliminated.

- 2a. Identical with Option 2 except that the oversight office along with overall monitorship responsibility is placed in the Office of the Vice President.

ADVANTAGES:

- a. Consistent with the Freedom of Information act, as amended, this course leaves the final executive branch decision on appeals with the Departments.
- b. This course of action gives the appearance of increased authority for the oversight body and more independence.
- c. This option eliminates many of the delays associated with Committee action and will permit more rapid monitorship actions.
- d. This option will allow the oversight body more time to make substantive policy decisions and to initiate progressive actions.
- e. This course of action does not interfere with current planning for reorganization of the Executive Office of the President.
- f. This course of action creates an oversight body which is independent of classification authorities.
- g. This course retains an interagency forum for the exchange of views and ideas on security information.
- h. This course will allow the oversight body to continue to draw on Departmental expertise.

DISADVANTAGES:

- a. Since this course of action eliminates the oversight appeal level, there will be no avenue available for requesters seeking declassification of those executive branch classified records which are not subject to the provisions of the FOIA, as amended; e.g. Classified documents in the Presidential libraries.
- b. The elimination of the appeals function could have a negative impact on the public.
- c. Adoption of this option will require a slight increase in the size of the Executive Office of the President.
- d. This option removes a national security related function from the responsibilities of the Assistant to the President for National Security Affairs.

3. Retain overall responsibility for oversight of the Information Security Program in the National Security Council. Abolish the ICRC and hold the head of each Department responsible for monitoring the implementation of the program within his/her Department. Require Departmental reviews and inspections and annual reports on program progress to a designated NSC office.

ADVANTAGES:

- a. The adoption of this option would place final authority in the head of the Department where responsibility for classification actions rests, rather than in an oversight body.
- b. Implementation could be effected more rapidly since Departments would not be required to submit implementing regulations to an oversight body for approval.
- c. Departmental reporting requirements would be reduced to an annual basis rather than semi-annual as now required.
- d. A slight cost savings would accrue due to the elimination of the current ICRC staff.

DISADVANTAGES:

- a. There would probably be a negative public perception of this course of action -- it would be viewed as retrogressive.
- b. This course of action would contribute to a lack of standardization in the application of information security procedures.
- c. Experience shows that Departments will now allocate sufficient resources to effectively implement the Order -- rather, resources will be diverted to other programs or projects of greater immediate interest to the particular Department.
- d. The appeal function now handled by the ICRC would have to be eliminated in the absence of an oversight body. Some other mechanism would be required to hear appeals regarding information contained in Presidential materials since such information is not subject to the Freedom of Information Act, as amended.
- e. No independent external group will be available by Executive action to review, inspect or objectively analyze Departmental implementing actions.
- f. In all likelihood, a slight increase in the NSC staff will be required.
- g. This course of action eliminates the Interagency forum for dealing with mutual problems related to classified information.
- h. This course of action is unlikely to contribute to greater openness or better protection of national security information.



4. Retain overall responsibility for oversight of the program in the NSC. Either retain the ICRC as currently organized or add three additional Presidential appointees from outside the executive branch to give it a more independent appearance. Retain functions as currently assigned to the ICRC.

ADVANTAGES:

- a. This course of action would contribute to continuity of operations since procedures would not be significantly modified.
- b. This option would continue to permit the Committee to draw on agency resources and expertise.
- c. Minimal re-education of the public will be required to ensure awareness of available routes for suggestions, complaints and appeals.
- d. The addition of three members from outside the executive branch will provide the appearance of some degree of independence.

DISADVANTAGES:

- a. Even the addition of three Presidential appointees does not give the oversight body a sufficiently independent appearance.
- b. Decision by Committee is not always efficient, particularly when members of the Committee have very definite vested interests.
- c. The lack of a finite organizational tie between the Executive Office of the President and the Committee will be perceived by both the public and the Departments as a lack of authority on the part of the Committee.
- d. Action by Committee causes considerable delay in day-to-day operations, appeals, and review functions.
- e. From the perspective of the Departments, appeals to an oversight body undermine the authority of the head of the Department.
- f. This course of action offers no overriding advantages over the existing monitorship system under E.O. 11652.

5. Abolish the ICRC. Establish in its place in the Executive Office of the President an independent advisory board composed of Presidential appointees from outside the executive branch. Charge the board with overall review, policy and appeals responsibility.

ADVANTAGES:

- a. Public perception of the board would be one of greater independence.

- b. This course of action would provide a diversified oversight of the implementation of the program drawing on the board members experience in various disciplines.
- c. This option would provide a clear indication of the President's commitment to openness.

DISADVANTAGES:

- a. Current Administration planning is to reduce the number of advisory boards.
  - b. The gathering of the board members from various parts of the country would make the holding of periodic meetings difficult.
  - c. Administrative costs would be significantly higher because of travel, per diem and other logistical support costs for board members.
  - d. Members appointed from outside the executive branch would lack knowledge of current executive branch organization, functions, and operations.
  - e. The appeals function would be difficult to carry out because of the decentralized location of members.
  - f. This course of action has the potential for undermining final Presidential authority over classification matters.
6. Retain current Departmental representation on the ICRC. Place overall monitorship responsibility for the program in a new office in the Executive Office of the President. Appoint a prominent U.S. citizen from outside the executive branch as Chairman of the ICRC. Retain functions currently assigned to the ICRC.

ADVANTAGES:

- a. Since operating procedures will not change significantly, this course of action will contribute to continuity of operations.
- b. This course would continue to permit the Committee to draw on Departmental resources and expertise.
- c. Minimal re-education of the public will be required to ensure awareness of available routes for suggestions, complaints and appeals.
- d. The appointment of a permanent Chairman from outside the executive branch lends some degree of independence to the body.
- e. Establishment of the office in the Executive Office of the President gives the appearance of greater authority for the oversight body.

DISADVANTAGES:

- a. It may prove difficult to find a prominent U.S. citizen willing to chair the oversight body.
  - b. Even the changes suggested by this option do not give the oversight body a sufficiently independent appearance.
  - c. This course of action retains the difficulties involved in committee operation. Committee members may have definite vested interests.
  - d. Action by Committee causes considerable delays in day-to-day operations, appeals and review functions. In addition, it creates an extensive administrative workload in the processing of appeals, reviews and policy matters.
  - e. This course does not provide for the hearing of FOIA appeals above the Departmental level involving the b(1) exemption.
7. Retain current Departmental representation on ICRC. Overall monitorship responsibility for the program shall be placed in a separate office in the Executive Office of the President. A Chairman shall be appointed by the President and shall be a member of the White House Staff. He shall also serve as full-time Director of the oversight Office. Charge the office with all functions currently assigned to the ICRC plus responsibility for acting on those FOIA appeals above Departmental level involving the (b)(1) exemption submitted to the oversight office voluntarily by requesters.

ADVANTAGES:

- a. This course of action meets Departmental needs and desires to participate in appeals and policy functions.
- b. The course of action provides for a dispersal of authority.
- c. This course of action will allow monitorship activities to be undertaken and completed more rapidly.
- d. This course of action will continue to permit the oversight body to draw on Departmental resources and expertise.
- e. This course of action provides the Committee with a closer tie with the President and, concomitantly, the appearance of greater authority.

DISADVANTAGES:

- a. Retention of current Departmental representation may be looked upon by some members of the public as a perpetuation of the status quo.
- b. This course of action will require significant expansion of the White House staff.

- c. This course of action proposes an oversight body which is not independent of classification authorities.

RECOMMENDATIONS: During the course of its deliberations the Sub-Group developed and fully considered a number of options. Basic agreement was reached among the members regarding overall monitorship responsibility, location of the oversight office, composition of the oversight body and with one major exception, functions to be assigned to the oversight body. This exception was a divergence of views on whether or not the selected oversight office should hear appeals from Departmental denials of declassification requests, and if so, to what extent. A poll of the Sub-Group members disclosed a preference for the following three possibilities:

Option 1 --- This course of action provides for the oversight body to hear and act on all appeals including FOIA appeals involving the (b)(1) exemption. To handle this function the option provides as an alternative the designation of a three member board. This option was favored by the representatives from the Office of Management and Budget, the Domestic Staff and the National Archives and Records Service. Support for this position was based on the opinion that the hearing of appeals serves a useful and cost-savings purpose and that any action to eliminate this function would be viewed by the public as a retrogressive step.

Option 2 --- This option provides for the complete elimination of all appeals functions of the oversight body. This option was supported by the representatives of the Energy Research and Development Administration, the Department of Defense, the Central Intelligence Agency/IC Staff, and the National Security Council Staff. - *option 8*  
Support for this position was based on the opinion that the hearing of appeals has consumed the entire time of the ICRC thereby precluding that body from making substantive policy and procedural changes in the program. Further, that the proposed Executive order should be consistent with the FOIA regarding appeals, and that final executive branch decisions on classification and has cognizance over the information.

Option 2 (Modified) -- The ICRC representative supported the adoption of Option 2 with a modification which would require the oversight body to hear appeals regarding that classified information created by the executive branch which is not subject to the provisions of the FOIA, as amended; e.g., Presidential materials. It was the opinion of the ICRC representative that

elimination of the oversight body appeals function would remove the only available avenue for persons to appeal this type information. Further, most appeals which have been heard by the ICRC have been this type material, and that the Government has a responsibility to ensure that such avenues are available to the public.

The Department of State representative abstained from selecting a preferred option from all available options based on the opinion that the Sub-Group should develop and consider all possible options along with their advantages and disadvantages. However, it was his opinion that the selection of a preferred option should be left to the decision of the ad-hoc Committee. Notwithstanding, it is the recommendation of this Sub-Group that the ad-hoc Committee consider both Option 1 and Option 2 (original and modified as above) in arriving at a decision on the oversight body.

FURTHER RECOMMENDATIONS:

- That Section 6, Executive Order 11652, be changed to reflect the language of Section 22, page 25, of the Van Cook/Wells proposed order with the following additional changes:
  - a. In the lead paragraph, change the reference to the "Office for Openness in Government" to the title selected for the new oversight Office.
  - b. Change the language of Section 22 (A) to reflect the recommendation arrived at by Sub-Group I/R 3 regarding trustworthiness.
  - c. If Sub-Group I/R 2 determines that security agreements should be required, and this recommendation is adopted, a policy statement regarding security agreements should be included in this Section.
  
- That Section 7, Executive Order 11652, be changed to reflect the language of Section 24, Page 27 of the Van Cook/Wells proposed Order with the following additional changes:
  - a. Change reference to the "Office for Openness in Government" throughout Section 24 to the title selected for the new oversight body.
  - b. If the final decision determines that an interdepartmental advisory board is to be established, include this fact and composition of the board.

- c. Retain or change the language of Section 24 (A)(2) to reflect the decision arrived at regarding the hearing of appeals.
  - d. Retain or change the language of Section 24(B)(4) to reflect the decision arrived at regarding Departmental preparation of classification guidelines.
- Add a new section regarding the responsibility of the Attorney General of interpreting the Order using language such as that contained in Section 26, page 30, of the Van Cook/Wells proposed order, with the exception that reference to the "Office for Openness in Government" should be changed to the title decided for the new oversight body.

Recommended Option

Abolish the ICRC. In its place, establish a Classification Oversight Board (COB) in the Executive Office of the President which shall have overall monitoring responsibility for the United States Government information security program. The Board shall consist of three prominent private citizens appointed by the President, and reporting to him. This Board shall be supported by a staff headed by an Executive Secretary. The functions of the Board and its staff shall be identical to those currently assigned to the ICRC except that those pertaining to the hearing of appeals shall be eliminated.\* The Executive Secretary shall be advised by an interdepartmental committee comprised of the current ICRC membership.

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\* In view of current reorganization efforts underway affecting the Executive Office of the President, it may or may not be possible to have the COB physically located in the Executive Office. Although this is the strongly preferred option of the subcommittee, the alternative would be for the Board and staff to be placed administratively and for budgetary purposes under another Executive Branch Department; e. g., under GSA funded through NARS -- the present arrangement for the ICRC.

\*\* There is dispute among the agencies whether the Board should hear appeals of final Agency determinations on declassification requests. We are agreed on the form and function of the body replacing the ICRC except in this respect.

Advantages:

- a. Public perception of the board would be one of greater independence.
- b. This course of action would provide a diversified oversight of the Program drawing on the experiences of the board members and the interdepartmental advisory committee.
- c. This course of action would provide an indication of the President's commitment to openness consistent with national security.
- d. This course of action would provide monitorship independent of classifying Departments/Agencies.
- e. Placement of the board in the Executive Office of the President would provide the appearance of greater authority.
- f. Deletion of the appeals provides consistency with the Freedom of Information Act, as amended, leaving the final decision on appeals with Department Agency Heads who have responsibility for the information.

Disadvantages:

- a. Current Administration planning is to reduce the number of boards.
- b. The gathering of board members from various parts of the country would make the holding of periodic meetings difficult.
- c. Board members appointed from the private sector would lack knowledge of current Executive Branch organization, functions, operations, and, moreover, lack contemporary experience with respect to the question of what information requires protection



in the interest of national security.

- d. If the appeal function were included, it would be most difficult to carry out due to the dispersal of the board members around the country.
- e. This course of action, if the appeal function were to be included, would place the board in a position of being able to override a Department Head's decision with respect to the continuation of the classification of information for which he is responsible. Moreover, this course of action has the potential for undermining final Presidential authority over classification matters.
- f. If the appeal function is deleted, this course of action would have the possible appearance of diminished public access to classified information.
- g. There would be a significant amount of authority placed in a small number of people.
- h. This course of action would remove a national security related function from the purview of the Assistant to the President for National Security Affairs.
- i. If the board is placed in the Executive Office of the President, this course of action would require an increase in the size of the Executive Office. If the board were to be placed in GSA, it may give the appearance of cosmetic change alone.