Information Security Oversight Office
Washington, DC 20405

STANDARD FORM 312
CLASSIFIED INFORMATION NONDISCLOSURE AGREEMENT

Q: What is the Information Security Oversight Office?

A: The Information Security Oversight Office (ISOO), established by Executive Order 12065 (December 1, 1978) and continued under Executive Order 12356 (April 6, 1982), is responsible for monitoring the information security programs of all executive branch departments and agencies that create or handle national security information. In National Security Decision Directive No. 84, March 11, 1983, the President directed ISOO to develop and issue a standardized classified information nondisclosure agreement to be executed by all cleared persons as a condition of access to classified information.

Q: What is the purpose of a nondisclosure agreement?

A: The primary purpose of a nondisclosure agreement is to inform employees of (a) the trust that is placed in them by providing them access to classified information; (b) their responsibilities to protect that information from unauthorized disclosure; and (c) the consequences that may result from their failure to meet those responsibilities. Secondly, by establishing the nature of that trust, those responsibilities, and those consequences in the context of a contractual agreement, if that trust is violated, the United States will be in a better position to prevent unauthorized disclosures or to discipline employees responsible for such disclosures by initiating a civil or administrative action.

Q: Upon what legal authority is the SF 312 based?

A: The direct legal bases for the issuance of SF 312 are Executive Order 12356, in which the President authorizes the Director of ISOO to issue standardized security forms; and National Security Decision Directive No. 84 (NSDD 84), in which the President directs ISOO to issue a standardized classified information nondisclosure agreement. Both E.O. 12356 and NSDD 84 are based on the President's constitutional responsibilities to protect national security information. These responsibilities derive from the President's powers as Chief Executive, Commander-in-Chief, and the principal architect of United States foreign policy.

Nondisclosure agreements have consistently been upheld by the Federal courts, including the Supreme Court, as legally binding and constitutional. At every stage of the development and implementation of the SF 312 and its predecessors, the SF 189 and the SF 189-A, experts in the Department of Justice have reviewed their constitutionality and enforceability under existing law. The most recent litigation over the SF 189 resulted in a decision that upheld its basic constitutionality and legality.

Q: Who must sign the SF 312?

A: As provided in National Security Decision Directive No. 84, dated March 11, 1983: "All persons with authorized access to classified information shall be required to sign a nondisclosure agreement as a condition of access." Therefore, each person at the time that he or she is cleared for access to classified information, or each person who has been cleared previously and continues to require access to classified information must sign the SF 312, unless he or she has previously executed one or more of the following:

(a) The SF 189, for cleared employees in both Government and industry;

(b) The SF 189-A, for cleared employees within industry; or

(c) A nondisclosure agreement for which the National Security Council has granted a waiver from the use of the SF 312, the SF 189 or the SF 189-A, as provided in 32 CFR § 2003.20.

By tradition and practice, United States officials who hold positions prescribed by the Constitution of the United States are deemed to meet the standards of trustworthiness for eligibility for access to classified information. Therefore, the President, the Vice President, Members of Congress, Supreme Court Justices, and other federal judges appointed by the President and confirmed by the Senate need not execute the SF 312 as a condition of access to classified information.

Q: Are all Members of Congress, as constitutionally elected office-holders, entitled to unlimited access to classified information?

A: No. Access to classified information is a function of three pre-conditions: A determination of a person's trustworthiness, i.e., the security clearance; (2) the signing of an approved nondisclosure agreement; and (3) the exercise of the "need-to-know" principle, i.e., access is necessary in order to perform one's job. Members of Congress, as constitutionally elected officials, are not ordinarily subject to clearance investigations nor does ISOO's rule implementing the SF 312 require that Members of Congress sign the SF 312 as a condition of access to classified information. Members of Congress are not exempt, however, from fulfilling the "need-to-know" requirement. They are not inherently authorized to receive all classified information, but agencies provide access as is necessary for Congress to perform its legislative functions, for example, to members of a committee or subcommittee that oversees classified executive branch programs. Frequently, access is governed in these situations by ad hoc agreements or rules to which the agency head and the committee chairman agree.

The three basic requirements for access to classified information mentioned in the opening paragraph apply to congressional staffs as well as executive branch employees. ISOO's regulation implementing the SF 312 provides that agency heads may use it as a nondisclosure agreement to be signed by non-executive branch personnel, such as congressional staff members. However, agency heads are free to substitute other agreements for this purpose.

Q: Is an employee who signed an SF 312, SF 189 or SF 189-A in a prior position required to sign an SF 312 in a new position that also involves access to classified information?

A: The SF 312 and its predecessors have been purposely designed so that new nondisclosure agreements need not be signed upon changing jobs. Therefore, ordinarily the answer is no. However, if the location and retrieval of a previously signed agreement cannot be accomplished in a reasonable amount of time or with a reasonable amount of effort, the execution of the SF 312 may be practicable or even necessary. Also, a person who has signed the SF 189-A, which was designed exclusively for non-Government employees, would be required to sign the SF 312 if he or she began working for a Government agency in a position that required access to classified information.

Q: Should a person who does not now have a security clearance but who may very well have such a clearance in the future sign the SF 312?

A: No. The SF 312 should be signed only by persons who already have a security clearance or are being granted a security clearance at that time. It is inappropriate to have any uncleared person sign the SF 312, even if that person may have a need to be cleared in the near future.

Q: Should a person who has a security clearance but has no occasion to have access to classified information be required to sign the SF 312?

A: Since every cleared person must sign a nondisclosure agreement, the routine answer to this question is "yes." However, in implementing this program, ISOO has learned of a number of cleared employees who questioned executing a nondisclosure agreement on the basis that they had not had access to classified information over a lengthy period of time. Persons who do not require access to classified information should not have or retain security clearances. Therefore, the agency or contractor in such a situation should first determine the need for the retention of the security clearance. If its retention is unnecessary or speculative, the clearance should be withdrawn through established procedures and the employee should not sign the SF 312. If the agency or contractor determines a legitimate, contemporaneous need for the employee's clearance, the employee must sign the SF 312. In these situations, the agency or contractor must be prepared to justify the need for the clearance, since the affected employee may continue to resist executing the SF 312 on the basis that he or she has not had access to classified information.

Q: How much time should an agency or contractor provide an employee to decide whether to sign the SF 312?

A: In all situations, the answer to this question should be governed by what is reasonable under the circumstances. The following examples are illustrative. Because examples such as these and others may result in adversarial proceedings, written documentation of the transaction between the agency/contractor and the employee is critical. Also, in any situation in which there is a delay in the execution of the SF 312, the employee should be briefed on the criminal, civil or administrative consequences that may result from the unauthorized disclosure of classified information, even though the individual has not signed a nondisclosure agreement.

Example I: An employee declares explicitly that under no circumstances will he or she execute the SF 312. He or she should be advised again of the consequences of that decision. If he or she maintains the same position, the agency or contractor should take immediate steps to deny further access to classified information and to initiate the revocation of the clearance.

Example II: An employee requests additional time to consider his or her decision. He or she should be afforded a reasonable period of time to do so. If the requested additional time is 15 days or less, the agency or contractor should ordinarily grant it and make a written record of the established deadline. If the requested period of time is greater than 15 days, what that period of time will be should be discussed between the agency/contractor and employee, and a decision made, recorded, and communicated to the employee before the time begins.

Example III: An employee requests an opportunity to consult with outside counsel. He or she should be afforded a reasonable period of time in which to do so. What that period of time will be should be discussed between the agency/contractor and employee, and a decision made, recorded, and communicated to the employee before the time begins.

Example IV: An employee submits questions about the SF 312, which are reasonable both in number and in content, and requests written answers. He or she should be given a reasonable time to review those answers before any action adverse to the employee is undertaken. If the requested additional time after receipt of the answers is 15 days or less, the agency or contractor should ordinarily grant it and make a written record of the established deadline. If the requested period of time is greater than 15 days, what that period of time will be should be discussed between the agency/contractor and employee, and a decision made, recorded, and communicated to the employee before the time begins.

Q: What steps should be taken if a person who has not signed either the SF 189 or SF 189-A refuses to sign the SF 312?

A: As provided by presidential directive, the execution of an approved nondisclosure agreement shall be a condition of access to classified information. Therefore, an agency shall take those steps that are necessary to deny a person who has not executed an approved nondisclosure agreement any further access to classified information. In accordance with agency regulations and procedures, the affected party's security clearance shall either be withdrawn or denied. For purposes of meeting this condition for access, the approved nondisclosure agreements include any of the following:

(a) The SF 312, for cleared employees in both Government and industry;

(b) The SF 189, for cleared employees in both Government and industry;

(c) The SF 189-A, for cleared employees within industry; or

(d) A nondisclosure agreement for which the National Security Council has granted a waiver from the use of the SF 312, the SF 189 or the SF 189-A, as provided in 32 CFR § 2003.20.

Q: How does the SF 312 differ from the SF 189 and SF 189-A?

A: The most obvious difference between the SF 312 and the SF 189 or SF 189-A is that the SF 312 has been designed to be executed by both Government and non-Government employees. The SF 312 differs from the SF 189 and SF 189-A in several other ways as well.

First, the term "classifiable information," which has now been removed from paragraph 1 of the SF 189 by regulation, does not appear in the SF 312.

Second, the modifiers "direct" and "indirect," which appear in Paragraph 3 of both the SF 189 and SF 189-A, do not appear in the new nondisclosure agreement.

Third, the "Security Debriefing Acknowledgement," which appears in the SF 189-A but not the SF 189, is included in the SF 312. Its use is optional at the discretion of the implementing agency.

Fourth, the SF 312 includes specific references to marked or unmarked classified information and information that is in the process of a classification determination. These references have now been added to the SF 189 by regulation.

Fifth, the SF 312 specifically references a person's responsibility in situations of uncertainty to confirm the classification status of information before disclosure.

The SF 312 also contains several other editorial changes which clarify perceived ambiguities in the predecessor forms. Notwithstanding these changes, the SF 312 does not in any way differ from the SF 189 and SF 189-A with respect to the substance of the classified information that each has been designed to protect.

Q: For purposes of the SF 312, what is "classified information?"

A: As used in the SF 312, the SF 189, and the SF 189-A, "classified information" is marked or unmarked classified information, including oral communications; and unclassified information that meets the standards for classification and is in the process of a classification determination, as provided in Sections 1.1(c) and 1.2(e) of Executive Order 12356 or under any other Executive order or statute that requires interim protection for certain information while a classification determination is pending. "Classified information" does not include unclassified information that may be subject to possible classification at some future date, but is not currently in the process of a classification determination.

The current Executive order and statute under which "classified information," as used in the SF 312, is generated are Executive Order 12356, "National Security Information," and the Atomic Energy Act of 1954, as amended.

Q: What is the threshold of liability for violating the nondisclosure provisions of the SF 312?

A: A party to the SF 312, SF 189 or SF 189-A may be liable for disclosing "classified information" only if he or she knows or reasonably should know that: (a) the marked or unmarked information is classified, or meets the standards for classification and is in the process of a classification determination; and (b) his or her action will result, or reasonably could result in the unauthorized disclosure of that information. In no instance may a party to the SF 312, SF 189 or SF 189-A be liable for violating its nondisclosure provisions by disclosing information when, at the time of the disclosure, there is no basis to suggest, other than pure speculation, that the information is classified or in the process of a classification determination.

Q: Why was the term "classifiable" not included in the SF 312?

A: The term "classifiable," as originally used in Paragraph 1 of the SF 189, was not included in the SF 312 to avoid the confusion that arose over the intended scope of that word. The "able" suffix in the word "classifiable" promoted the incorrect interpretation that the word referred to unclassified information that might be classified in the future. Rather, the term "classifiable information" was intended and defined to encompass two narrow classes of information that must be protected under Executive Order 12356, "National Security Information." These are (a) unmarked classified information, including oral communications; and (b) unclassified information that meets the standards for classification and is in the process of a classification determination. In response to a recent order of the United States District Court for the District of Columbia, the word "classifiable" has now been struck from the SF 189 and replaced with language consistent with its previously published definition. The same language is included in the SF 312. Further, in accordance with a rule issued by the Information Security Oversight Office, the SF 189 and the SF 189-A shall be interpreted and enforced in a manner that is fully consistent with the interpretation and enforcement of the SF 312.

Q: May the language of the SF 312 be altered to suit the preferences of an individual signer?

A: No. The SF 312 as drafted has been approved by the National Security Council as meeting the requirements of NSDD 84, and by the Department of Justice as an enforceable instrument in a court of law. An agency may not accept an agreement in which the language has been unilaterally altered by the signer.

Q: Does the SF 312 conflict with the "whistleblower" statute?

A: The SF 312 does not conflict with the "whistleblower" statute (5 U.S.C. § 2302). The statute does not extend its protection to employees who disclose classified information without authority. If an employee knows or reasonably should know that information is classified, provisions of the "whistleblower statutes" should not protect that employee from the consequences of an unauthorized disclosure.

In addition, Executive Order 12356, Sec. 1.6(a), specifically prohibits classification "in order to conceal violations of law, inefficiency, or administrative error; to prevent embarrassment to a person, organization, or agency; to restrain competition; or to prevent or delay the release of information that does not require protection in the interest of national security." This provision was included in the Order to help prevent the classification of information that would most likely be the concern of whistleblowers.

Finally, there are remedies available to whistleblowers that don't require the unauthorized disclosure of classified information. There are officials within the Government who are both authorized access to classified information and who are responsible for investigating instances of reported waste, fraud, and abuse. Further, each agency has designated officials to whom challenges to classification may be addressed or to whom a disclosure of classified information is authorized. For example, within the Department of Defense employees are now required to challenge the classification of information that they believe is not properly classified. Special procedures have been established to expedite decisions on these challenges.

Q: Must a signatory to the SF 312 submit any materials that he or she contemplates publishing for prepublication review by the employing or former employing agency?

A: No. There is no explicit or implicit prepublication review requirement in the SF 312, as there is none in the SF 189 and SF 189-A. However, if an individual who has had access to classified information is concerned that something he or she has prepared for publication may contain classified information, that individual should be encouraged to submit it to his or her current or last employing agency for a voluntary review. In this way the individual will minimize the possibility of a subsequent action against him or her as a result of an unauthorized disclosure.

Q: How long do agencies and contractors have to fulfill the requirement to implement the execution of the SF 312 by cleared employees?

A: In issuing the SF 312, ISOO is not establishing at this time a firm deadline for full agency and contractor compliance. However, ISOO encourages agencies that are responsible for Government and non-Government compliance to impose deadlines consistent with logistical realities. ISOO will continue to monitor agency compliance to help ensure that full implementation is achieved in a timely manner.

Further, it should be noted that the effort to achieve full compliance within Government agencies should not be particularly burdensome. At the time ISOO imposed a moratorium on the execution of further copies of the SF 189 at the end of 1987, agencies had reported compliance that approximated 98-99% of the persons required to execute the nondisclosure agreement. To achieve full compliance within Government agencies will require the execution of the SF 312 by the remaining one or two percent of employees; by those employees who have been cleared for access to classified information since the imposition of the moratorium; and by newly cleared employees.

ISOO does not have comparable data for the degree of compliance within industry at the time of the imposition of the moratorium. The Defense Investigative Service and other agencies that are responsible for the security administration of classified contracts, licenses and grants should establish deadlines for full compliance.

Q: What kind of briefing or other information should an agency offer at the time a person is asked to sign the SF 312?

A: At the time an employee is asked to sign the SF 312, the agency or contractor should provide a briefing that, at a minimum, provides information about: (a) the purposes of the nondisclosure agreement; (b) the intent and scope of its provisions; (c) the consequences that will result from the employee's failure to sign the agreement; and (d) the consequences that may result from the unauthorized disclosure of classified information, including possible administrative, civil, or criminal sanctions. In this context, the briefing should explain clearly the procedures to be followed in ascertaining whether a prospective recipient may have access to classified information.

The briefing may be limited to the subject of the SF 312, or it may be in the context of an initial or refresher briefing about the information security system, generally. While the heart of the briefing may be based upon a prepared text or audiovisual, the agency or contractor representative should answer any reasonable questions or concerns raised by the individual regarding the SF 312, or be prepared to obtain answers to those questions. The representative must also have available copies of every statute, executive order or regulation that is referenced in Paragraph 10 of the SF 312.

Q: If a person who has previously signed the SF 189 or SF 189-A opts to sign and substitute the SF 312, must he or she also receive another briefing?

A: The agency or contractor is not required to provide an additional briefing upon execution of the SF 312 in these circumstances. However, the agency or contractor representative should answer any reasonable questions or concerns raised by the individual regarding the SF 312, or be prepared to obtain answers to those questions. The representative should also have available copies of every statute, executive order or regulation that is referenced in Paragraph 10 of the SF 312.

Q: What steps must an agency or contractor take to substitute a signed SF 312 for a signed SF 189 or SF 189-A? If requested, must the agency or contractor return the previously signed form to the signatory?

A: In the event that a signatory opts to substitute a signed SF 312 for a previously signed SF 189 or SF 189-A, the agency or contractor shall dispose of the SF 189 or SF 189-A, either through its physical destruction or, if requested, through its return to the signatory, if these means of disposal can be accomplished with a reasonable amount of effort or expenditure of resources. In situations in which physical disposal is not a reasonable alternative, the agency or contractor shall take all reasonable steps to annotate the retained version of the SF 189 or SF 189-A with markings that make clear that it has been voided; and provide the signatory with an official written statement to that effect. In extraordinary circumstances in which none of the alternatives above is reasonable, the agency or contractor shall provide the signatory with an official written statement that the retained SF 189 or SF 189-A is void. In any circumstances, the SF 189 or SF 189-A should not be destroyed or voided until <u>after</u> the employee has executed the SF 312.

Q: How long must executed copies of the SF 312 be retained? Where must they be stored? Can they be retained in a form other than the original paper copy?

A: The originals or legally enforceable facsimiles of SF 312 must be retained for 50 years following the date of execution. Ordinarily, microforms and other reproductions are legally enforceable in the absence of the originals. Each agency must retain its executed copies of SF 312 in a file system from which the agreement can be expeditiously retrieved in the event that the United States must seek their enforcement. Official personnel files, both for civilian and military service, ordinarily are not scheduled for preservation for a sufficient period of time to allow them to be used for this purpose.

The retention of the nondisclosure agreements by contractors shall be governed by instructions issued by the Defense Investigative Service or other agency that is responsible for security administration of the contractor's classified contracts. These instructions must take into account the retention and retrieval standards discussed above.

Q: May the signer keep a copy of the executed SF 312?

A: Ordinarily, a signer of the SF 312 who requests a copy of the executed form may keep one. Only in the extraordinary situation in which one of the signatures on the agreement reveals a classified relationship, resulting in the classification of that particular form, may the signer not keep a copy.