August 16, 1971

MEMORANDUM FOR JOHN DEAN

FROM: TOM LATIMER

Attached is a proposal from the AEC member of the Declassification Study Group suggesting a major change in our current procedures. He would make TOP-SECRET and SECRET covered by espionage laws and take CONFIDENTIAL material out of the espionage laws. Could you give me your views on this. Thanks.

REFER TO DOS

TL:nm:8/16/71

No Objection To Declassification in Full 2010/08/27 : LOC-HAK-16-1-35-4

8/13/71

ACTIONS TO PATENTLY INDICATE OBJECTIVE OF
PREVENTING EXCESSIVE CLASSIFICATION

As things stand now under E.O. 10501, any information the publication of which "could be prejudicial" to the national defense (Confidential) appears to be given, at the very outset of the Order, the same basic "off-limits" treatment that is given to information which if published would result in exceptionally grave (Top Secret) or serious (Secret) damage to the Nation. (The redraft under consideration would even explicitly expand the approach to include the foreign relations field.)

Yet, historically the Executive Order has been related to national defense considerations so that it would track the language of the espionage provisions of the Criminal Code. In other words, a classifier's decision to place information under the E.O. system was supposed to reflect, at least impliedly, a decision that the unauthorized release of any level or category of information (including Confidential) would result in sufficient harm to the Nation to warrant bringing the espionage laws into play.

In practice, however, the Confidential category almost inevitably serves as the catch-all provision which, to an ultra-cautious classifier, could cover almost any sort of information. Resulting hazards can be mitigated through special emphasis on procedures for declassification, such as are called for in the proposed redraft. But to get at the root of the problem, and restore respect for and confidence

in the basic classification system, steps need to be taken to head off classification action which, for purposes of our criminal laws tends to equate, in the public mind, the "could be prejudicial" type data with the serious and exceptionally grave damage data.

Perhaps the approach that would evidence most dramatically and concretely the President's desires in this respect would be one that resulted in the elimination of the Confidential category, at least from the field of sensitive information subject to the espionage laws. Since so much of our domestic security regime and our international arrangements in the security field are geared to the three category approach, such a change would have to be handled with careful planning.

It should be kept in mind, however, that our regime of security controls is already grounded on the premise that there is a much greater difference between the Confidential and Secret levels than there is between the Secret and Top Secret levels. There is, for example, a substantial difference in the resources devoted to clearance procedures for access to Confidential, on the one hand, and Secret and Top Secret on the other hand. Also, document control procedures escalate in intensity markedly at the Secret level. Indeed, in terms of the kind of comparatively minimal security controls applicable at the Confidential level, it becomes difficult to distinguish such information from that

which is given Confidentiality status within the Government under a number of statutes, such as the Internal Revenue Code. There are statutory sanctions for violations of such Confidentiality but they are of a singnficantly lower order than what is provided for in the espionage laws. But the presence of these lesser sanctions, such as fines, seem to achieve their objective.

This is not to say that the Confidential category would be eliminated from use for all purposes. It could be retained, without raising the above-noted problem, for purposes of exercising the exemption from public disclosure provided for in the Freedom of Information Act for information warranting non-disclosure in the interests of national security or foreign policy. Unauthorized disclosure of such information by government and contractor personnel would still be subject to the possibility of administrative sanctions for domestic disclosures and would leave applicable the penal sanctions of the various export control laws for unlicensed disclosure of any technical data in this category to foreign interests.

Such an approach should also help to establish a more receptive atmosphere for new supplemental legislation, such as that discussed in Bill Rehnquist's memo, for unauthorized disclosure or for expansion of the espionage laws to cover foreign relations, as well as national defense, cases. That is, there should be better prospects

for wide Congressional support if such legislation would be applicable only to cases of unauthorized disclosure of information determined to involve exceptionally grave or serious damage to the Nation: i.e., information at the Secret or Top Secret level.

The resulting atmosphere ought, furthermore, to dispose Congress to support the needed concept of Executive finality of classification in such cases. (We would always have to anticipate the possibility of limited judicial review in the event of a showing that a particular classification action was arbitrary or capricious.)

The basics of this kind of approach, and their practical consequences, are illustrated in summary form in the attached chart.

There are, of course, various refinements that might be developed. As a minimum, readily noticeable changes, of some substance as well as tenor, would have to be readily apparent at the outset of a new Executive Order. An illustrative draft of the opening part of the Order reflecting these thoughts is also attached.

Howard C. Brown
AEC Member

Attachments:
1. Chart
2. Draft E.O.

EXECUTIVE ORDER _____

CONTROL [SAFEGUARDING] OF CLASSIFIED INFORMATION

In furtherance of the ideals upon which this Nation was founded, it is essential that citizens be as fully and currently informed as possible about the activities of their government, including those activities covering the national defense and conduct of foreign relations. To that end, only such information concerning those activities as it is essential to safeguard, as provided hereinafter, in order to prevent serious harm to the national defense or the conduct of foreign relations through its use against the United States by potential enemies, shall be subject to the special constraints of this Order regarding public release.

Now, Therefore, ...

Section 1. Classified information, for purposes of this Order, shall consist only of such official information as is determined by senior government officials as provided herein, to warrant the protection of [the Espionage laws] and the other safeguards specified herein so as to control strictly the dissemination of such information and thereby avoid at least serious harm to the United States in its national defense efforts or its conduct of foreign relations.

Section 2. Categories of Classified Information. For purposes of determining the stringency of controls, in light of the severity of

potential harm to the United States by unauthorized release, the following categories of classification will be used:

(a) Top Secret: [as is].

(b) Secret: [as is except change "serious" to "grave" so as to contrast with "exceptionally grave" in Top Secret. Might also be well to add "clearly" before "result" here as well as in Top Secret].

[(c) Confidential. If this is retained here, it could be tightened up along these lines: "The use...only for... information...which would normally be expected to cause serious harm to the national defense of the U.S. or its conduct of foreign relations." Alternatively, if it is decided to use this category primarily for purposes of the Freedom of Information Act exemption, it should be moved to a separate part of the Order and provision could be made for somewhat different treatment of this category, such as automatic availability after some relatively short holding period on the order of 12-18 months.]

	ADMINISTRATIVE CONTROLS				DETERRENTS OR SANCTIONS	
	Clearance	Access	Initial Class.	Declass.	Present	Add
TOP SECRET (DI & RD)	No change	Tighten practices on need-to-know in varying degrees up to PAM type procedures	Tighten	Advance & Improve Management	1. Espionage laws (DI & RD: felonies, misdemeanors & injunction) 2. Atomic Energy Act (RD: Felonies, misdemeanors & injunction)	1. ref. to foreign relations in espionage laws 2. provisions for misdemeanors & injunctions re any unauthorized disclosure of nat'l defense or for. rels. info.
SECRET (DI & RD)	No change	Tighten practices on need-to-know in varying degrees up to PAM type procedures	Tighten	Advance & Improve Management	1. Espionage laws (DI & RD: felonies, misdemeanors & injunction) 2. Atomic Energy (RD: Felonies, misdemeanors & injunction)	1. ref. to foreign relations in espionage laws 2. provisions for misdemeanors & injunctions re any unauthorized disclosure of nat'l defense or for. rels. info.
CONFIDENTIAL	No change	No change	No change	Automatic: 12-13 mos. (or less if so marked)	Change to rely on 1. Administrative measures for govt & contractor employees. 2. New provision for misdemeanors treatment as above	

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