



**Statement  
Of  
Patrice McDermott  
Executive Director  
OpenTheGovernment.org**

Subcommittee on Government Operations  
Committee on Oversight and Government Reform

On  
The Growing Use of the Unclassified Designation of Information in  
the Executive Branch Departments and Agencies

May 29, 2014

2154 Rayburn House Office Building

10:00 am

Thank you, Chairman Mica, Ranking Member Connolly, and Members of the Subcommittee, for the opportunity to speak today about the continued use of Sensitive But Unclassified markings in the Executive Branch, three and one-half years after the issuance of President Obama's Executive Order. My name is Patrice McDermott and I am the Executive Director of OpenTheGovernment.org, a coalition of nearly ninety organizations dedicated to openness and accountability. My remarks here today do not necessarily represent the positions of all our partner organizations.

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Let me start with a little history on the issue of the use of Sensitive But Unclassified markings in the Executive Branch. In May 2008, President Bush issued a Presidential Memorandum with the stated intent to standardize control markings and handling procedures across the "information sharing environment," a term codified in Intelligence Reform and Terrorism Prevention Act of 2004 to indicate the intelligence, law enforcement, defense, homeland security, and foreign affairs communities. The CUI Council called for in the Memorandum was a subcommittee of the Information Sharing Council within the Office of the Director of National Intelligence and, therefore, entirely outside any public access or accountability.

That memorandum did nothing to rein in the use of what were called Sensitive But Unclassified markings; in fact, the memo allowed agencies to continue to make control determinations as a matter of "department policy" — meaning that the public was given no notice or chance to comment on the proposal. Under President Bush's proposed framework, control designations could easily have been treated as simply another level of classification — reducing the public's access to critical information.

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On November 3, 2010, President Obama issued the Executive Order on Controlled Unclassified Information. The Order limits control markings to those based on government-wide policy, as well as statute or regulation. This is an enormous victory for openness. This limitation will, when fully enacted, both significantly limit the number and end the spiraling proliferation of “agency policy” markings, most particularly “For Official Use Only.”

Organizations working on government openness and accountability and on whistleblower protection welcomed the release of the Executive Order, which rescinded the Bush Administration CUI memorandum, and which requires standardizing and limiting the use of control markings on unclassified information. The openness community applauded the Obama Administration for making this an open government document when it could have become quite the opposite.

Earlier drafts of the Obama order would have allowed agencies to continue using designations that were not based in either statute or regulation, but were created by “agency policy.” Previous drafts would have created a system of sanctions, which the openness community was concerned would impede needed sharing and could lead to repercussions outside current law for whistleblowers. The new Order has none of this language, reflecting its role as government-wide information management policy.

A key aspect of the Order is that it makes clear that a CUI marking has no bearing on the decision to disclose information under the Freedom of Information Act, or on disclosure to the legislative or judicial branches of the U.S. government. Finally, the Order involves the public in consultation on the implementation of the new framework.

It was significant that the process in the Obama Administration began in a manner not dissimilar to that under the Bush Administration. While we did have opportunities to meet with the government officials involved in the work on CUI – and there were officials involved who were deeply committed to government transparency – the early discussions and drafts were led by the National Security Staff and based on the [Report and Recommendations of the Presidential Task Force on Controlled Unclassified Information](#), a task force led by the Attorney General and the Secretary of Homeland Security. They came to this with an approach quite similar to that of the Bush Administration – that this was about controlling dissemination of and access to ‘sensitive but unclassified’ information to those with a recognized need-to-know. Recognized within the information sharing environment, of course.

We had numerous meetings and were able to review drafts in the meetings, and we provided extensive comments. Finally, we were presented with what the government officials considered the final draft of an Executive Order and we were asked for our ‘headline.’ We responded that the headline of the openness and whistleblower communities would be “Obama Creates 4<sup>th</sup> Level of Classification.”

Apparently, this de-railed the train that had been moving down the track. At some point in this timeframe, the Office of Management and Budget also became involved in the process. The next thing we heard was that a new draft was in the works. That draft took what essentially had been a national security driven effort and turned it into what it properly was – a government-wide information management policy.

So, the “agency policy” markings are to be ended. The question for us is “When?” Regrettably, here is where the rub comes in.

### Implementation

The CUI staff worked extraordinarily hard, with very limited resources, to create the Registry of approved CUI categories and subcategories. It was released in November 2011. It is accompanied, however, with a “Reminder from the Executive Agent: **Existing practices for sensitive unclassified information remain in effect until the CUI marking implementation deadline (TBD).**”

I want to stipulate that the CUI staff housed at ISOO (at NARA) have been very open: they have initiated meetings with our communities and have been willing to meet with us at our request; they have taken our concerns and our comments on various implementation drafts very seriously and have made changes along the way.

Our concern is that the process is – from our perspective, at least – a long way behind schedule. We suspect that this is due to intransigence and resistance from some agencies and the “adjudication” the CUI staff has had to do with them. We saw and commented on draft language in March 2011, again – after two years – in January 2013, and most recently in the early part of this year. The process has now moved to OIRA and to agency comment and, again, adjudication. Later this summer, the public will have an opportunity to comment.

It is the timeline after the review process that especially troubles us. The Executive Agent expects the CFR to become effective in April 2015. Then begins an extended process, in 6-month segments, of agencies only then *beginning* to develop the budget, IT, and training toward a requirement of which they will have been aware for almost five years. Agencies will not begin to “implement CUI practices” or to “phase out obsolete practices” until April 2016. And not until 2017 – and beyond into the next decade – will agencies finally *begin* to “eliminate old markings” and “assure use of only new marking” that are on the Registry. The Executive Agent indicates an expectation that this process will extend into 2018, 2019 and beyond. Well beyond the end of the current Administration and its openness impetus.

So, bearing in mind the Executive Agent’s reminder that “Existing practices for sensitive unclassified information remain in effect until the CUI marking implementation deadline (TBD),” the public – and Congress – will not stop seeing markings like FOUO until sometime in the third decade of this century.

What does this mean in practice?

The president was clear that “the mere fact that information is designated as CUI shall not have a bearing on determinations pursuant to any law requiring the disclosure of information or permitting disclosure as a matter of discretion, including disclosures to the legislative or judicial branches.”

Agencies, however, continue to use -- not CUI-registry markings -- but the “existing practices,” especially FOUO, to either withhold or to make it difficult for requestors to get information that should otherwise be public. As an example, the Project on Government Oversight recently reported on a DOD IG report that the Pentagon labeled FOUO: in such cases the DoD IG will post only the report’s title or a summary on its website. The complete report must be requested through the Freedom of Information Act (FOIA).

POGO was fortunate enough to have obtained the contract overbilling report through non-FOIA means, but they are still waiting on requests for two other DoD IG reports, one of which they filed nine months ago. Both of these reports are unfavorable assessments of other defense contracting programs.

We are as frustrated as you and continue to push the Executive Agent and OMB to move the implementation along in a more timely manner.

Thank you for the opportunity to speak to you on this important issue. I am happy to answer any questions you might have.

## **Patrice McDermott**

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### Education

- B.A.: Florida State University, 1972, cum laude
- M.A.: Brown University, 1974  
Department of Political Science.
- Ph.D.: University of Arizona, December 1982  
Department of Political Science.
- M.Ln.: Emory University, May 1986  
Division of Library and Information Management.

### Professional Honors

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|---|----------------|
| Freedom of Information Act Hall of Fame | March 16, 2001 |
| James Madison Award                     | March 16, 2011 |

### Current and Related Professional Positions

Executive Director, OpenTheGovernment.org, July 2006 – present.

Deputy Director, Office of Government Relations. American Library Association Washington Office. Washington, D.C. December 2001 – June 2006.

Senior Information Policy Analyst. OMB Watch, Washington, D.C. January 1994 – November 2001.

Archives Specialist, Life Cycle Coordinator. National Archives and Records Administration, Washington, D.C. August 1990-1993.

Assistant Director. Office for Intellectual Freedom, American Library Association, Chicago, Illinois. November 1986-July 1988.

### Speeches and Testimony (Partial List)

Speaker, “He Leaks, She Leaks, Wikileaks,” Spotlight Session at SLA Annual Conference, July 16, 2012.

Testimony before the House Oversight and Government Reform Committee Subcommittee on Information Policy, Census, and National Archives on Implementation on the Office of Government Information Services, September 17, 2008.

Statement submitted to the Constitution Subcommittee of the Senate Judiciary Committee on "Restoring the Rule of Law," September 16, 2008.

Testimony before the House Committee on Homeland Security's Subcommittee on Intelligence, Information Sharing, and Terrorism Risk Assessment on "controlled unclassified information" (CUI), and H.R. 6193, "The Improving Public Access to Documents Act of 2008," June 11, 2008.

Testimony before the Senate Homeland Security and Government Affairs Committee's Subcommittee on Federal Financial Management, Government Information, Federal Services, and International Security, on "National Archives Oversight: Protecting Our Nation's History for Future Generations," May 14, 2008.

Remarks. Public Interest Declassification Board. National Archives and Records Administration, March 17, 2008.

Testimony before the House Government Reform Subcommittee on Government Management, Finance, and Accountability, on The Implementation of Executive Order 13392, July 26, 2006.

Speaker. "Who Needs to Know? Access to Government Information After September 11<sup>th</sup>," U. S. Census Bureau, April 11, 2005.

Speaker. Who Needs to Know? Information and Security After September 11<sup>th</sup>," Defense Technical Information Center 2005 Annual Conference, April 4, 2005.

Speaker. "Disappearing Access to Government Information," Oklahoma Library Association Annual Meeting, March 31, 2005.

Speaker. "Withhold and Control: Information in the Bush Administration," Kansas Journal of Law & Public Policy Symposium, November 12, 2002.

Panelist. Canadian Access and Privacy Association, October 3, 2002.

Keynote Address, "What is E-Government – How Will It Affect Us?" at National Institutes of Health Forum "Electronic Government: Recognizing the Challenges – Planning the Transition," October 24, 2000.

Panelist. Congressional Staff and Press Briefing, "Public Interest Issues in Telecommunications Reform." May 8, 1995.

Speech before the Computer Professionals for Social Responsibility's Directions and Implications of Advanced Computing conference, "The Information Superhighway and Public Interaction with

the Government." April 23, 1994.

Publications (Partial List)

"WikiLeaks is a wake-up call for openness," with Danielle Brian and Jake Weins, in *Government Information Quarterly*, Volume 28, Issue 2, April 2011, pp. 135-136

"Building open government," *Government Information Quarterly*, Volume 27, Issue 4, October 2010, pp. 401-413

"Secrecy reform or secrecy redux? Access to information in the Obama administration," in *Government Secrecy, Research in Social Problems and Public Policy*, Volume 19, 2011.

"Open the Government, A New Information Policy," in Mandate for Change: Policies and Leadership for 2009 and Beyond. Lexington Books, January 2009.

"Who Needs to Know? The State of Public Access to Federal Government Information." Bernan Press, 2007.

"Withhold and Control: Information in the Bush Administration," *Kansas Journal of Law & Public Policy*, Vol. XII, Issue 3.

**Committee on Oversight and Government Reform**  
**Witness Disclosure Requirement – “Truth in Testimony”**  
**Required by House Rule XI, Clause 2(g)(5)**

Name: **Patrice McDermott**

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1. Please list any federal grants or contracts (including subgrants or subcontracts) you have received since October 1, 2011. Include the source and amount of each grant or contract.

None

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2. Please list any entity you are testifying on behalf of and briefly describe your relationship with these entities.

I am testifying as the Executive Director of OpenTheGovernment.org, but am not speaking on behalf of any of the partner organizations in the coalition.

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3. Please list any federal grants or contracts (including subgrants or subcontracts) received since October 1, 2010, by the entity(ies) you listed above. Include the source and amount of each grant or contract.

None

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*I certify that the above information is true and correct.*

Signature:



Date:

27 May 2014

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