

INFORMATION SECURITY OVERSIGHT OFFICE
NATIONAL ARCHIVES *and* RECORDS ADMINISTRATION
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December 26, 2012

J. William Leonard
P.O. Box 2355
Leonardtown, MD 20650

VIA E-MAIL

Dear Mr. Leonard,

I am responding to your letter of July 30, 2011, in which you asked that I, in accordance with my assigned duties under Executive Order 13526, "Classified National Security Information" ("the Order"), consider and take action with regard to what you viewed as a violation of the Order. Specifically, you requested I "ascertain if employees of the United States Government, to include the National Security Agency (NSA) and the Department of Justice (DOJ), have willfully classified or continued the classification of information in violation of the Order" in the matter of *United States v. Thomas A. Drake*. I have concluded my inquiries into this matter, having consulted with the above-mentioned agencies, drawn upon the Order, its implementing Directive, and examined relevant portions of each agency's security regulations, and now share with you my findings and observations.

With regard to your complaint, I conclude that neither employees of the Department of Justice nor of the National Security Agency willfully classified or continued the classification of the "What a Wonderful Success" document in violation of the Order. I wish to note that your complaint suggests this was done "in the matter of *United States v. Thomas A. Drake*." I think it is important to point out that my process in addressing your complaint examined (and distinguished between) the classification of the document in its first instance and any continuation of its classification "in the matter of *United States v. Thomas A. Drake*." I find no violation in either case. In fact, as materials you provided with your complaint make clear, NSA discontinued the classification of the document in question and represented the same to the court "in the matter of *United States v. Thomas A. Drake*."

In examining the "What a Wonderful Success" document, I find that the NSA did not violate the Order's requirements for appropriately applying classification at document creation, nor did the agency violate the Order's expectation that information shall be declassified when it no longer meets the standards for classification. While my examination of the matter has led to my conclusion that the content and processing of the document fall within the standards and authority for classification under the Order and NSA regulations, that does not make them immune to opinions about how substantial the document's content may or may not be. I find, simply, that those opinions do not rise to the level of willful acts in violation of the Order. That said, such commentary on the culture of classification fits well in discussions of policy reform. In such fora, including the work of the Public Interest Declassification Board, your experience and observations would continue to be welcome.

Separate and apart from the specifics of the Drake matter, there are important aspects of the classification system worth noting in this larger discussion of the scope of classification guidance. As you are aware, section 1.1 of the Order grants both responsibility and latitude to Executive branch officials with original classification authority. These officials are the chief subject matter experts in government concerning information that could be damaging to national security if compromised or released in an unauthorized manner.

In light of this, section 2.2 of the Order directs officials with original classification authority to prepare classification guides to facilitate the proper and uniform classification of information. A well-constructed classification guide can foster consistency and accuracy throughout a very large agency, can impart direction concerning the duration of classification, and ensure that information is properly identified and afforded necessary

protections. Throughout the Executive branch, officials strive to impart proper classification guidance that is accurate, consistent, and easy to adopt in workforces that operates under tight time constraints. It seems quite clear, however, that the system would benefit from greater attention of senior officials in ensuring that their guidance applies classification only to information that clearly meets all classification standards in section 1.1 of the Order. For emphasis, I draw specific attention to language in Section 1.1 (a)(4) "... that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security..." and, 1.1 (b) "If there is significant doubt about the need to classify information, it shall not be classified."

I have a few observations about these matters in the context in which you raised them, namely, the matter of the *United States v Thomas A. Drake*. I have no basis to comment about the disposition of the case in the courts; that is not my purview. The conduct of the case did, however, bring to light actions and behaviors I will comment on briefly, for emphasis. The Order does not grant any individual the authority to safeguard classified information in a manner that is contrary to what the Order, its implementing directive, or an agency's security regulations require. The Order does not grant authorized holders of classified information the authority to make their own decisions concerning the classification status of that information. Furthermore, individuals are provided the means to challenge classification either formally or informally. Section 1.8 of the Order provides all authorized holders of classified information with the authority to issue challenges to classification actions. It explicitly states that individuals are "encouraged and expected" to challenge the classification status of the information through appropriate channels, and every agency is required to implement procedures whereby any authorized holder may issue a challenge without fear of retribution. I know, through the work of this Office, that the National Security Agency is well practiced in the Order's requirements concerning classification challenges. It is my understanding that Mr. Drake made no attempts to challenge the classification status of the information in question.

I note that neither version of the Order in force during the Drake case's time frame [Executive Order 13526 (29 December 2009) and its predecessor Executive Order 12958 (17 April 1995)] provides much in the way of guidance or direction, on its own, to influence the use of classified information in building prosecutions such as this. In general, the Department of Justice defers to the judgment of the "victim" agency as to what constitutes classified information. In building a case, victim agencies, for their part, tend to provide evidence that they deem sufficient to obtain a conviction with the hopes of protecting their most sensitive information and activities from release during court proceedings. The Directive (32 CFR 2001.48) requires only that agency heads "use established procedures to ensure coordination with" the Department of Justice and other counsel. All of this assumes that other influences will be at work to pursue only worthwhile prosecutions, but one interpretation of the Drake case outcome might suggest that this "coordination" was not sufficient. I would welcome your thoughts on whether there is role for policy to provide clearer, more effective guidance in the manner in which such cases are built.

I thank you for your diligent, care-filled observations and comments concerning classification matters. You continue to serve the public well by remaining engaged in the dialogue around the use of secrecy by the government. I can assure you that we take these viewpoints to heart.

Sincerely,

<Signed>

JOHN P. FITZPATRICK
Director, Information Security Oversight Office