ABSTRACT

Title of Document: THE FUTURE OF FREEDOM OF INFORMATION: AN ANALYSIS OF THE IMPACT OF EXECUTIVE ORDERS ON THE FREEDOM OF INFORMATION ACT NATIONAL SECURITY EXEMPTIONS

Joan Gibson Kaminer, MLS, 2010

Directed By: Dr. Paul Jaeger, College of Information Studies

The Freedom of Information Act ("FOIA") was enacted in 1976 to provide access to government information while balancing the interests of privacy and national security. A constant theme in court interpretations has been the extent of FOIA's national security exemptions in preventing disclosure. These interpretations are based on both FOIA and current Presidential Executive Orders addressing the classification of national security information. This paper analyzes the changes between President Bush's and President Obama's Executive Orders. Furthermore, this paper examines the relevant case law regarding FOIA national security exemptions and possible impacts from the changes in Executive Orders. This paper also makes recommendations on how to better implement the policy presented in the Executive Order. This paper concludes that President Obama's Executive Order, while clearly stating the intended policy of open access and addressing prior problems in internal agency procedures, fails to provide adequate changes that will impact FOIA litigation.

THE FUTURE OF FREEDOM OF INFORMATION: AN ANALYSIS OF THE IMPACT OF EXECUTIVE ORDERS ON THE FREEDOM OF INFORMATION ACT NATIONAL SECURITY EXEMPTIONS

By

Joan Gibson Kaminer

Thesis submitted to the Faculty of the Graduate School of the
University of Maryland, College Park, in partial fulfillment
of the requirements for the degree of
Master of Library Science
2010

Advisory Committee:
Dr. Paul T. Jaeger, Chair
Dr. John Carlo Bertot
Dr. Jennifer Golbeck

Acknowledgements

I would like to thank John Carlo Bertot and Jennifer Golbeck for their time and help throughout this process. In particular, I would like to thank Paul Jaeger for the extensive amount of time and patience he had in dealing with my never ending questions.

I would also like to thank my parents for always reading what I write from Welsh law to FOIA. I wouldn't have made it here without your support and love.

Most especially, I would like to thank Alan, my best friend and husband, for coping with the breakdowns and incessant passive voice. Thank you for being a critical editor, a supportive friend, and a compassionate husband. I love you.

Table of contents

Acknowledgements ii

Table of contents iii

Chapter 1: Introduction 1

Chapter 2: The Freedom of Information Act and Amendments 5
- **2.1: Purpose of FOIA** 5
- **2.2 Freedom of Information Act Exemptions** 8

Chapter 3: Freedom of Information Act Amending Legislation 11
- **3.1 The Privacy Act of 1974** 11
- **3.2 The Government in the Sunshine Act of 1976** 12
- **3.3 The Electronic Freedom of Information Act Amendments of 1996** 13
- **3.4 The Intelligence Authorization Act of 2002** 13
- **3.5 OPEN Government Act of 2007** 14
- **3.6 OPEN FOIA Act of 2009** 14

Chapter 4: Freedom of Information Act Procedures 14
- **4.1 Definitions** 14
- **4.2 Filing a Freedom of Information Act request** 16
- **4.3 Request Timeframe** 16
- **4.4 Freedom of Information Act Fees** 17
- **4.5 Agency Responses** 18
- **4.6 Appeals Process** 18

Chapter 5: National Security Exemptions 19
- **5.1 Exemption 1** 19
- **5.2 Exemption 3** 20

Chapter 6: Executive Orders 20
- **6.1 Executive Order 13526: Classified National Security Information** 21
- **6.2 Differences between Executive Order 13526 and Executive Order 13292** 22

Chapter 7: Legal Status of the Freedom of Information Act 32
- **7.1 Standard of Review** 32
- **7.2 Methods of Interpretation** 34
- **7.3 Other Considerations** 37

Chapter 8: Court Cases 39
- **8.1 Proper Classification** 39
- **8.2 Reclassification** 40
- **8.3 Prior disclosure of Information** 43
- **8.4 Redaction of Information** 46
- **8.5 Existence or Non-Existence of Information** 47

Chapter 9: Impact of Executive Order 13526 49

9.1 Proper Classification **49**
9.2 Reclassification **52**
9.3 Prior Disclosure of Information, Redaction of Information, and the Glomar Response **53**
Chapter 10: Recommendations **54**
10.1 Changes to Future Executive Order **55**
10.2 Procedure and Review Transparency **56**
Chapter 11: Conclusion **57**
Appendix A: Freedom of Information Act **60**
Appendix B: Executive Order 13292 ..... **60**
Appendix C: Executive Order 13526 ..... **60**
Bibliography **61**

Chapter 1: Introduction

Lyndon B. Johnson signed the Freedom of Information Act ("FOIA") into law on September 6, 1966, enacting the most comprehensive information access legislation in U.S. history, albeit with reluctance. The lack of enthusiasm shown by President Johnson was so great that he refused to participate in a public bill signing, as was the normal practice (Johnson, 1966). Instead Johnson was "dragged kicking and screaming to the signing," as later described by Johnson aide Bill Moyer (Moyer, 2005, p. 2). While Johnson acknowledged the vital role that freedom of information plays in Democracy he tempered this support with a longstanding caveat, that national security will always trump the public's right to information (Johnson, 1966). FOIA was the result of "11 years of investigation and deliberation in the House of Representatives and half as many years of consideration in the Senate," yet furthered the establishment of the principles of freedom of information first set forth in the Declaration of Independence (Relyea, 2009a, p. 314).

In the Statement of the President Upon Signing S. 1160, the Freedom of Information Act, Johnson affirmed "the welfare of the Nation or the rights of individuals may require that some documents not be made available…As long as threats to peace exist…there must be military secrets" (Johnson, 1966, p. 1). The priority of national security has shaped FOIA policies and procedures ever since its inception. While many believed that "the language of the bill will be constructed in such a way as to impair government operations," Johnson did not share their concerns (Johnson, 1966, p. 1). To the contrary, the operations of the U.S. Government would impair the operations of FOIA. In March 2006, the GAO reported that "more than 4 years after September 11, the nation still lacks the governmentwide policies and processes that Congress called for to

provide a framework for guiding and integrating the myriad of ongoing efforts to improve the sharing of terrorism-related information critical to protecting our homeland" (U.S. Government Accountability Office, 2006, p. 27).

While the Freedom of Information Act was not implemented until 1966, the concept of freedom of information has long been an important part of U.S. history and policy. Freedom of information played a role in the development of both the Declaration of Independence and the Constitution. The Declaration cites lack of freedom of information as a major point of contention due to the "separation of public records and legislative bodies" (Jaeger & Bertot, 2010, p. 371). The Constitution furthered the importance of this policy by including in the first amendment a focus on "information access and exchange through freedoms of exchange, assembly, and press (Jaeger & Bertot, 2010, p. 371). At the Constitutional Convention "James Madison and George Mason spoke about the importance of publishing all receipts and expenditures of public money under the new government" impressing on the Convention the importance that the American people know what their government is doing (Relyea, 2009a, 438). Over one-hundred years later the U.S. continued to assert the importance of freedom of information in post-World War I negotiations, resulting in the spread of this concept to other countries and the eventual formalization in the U.S. with FOIA (Jaeger & Bertot, 2010, p. 371).

Currently, freedom of information is a vital issue in the U.S due, in large part, to the September 11, 2001 attacks and the post-9/11 reactions. During this time both the government and the American people lacked accurate and current information resulting in fear and inability to effectively respond. Furthermore, the attacks resulted in greater

restrictions to government information in the name of protection. For example, "the Bush administration worked to keep as much information as possible related to their activities away from public view and other parts of government" (Jaeger & Bertot, 2010, p. 372). A strong policy of freedom of information is no more important than in a time of instability and fear. The public needs accessibility to accurate and complete information in order to make informed judgments on actions of the government and to participate in democracy. Without freedom of information the foundations of democracy are unstable.

One result of this move away from transparency was a change in command. Barack Obama campaigned on an open and transparent government "including promises of greatly increased government transparency and the use of new technologies to new means of access to government information" (Jaeger & Bertot, 2010, p. 372). After his inauguration President Obama began acting on those promises, issuing two "executive orders requiring government agencies to err on the side of openness when considering FOIA requests for government records and opening presidential records to the public" (Jaeger & Bertot, 2010, p. 372). Following the enactment of these Executive Orders the future of freedom of information in the U.S. appeared to be moving from a policy of restriction towards openness.

The current state of freedom of information in the U.S., however, is unknown and untested particularly regarding the disclosure of national security information. Court rulings on disclosure of national security information through FOIA are based on the current Executive Order in effect at the time of trial (Powell v. U.S. Department of Justice, 1984, p. 1516). Generally, Presidents will issue a new Executive Order on the classification of national security information, which will set the tone and procedure for

freedom of information for their terms in office. In December 2009, President Obama issued Executive Order 13526 which was heralded to shift policy and procedure away from secrecy to freedom of information.

Executive Order 13526 went into effect in June 2010 and has as yet not been applied to a FOIA national security exemption case. While the White House argued "President Obama's new Order strikes a careful balance between protecting essential secrets and ensuring the release of once sensitive information to the public as quickly and as fully as possible," no concrete analysis of its application has been presented (White House, 2009, p. 1). In order to understand the implications of EO 13526 on freedom of information, the difference between EO 13526 and President Bush's Executive Order 13292 must first be determined, followed by an analysis of important FOIA national security exemption case law, and lastly a determination of what changes to these court holdings might result from EO 13526.

The following is an analysis of the implications of EO 13526 on FOIA within the scope of national security exemptions. This paper will briefly discuss the nine exemptions provided in the Freedom of Information Act but the primary objective will be to analyze the national security exemptions, Exemptions 1 and 3, discussed later in the paper. First, the current legislation and legislative history pertaining to FOIA national security exemptions and information policies will be addressed. Following this explanation EO 13526 and EO 13292 will be compared and the changes between the two highlighted. Next important court statutory interpretations on key FOIA national security exemption issues since 1966 will be analyzed. Lastly, potential changes to court rulings due to EO 13526 will be addressed followed by a determination of how these potential

changes fit with the overall policy established by EO 13526 and recommendations on how to better achieve this policy.

Chapter 2: The Freedom of Information Act and Amendments

2.1: Purpose of FOIA

FOIA has four primarily purposes illustrated in the legislative history: disclosure of government information, repair of prior statutory deficiencies, clarification of access procedures, and the balancing of purposes.

2.1.1 Disclosure of government information:

Statutorily, the primary purpose of FOIA was to provide "broad disclosure of Government records" (U.S. Department of Justice v. Julian, 1988, p. 8) through individually initiated requests for specific government information. While FOIA was not a welcome proposal by many in the executive branch, legislative history points to the original intent behind the statute: "it is the purpose of the bill…to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language" (Senate Committee on the Judiciary, 1965, p. 38). The Senate recognized, as President Johnson later did, the importance of national security. Yet the Senate also stressed that the multi-fold interests of the bill should be balanced. "It is not necessary to conclude," the members of the Senate Committee on the Judiciary stated, "that to protect one of the interest, the other must, of necessity, either be abrogated or substantially subordinated" (Senate Committee on the Judiciary, 1965, p. 38). Court interpretations of FOIA have reinforced the policy illustrated in the legislative history.

The U.S. Supreme Court has supported the policy of openness stating that FOIA should be implemented with a "strong presumption in favor of disclosure" (U.S. Department of State v. Ray, 1991, p. 173). In addition, the U.S. Court of Appeals stressed that FOIA should "not be interpreted in any way as [a] restriction on government disclosure" (Charles River Park A, Inc. v. Department of Housing and Urban Development, 1975, p. 941).

2.1.2 Prior statutory deficiencies:

FOIA was also established to repair many deficiencies in U.S. law, specifically to "eliminate much of the vagueness of the old law" (American Mail Line, Limited v. Gulick , 1969, p. 699). Prior law failed to provide individuals with a standard procedure for requesting government information regardless of the agency. Previous disclosure of government information was based on the Administrative Procedures Act ("APA"), which had thus far been used "as an excuse for secrecy" (Floor consideration of S. 1160, 1965, p. 26821). The APA was considered a withholding statute as opposed to FOIA, which is considered a disclosure statute (Floor consideration of S. 1160, 1965, p. 26822). FOIA forced the burden of proof to the government. While the APA proposed a 'need to know,' FOIA created a 'right to know' standard. Furthermore, in regards to disclosure, the APA was considered "full of loopholes which allow agencies to deny legitimate information to the public" (Floor consideration of S. 1160, 1965, p. 26821). FOIA would close these loopholes and provide a concrete fix to deficiencies in disclosure statutes.

2.1.3 Clarity of procedures:

FOIA was intended to clarify for individuals the procedures to obtain government information. Legislative history indicates that FOIA would provide 1) "workable standards for what records should and should not be open to inspection…avoiding phrases as 'good cause,'" 2) removing limitations on who has a right to know information based on vague tests of permissibility, and 3) providing citizens a remedy in court for denial of disclosure (Floor consideration of S. 1160, 1965, p. 26822). These statutory changes would allow citizens a clear view, prior to requesting disclosure, of both their rights to view government information and how to obtain that information.

2.1.4 Balancing of purposes:

The purposes of FOIA are balanced against the sensitive nature of certain information or the privacy concerns of U.S. citizens. Specifically, FOIA is intended "to provide a workable formula which balances and protects all interests, yet places emphasis on the fullest possible disclosure" (Floor consideration of S. 1160, 1965, p. 26821). The drafters of FOIA attempted to provide this balance through the inclusion of exemptions for specific information and amendments to the statute.

The Privacy Act of 1974 amended FOIA in order to avoid the invasion of citizen's privacy rights. The Privacy Act provides that "no agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains" (Privacy Act of 1974, 5 U.S.C.A. § 552a(b)), thereby restricting from disclosure through FOIA any private

information that falls into the Privacy Act. Personal information is also restricted through Exemption 6 of FOIA, which applies to personnel and medical files that might pose an "unwarranted invasion of personal privacy if disclosed" (Freedom of Information Act, 5 U.S.C.A. § 552(b)(6)). The Privacy Act is generally now used in conjunction with FOIA, allowing an individual to request information simultaneously through the two statutes to maximize disclosure.

Concerns about disclosure of sensitive information, such as national security information, were addressed by the inclusion of nine exemptions to FOIA, which are discussed below.

2.2 Freedom of Information Act Exemptions

While the purpose of FOIA is to provide the fullest possible disclosure, agencies may be exempt from disclosure in nine situations. In evaluating the proper application of any of the FOIA exemptions the courts will "balance the public interest in disclosure against the interest Congress intended the exemption to protect" (U.S. Department of Defense v. Federal Labor Relations Authority, 1994, p. 487).

2.2.1 *Information exempted under an Executive Order in the interests of national defense or foreign policy and is properly classified* (FOIA, 5 U.S.C.A. § 552(b)(1))

Exemption 1 covers a broad subject area and is managed by various Executive Orders. A frequently applied EO is the recently implemented EO 13526 on Classified National Security Information. Information exempt under this provision must be classified properly according to the prevailing EO.

2.2.2 *Information related to the internal personnel rules and practices of an agency* (FOIA, 5 U.S.C.A. § 552(b)(2))

Exemption 2 contains two categories of information. Low 2 covers internal matters of a "relatively trivial nature" (Department of Justice, 2009, p. 173). High 2 covers "more substantial matters, the disclosure of which would risk circumvention of a legal requirement" (Department of Justice, 2009, p. 173). High 2 may cover national security information that demonstrates possible "agency vulnerability assessments and evaluations" (Department of Justice, 2004, p. 224).

2.2.3 *Information statutorily exempted that meets certain criteria* (FOIA, 5 U.S.C.A. § 552(b)(3))

Another frequently utilized exemption applies to statutorily exempted information. Currently, statutes must directly specify Exemption 3 in order for the exemption to be valid.

2.2.4 *Trade secrets and commercial or financial information obtained from a person and that is privileged or confidential* (FOIA, 5 U.S.C.A. § 552(b)(4))

Exemption 4 covers privileged or confidential information that is either classified as a trade secret or commercial or financial information. This information must have been submitted from a non-government source to be exempt.

2.2.5 *Inter-agency or intra-agency memoranda or letters that would not otherwise be available by law to another party except in litigation with that specific agency* (FOIA, 5 U.S.C.A. § 552(b)(5))

Information is exempt under Exemption 5 if it meets the "inter-agency or intra-agency threshold requirement" meaning that the information is "the type intended to be covered" (Department of Justice, 2009, p. 359). The courts have held that this covers both pre-decisional and deliberative records (Environmental Protection Agency v. Mink, 1973, p. 88).

2.2.6 *Personnel and medical files and other similar information that would constitute an unwarranted invasion of personal privacy if disclosed* (FOIA, 5 U.S.C.A. § 552(b)(6))

Exemption 6 provides protection for privacy rights by prohibiting disclosure of records that would result in an invasion of privacy. This exemption does not cover records that contain information about the requester.

2.2.7 *Information compiled for law enforcement purpose that meet specific criteria* (FOIA, 5 U.S.C.A. § 552(b)(7))

Exemption 7 covers records related to law enforcement purposes that:

> (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source…(E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement
>
> FOIA, 5 U.S.C.A. § 552(b)(7).

2.2.8 *Information in or relating to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions* (FOIA, 5 U.S.C.A. § 552(b)(8))

Exemption 8 is generally construed very broadly (Pentagon Federal Credit Union v. National Credit Union Association, 1996, p. 11) and is primarily used "to protect the security of financial institutions by withholding from the public reports that contain frank evaluations of a bank's stability" and "to promote cooperation and communication between employees and examiners" (Atkinson v. Federal Deposit Insurance Corporation, 1980, p. 4).

2.2.9 *Geological and geophysical information and data* (FOIA, 5 U.S.C.A. § 552(b)(9))

Exemption 9 applies to scientific data generally in the form of maps. While little court interpretation is available regarding Exemption 9 it may be applied more frequently in national security cases to protect natural resources from attacks (Little Rivers Inc v. U.S. Bureau of Reclamation, 2003).

Chapter 3: Freedom of Information Act Amending Legislation

3.1 The Privacy Act of 1974

As discussed above, FOIA and the Privacy Act are used in conjunction to provide individuals with the fullest possible accessibility to information. In addition, both the Privacy Act of 1974 and FOIA Exemption 6 help protect individuals from invasion of privacy and disclosure of personal information. The Privacy Act does provide ten exemptions to the access of personal information and records including: information

gathered for civil actions, Central Intelligence Agency records, records complied as the function of criminal law enforcement, information classified for national security or foreign policy reasons, non-criminal law enforcement purposes, protection of the President, used solely as statistical records, investigatory information collection for government clearances, appointment or promotion in the Federal service, and promotion in the Armed service (The Privacy Act of 1974, 5 U.S.C.A. § 552a(k), (j), (d)(1)).

3.2 The Government in the Sunshine Act of 1976

In 1976 the Government in the Sunshine Act ("Sunshine Act") was passed to promote open government together with a number of other laws that provided more public access to information developed during government meetings. The Sunshine Act provides an extension of FOIA Exemption 3 precluding the disclosure of information that is statutorily exempted. The Sunshine Act specifies particular exemptions including information related to national security, "(A) specifically authorized under criteria established by an executive order to be kept secret in the interest of national defense and foreign policy and (B) in fact properly classified pursuant to such executive order" (Government in the Sunshine Act of 1976, 5 U.S.C.A. §552B(c)(1)). The other exemptions closely follow those in FOIA: information related solely to internal personnel rules and practices of an agency, information that is statutorily exempted, trade secrets and commercial or privileged or confidential financial information, information involved in accusing a person of a crime or formally censuring someone, information which the disclosure of would constitute an unwarranted invasion of personal privacy, investigatory records complied for law enforcement purposes (Government in the Sunshine Act of 1976, 5 U.S.C.A. §552B(c)).

3.3 The Electronic Freedom of Information Act Amendments of 1996

The E-FOIA amendments placed requirements on agencies to provide electronic access to certain FOIA information. Documents under 552(a)(2), including final opinions, policy statements, manuals, and forms, which were created on or after November 1, 1996 must be made available electronically (FOIA, 5 U.S.C.A. § 552(a)(2)(D)). Generally agencies comply with these provisions by providing access to documents through FOIA reading rooms on the agency website.

3.4 The Intelligence Authorization Act of 2002

The major impact of the Intelligence Authorization Act of 2002 was to completely prevent an agency from disclosing to non-U.S. government officials through FOIA any information from a U.S. intelligence agency. The pertinent section states:

> (E) An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4))) shall not make any record available under this paragraph to-- "(i) any government entity, other than a State, territory, commonwealth, or district of the United States, or any subdivision thereof; or "(ii) a representative of a government entity described in clause (i).
>
> The Intelligence Authorization Act of 2002, 5 U.S.C.A. § 552(a)(3)(E).

The contacted agency may investigate requests that might have been placed for a non-U.S. government entity by proxy. The agencies covered in the Act include those defined as part of the intelligence community including the Central Intelligence Agency, National Security Agency, and the Defense Intelligence Agency (National Security Act of 1947, 50 U.S.C. 401a(4)).

3.5 OPEN Government Act of 2007

The Openness Promotes Effectiveness in our National Government (OPEN) Act of 2007 made many amendments to FOIA, including numerous procedural changes and additions. Most significant was the establishment of a department within the National Archives and Records Administration, the Office of Government Information Services, which would review agency compliance with FOIA (OPEN Government Act, 5 U.S.C.A. § 552(h)(1)).

3.6 OPEN FOIA Act of 2009

The OPEN FOIA Act made only one amendment to FOIA, which was an addition to Exemption 3. The addition included the requirement that all statutes, enacted after the OPEN FOIA Act, must specifically cite FOIA Exemption 3 in order for the exemption to apply (OPEN FOIA Act, 5 U.S.C.A. § 552(b)(3)(B)). This amendment removed any possibility of the statutory applicability later being inferred by either an agency or the court system.

Chapter 4: Freedom of Information Act Procedures

4.1 Definitions

4.1.1 Agency

FOIA requests may be made to an "executive office, military departments, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President,

or any independent regulatory agency" (FOIA, 5 U.S.C.A. § 552(f)(1)). FOIA requests may not be made of Congress or the federal courts.

4.1.2 Record

The term record may often be used interchangeably with documents or information. FOIA does not specifically define what a record is, merely stating that a record includes "any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format" and "maintained for an agency by an entity under Government contract, for the purposes of records management" (FOIA, 5 U.S.C.A. § 552(f)(2)). The courts have furthered this explanation by defining agency records as documents which an agency "must first either create or obtain" and "must be under agency control at the time of the FOIA request" (Forsham v. Harris, 1990, p. 170). Records that are created or obtained by the agency after receipt of the FOIA request but prior to the search for records are considered to be in agency control at the time of the request (FOIA Regulations, 28 CFR 16.4(a)).

More specifically records are "the product of data compilations" including "books, papers, maps, photographs, machine-readable materials" (Department of Defense, 2010, p. 3). This definition includes both physical and electronic formats as long as it was "created or obtained by an agency of the U.S. government under Federal law in connection with the transaction of public business and in agency possession and control at the time the FOIA request is made" (Department of Defense, 2010, p. 3).

4.2 Filing a Freedom of Information Act request

Each agency has a specific office dedicated to processing FOIA requests where the initial written requests should be submitted. The initial request must be "1. clearly marked "Freedom of Information Act Request;" 2. identify the records requested… 3. state that the records are requested under the Freedom of Information Act; and 4. include a daytime telephone number and/or email address in case additional information is needed before answering requests" (U.S. Copyright Office, 2010). The records identified should be as specific as possible including the subject matter, dates, origin, and the names of the originating persons or offices (U.S. Copyright Office, 2010). The agency will then process the request based on its specific procedures and may contact the requester for more information.

FOIA requests do not require specific forms but form letters are available from various sources. The requests may be submitted electronically, through the postal system, or by fax. Many agencies may require additional forms such as privacy agreements.

4.3 Request Timeframe

Agency must make a definitive response to FOIA requests within twenty business days (FOIA, 5 U.S.C.A. § 552(a)(6)(A)(i)). Saturdays, Sundays, and federal holidays are not included in this timeframe (FOIA, 5 U.S.C.A. § 552(a)(6)(A)(i)). Agencies are allowed ten additional business days in the event of unusual circumstances (FOIA, 5 U.S.C.A. § 552(a)(6)(B)(i)). In the event that the request is too complex to process in

thirty business days the agency may ask that the request be reduced in scope or otherwise compromised (FOIA, 5 U.S.C.A. § 552(a)(6)(B)(ii)).

FOIA provides for possible expedited processing "in cases which the person requesting the records demonstrates a compelling need" (FOIA, 5 U.S.C.A. § 552(a)(6)(E)(i)(I)). Each individual agency will determine specific situations in which to expedite processing. The Department of Justice, for example, allows for expedited processing in three situations: 1) standard processing time could "reasonably be expected to pose an imminent threat to the life or physical safety of an individual," 2) "if the requester is a 'person primarily engaged in disseminating information,' by demonstrating that an 'urgency to inform the public concerning actual or alleged Federal Government activity' exists," or 3) in a situation that the agency deems appropriate (Department of Justice, 2010, p. 66-67).

4.4 Freedom of Information Act Fees

Fees may be charged to three types of requesters: commercial use, educational use, and general use (FOIA, 5 U.S.C.A. § 552(a)(4)(A)(ii)(I)). Commercial users may be charged for records searches, processing, and duplication (FOIA, 5 U.S.C.A. § 552(a)(4)(A)(ii)(I)). Educational users, including the news media, may be charged for duplication after the first one hundred pages (FOIA, 5 U.S.C.A. § 552(a)(4)(A)(ii)(II)). General users are charged fees for searches, after the first two hours, and for duplication, after the first one hundred pages (FOIA, 5 U.S.C.A. § 552(a)(4)(A)(iv)(I)). Fees may be waived upon request if the request can be shown to be in the public interest (FOIA, 5 U.S.C.A. § 552(a)(4)(A)(i)).

4.5 Agency Responses

Agencies respond to requests via a written determination either fully or partially disclosing the requested information, denying the request in full, or citing one of the nine FOIA exemptions as cause for a full or partial denial (FOIA, 5 U.S.C.A. § 552(a)(6)(F)). Disclosed information may also be redacted, or edited to conceal information by removal or blacking out.

4.6 Appeals Process

If requesters disagree with the agency's response to disclose information, award expedited processing, deny the existence of a record, or deny a fee waiver, they may file an administrative appeal with the head of the agency in question (FOIA, 5 U.S.C.A. § 552(a)(6)(A)(i)). The agency will make a determination on the appeal within twenty business days (FOIA, 5 U.S.C.A. § 552(a)(6)(A)(ii)). Appeal requirements will vary depending on agency procedures. The Department of Justice requires the submissions of appeals within sixty days while the U.S. Copyright Office requires appeals within thirty days (Department of Justice, 2010; U.S. Copyright Office, 2010).

Following the denial of an administrative appeal a requester may apply for judicial review of the agency's determination in federal district court (FOIA, 5 U.S.C.A. § 552(a)(4)(B)). In order for a court to have proper federal jurisdiction over a FOIA case the complaint must attest that the agency had "(1) improperly, (2) withheld, (3) agency records" (Kissinger v. Reporters Committee for Freedom of the Press, 1980, p. 137-38). The federal district court will review various causes of action including the existence of records or the applicability of FOIA exemptions. In addition, if the district court

determines that the withholding was invalid, attorney's fees may be awarded (FOIA, 5 U.S.C.A. § 552(a)(4)(F)(i)). If the district court holds that "agency personnel acted arbitrarily or capriciously with respect to the withholding," disciplinary action may be warranted (FOIA, 5 U.S.C.A. § 552(a)(4)(f)(i)).

Chapter 5: National Security Exemptions

While all nine FOIA exemptions may be applicable to national security information, Exemption 1 specifically addresses national security information and Exemption 3 is often applied based on national security specific Executive Orders.

5.1 Exemption 1

Exemptions 1 covers records that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." (FOIA, 5 U.S.C.A. § 552(b)(1)(A)-(B)). While any Executive Order may be applicable each President generally issues an EO specific to the classification of national security information. The current Executive Order, EO 13526, is discussed below. While the rule for which Executive Order is currently controlling varies per jurisdiction, the general consensus is to apply the Executive Order "in force when the agency finally acts" (Powell v. U.S. Department of Justice, 1984, p. 1516).

In order to claim Exemption 1 when defending an appeal of a FOIA denial, an agency must provide the court with "detailed and specific information demonstrating "that material withheld is logically within the domain of the exemption claimed" (Campbell v. Department of Justice, 1998, p. 30). If such information is provided the

court will "accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record" (Military Audit Project v. Casey, 1981, p. 738).

5.2 Exemption 3

Exemption 3 covers records that are "(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld" (FOIA, 5 U.S.C. 552(b)(3)). In 1975 the Supreme Court interpreted Exemption 3 as allowing Congress to enact statutes specifically intended to withhold information (Administrator, Federal Aviation Administration v. Robertson, 1975). This broad discretion was narrowed the following year with the addition of the two requirements listed in Exemption 3. In addition, through the OPEN FOIA Act of 2009, statutes must specify whether they are claiming exemption under FOIA b (3), as opposed to later being interpreted in a way that claims the exemption (OPEN FOIA Act, 5 U.S.C.A. § 552(b)(3)(B)).

Chapter 6: Executive Orders

Executive Orders are issued by the President loosely based on Article II, Section 1, Clause 1 of the U.S. Constitution stating, "the executive Power shall be vested in a President of the United States of America." Executive Orders clarify a pre-existing law, as opposed to creating new law, may be issued on nearly any subject matter (Youngstown Sheet & Tube Co. v. Sawyer, 1952).

6.1 Executive Order 13526: Classified National Security Information

Beginning with former President Reagan's Executive Order 12356, a number of presidents have issued orders defining the classification policy and procedures for their presidency. President Reagan's EO 12065 was carried through unchanged until President Clinton's replacement with EO 12958 and then later President George W. Bush's changes in EO 13292. President Obama followed in suit in issuing EO 13526, which went into effect in June 2010 and revoked EO 13292. EO 13526's purpose is a balance between "protecting information critical to our Nation's security and demonstrating our commitment to open Government" (Executive Order 13526, 2009, p. 707).

One step toward finding this balance between the protection of national security and supporting open government lies in EO 13526's most dramatic change. EO 13526 established the National Declassification Center ("NDC"), which began operations in January 2010 (Executive Order 13526, 2009, Sec. 3.7(a)). The NDC was established in the National Archives and Records Administration to "streamline declassification processes, facilitate quality-assurance measures, and implement standardized training regarding the declassification of record" (Executive Order 13526, 2009, Sec. 3.7(a)).

In order to further the protection of national security, EO 13526 defines the procedures for classification of government information. While EO 13526 makes advancements by placing processing restrictions on sensitive information and requiring a timeline for the declassification of information a side-by-side comparison yields few substantial changes from EO 13292 (Executive Order 13526, 2009, Sec. 1.5). While the

bulk of the text is identical to previous Executive Orders key differences do exist that have the potential to make an impact on standing FOIA litigation.

Due to the recent implementation of President Obama's EO 13526 little scholarly, political, or legal analysis has been conducted. In order to determine how past court rulings might be altered due to changes from EO 13526, a detailed comparison of the President Obama's Executive Orders 13526 and President Bush's Executive Order 13292 must be undertaken, as well as an analysis of past court rulings based on past Executive Orders.

6.2 Differences between Executive Order 13526 and Executive Order 13292

One of the primary differences between EO 13526 and EO 13292 is apparent from the introductory paragraph. EO 13526 stresses the role of classification of national security information in open government. EO 13292 placed priority only on "protecting information critical to our Nation's security" (Executive Order 13292, 2003, p. 15315). EO 13526 includes an additional priority of "demonstrating our commitment to open Government through accurate and accountable application of classification standards and routine, secure, and effective declassification" (Executive Order 13526, 2009, p. 707). In addition, EO 13526 includes the need to encourage the "free flow of information both within the Government and to the America people," while EO 13292 failed to include the context of the flow of information (Executive Order 13526, 2009, p. 707). While this addition does not result in a substantive change to classification procedure it directs government policy.

6.2.1 Part 1 – Original Classification Section 1.1. Classification Standards

The priority of open government continues into the substantive aspects of EO 13526. In addressing the classification standards for original classification EO 13526 includes a provision for how to proceed in the case of doubt over classification. Section 1.1(b) states, "if there is significant doubt about the need to classify information, it shall not be classified" ((Executive Order 13526, 2009, Sec. 1.1(b)). This provision lacks teeth, however, as it does not "(1) amplify or modify the substantive criteria or procedures for classification; or (2) create any substantive or procedural rights subject to judicial review" (Executive Order 13526, 2009, Sec. 1.1(b)(1) & (2)). Without any course of action available to a party, this provision merely supports the policy and intent behind the Executive Order.

In determining the classification levels of national security information EO 13526 included an additional provision requiring that if the classifying official has "significant doubt about the appropriate level of classification, it shall be classified at the lower level" (Executive Order 13526, 2009, Sec. 1.2(c)). While the previous provision outlines the limitations to courses of action for litigants, this provision has no such qualifiers. It is unlikely, however, that this provision could be utilized outside the agency as the information in question would be classified regardless, even if at a lower level. This addition would likely only have application for inter- or intra-agency reviews.

6.2.2 Part 1 – Classification Standards Section 1.3. Classification Authority

EO 13526's alterations to the classification training provisions of EO 13292 are in keeping with the overall policy of openness. EO 13526 includes additional requirements

for training, at least once per year, on "proper classification (including the avoidance of over-classification) and declassification" (Executive Order 13526, 2009, Sec. 1.3(d)). EO 13292 merely requires training in "original classification" (Executive Order 13292, 2003, Sec. 1.3(d)). In addition, EO 13526 includes provisions for revoking classification authority for those who fail to receive such training (Executive Order 13526, 2009, Sec. 1.3(d)). While this provision will likely lead to more effective classification and declassification it is unlikely to provide an effective course for litigants as the repercussions are generally handled by the agency.

6.2.3 Part 1 – Classification Standards Section 1.4. Classification Categories

Section 1.4 contains very important provisions as it sets the standards for which categories of information may be classified under the ruling Executive Order. EO 13526 makes few changes to the categories of classification yet includes additions supporting the general policy of openness, stating, "information shall not be considered for classification unless its unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security in accordance with Section 1.2 of this order" (Executive Order 13526, 2009, Sec. 1.4). The implementing directive for EO 13526 states "there is no requirement, at the time of the decision, for the original classification authority to prepare a written description of such damage" (Executive Order 13526 Implementing Directive, 2009, p. 37255). This decision, however, must be supportable "in writing, including identifying or describing the damage, should the classification decision become the subject of a challenge or access demand" (Executive Order 13526 Implementing Directive, 2009, p. 37255).

The inclusion of the requirement for classifying officials to weigh the harm of disclosure against the inferred reference to the need for the free flow of information seems as first glance a token change. This addition might have drastic consequences to FOIA litigation. Unlike Section 1.1(b), which denies litigants possible causes of action, Section 1.4 leaves open the possibility of judicial review and a cause of action. The courts may determine that the weighing of the harm of disclosure or non-disclosure can be pursued in the trial itself in evaluating whether the information was properly classified.

6.2.4 Part 1 – Classification Standards Section 1.5. Duration of Classification

While retaining the automatic declassification requirement present in EO 13292, EO 13526 includes an additional restriction prohibiting the automatic declassification of "information that should clearly and demonstrably be expected to reveal the identity of a confidential human source or a human intelligence source or key design concepts of weapons of mass destruction" (Executive Order 13526, 2009, Sec. 1.5(a)). While this restriction decreases the likely amount of information that may be scheduled for automatic declassification, and therefore restricts the free flow of information, the section also includes the new requirement that "no information may remain classified indefinitely" (Executive Order 13526, 2009, Sec. 1.5(d)). In addition, EO 13526 includes a time limit of twenty-five years on the extension of an original classification (Executive Order 13526, 2009, Sec. 1.5(c)).

6.2.5 Part 1 – Classification Standards Section 1.7. Classification Prohibitions and Limitations

EO 13292 prohibited the classification of information in order to "(1) conceal violations of law, inefficiency, or administrative error; (2) prevent embarrassment to a person, organization, or agency; (3) restrain competition; or (4) prevent or delay the release of information that does not require protection in the interest of the national security" (Executive Order 13292, 2003, Sec. 1.7(a)). EO 13526 extended this provision stating, "in no case shall information be classified, continues to be maintained as classified, or fail to be declassified" in the provided circumstances (Executive Order 13526, 2009, Sec. 1.7(a)). While it is unlikely that this provision could be applied as a cause of action, it likely will require the release of additional information revealing these violations.

The reclassification of national security information has long been a point of contention in FOIA litigation. EO 13526 makes substantial changes to EO 13292 provisions on reclassification beginning with a subtle change in the presentation of reclassification. EO 13292 approached reclassification, stating, "information may be reclassified after declassification and release to the public under proper authority only in accordance with the following conditions" (Executive Order 13292, 2003, Sec. 1.7(c)). EO 13526, on the other hand, restricts reclassification unless the agency meets the four conditions discussed below (Executive Order 13526, 2009, Sec. 1.7(c)). While the change is minor it underscores the ongoing policy stated in the introduction.

The conditions for the reclassification of information have also been altered in EO 13526. Condition 1 now requires that the approval process is written by the "agency head based on document-by-document determination by the agency that reclassification is required to prevent significant and demonstrable damage to the national security" (Executive Order 13526, 2009, Sec. 1.7(c)(1)). Previously the reclassification action was "taken under the personal authority of the agency head or deputy head, who determines in writing that the reclassification of the information is necessary in the interest of the national security" (Executive Order 13292, 2003, Sec. 1.7(c)(1)). While there is no definition of a document-by-document determination, the inclusion of some standard of review, together with the requirement for "significant and demonstrable damage" places the threshold for reclassification somewhat higher than in EO 13292.

EO 13526 includes an additional requirement for condition 2 that the information to be reclassified must not only be able to be "reasonably recovered" as stated in EO 13292, but must also be recovered "without bringing undue attention to the information" (Executive Order 13526, 2009, Sec. 1.7(c)(2)). The implementing directive further clarifies undue attention as information where "most individual recipients or holders are known and can be contacted," the length of time the information has been available and the extent of access is evaluated, and the manner in which the information has been disseminated (Executive Order 13526 Implementing Directive, 2009, p. 37257). A number of court cases have focused on whether national security information that has been previously disclosed can be reclassified. The undue attention requirement added to EO 13526 may significantly change past court interpretations of this section.

The final two conditions of Section 1.7(c) address oversight of reclassification. Condition 3 previously required that reclassification actions are reported to the Director of the Information Security Oversight Office while EO 13526 requires that such actions also be reported to the Assistant to the President for National Security Affairs (National Security Advisor) (Executive Order 13526, 2009, Sec. 1.7(c)(3)). Condition 4 is an entirely new condition prohibiting reclassification of information that is already in the "physical and legal custody of the National Archives and Records Administration (National Archives) that have been available for public use" (Executive Order 13526, 2009, Sec. 1.7(c)(4)).

EO 13526 makes no substantial changes to the reclassification of national security information after a FOIA request for previously undisclosed information. Section 1.7(d) maintains the same language in both Executive Orders stating, "information that has not previously been disclosed to the public under proper authority may be classified or reclassified after an agency has received a request for it under the Freedom of Information Act" (Executive Order 13292, 2003, Sec. 1.7(d); Executive Order 13526, 2009, Sec. 1.7(d)).

6.2.6 Part 1 – Classification Standards Section 1.9. Fundamental Classification Guidance Review

EO 13526 includes new requirements for agency review of classification guidance. EO 13526 Section 1.9 outlines the schedule of the periodic reviews, scope of the evaluation, and report requirements (Executive Order 13526, 2009, Sec. 1.9). While

there appears to be no use for Section 1.9 in litigation, judicial review is not prohibited by the Executive Order.

6.2.7 Part 3 – Declassification and Downgrading Section 3.3. Automatic Declassification

EO 13526 makes considerable changes to provisions pertaining to automatic declassification. Tolling for automatic declassification started with original classification in EO 13292 and now begins with the origin of the record (Executive Order 13526, 2009, Sec. 3.3(a)). Allowances are made, however, for dates of origin that cannot be determined in which case the date of original classification will be used instead (Executive Order 13526, 2009, Sec. 3.3(a)). Information may be exempt from automatic declassification on certain conditions. EO 13292 required that the information "could be expected to" meet these conditions, while EO 13526 raises the threshold to "should clearly and demonstrably be expected to" (Executive Order 13292, 2003, Sec. 3.3(b); Executive Order 13526, 2009, Sec. 3.3(b)). While the threshold is somewhat higher in EO 13526 it is unclear until further court interpretation the extent of the change.

Included in these conditions are a number of changes between the two Executive Orders. Condition 6 now requires that the disclosure of information would "cause serious harm to relations between the United States and a foreign government" as opposed to "seriously and demonstrably impair relations" (Executive Order 13526, 2009, Sec. 3.3(b)(6); Executive Order 13292, 2003, Sec. 3.3(b)(6)). Condition 7 previously required that the disclosure of information would "clearly and demonstrably impair the current ability of United States Government officials to protect the President, Vice President, and other protectees" while EO 13526 drops the clearly and demonstrably factor and only

requires an impairment of this ability (Executive Order 13292, 2003, Sec. 3.3(b)(7); Executive Order 13526, 2009, Sec. 3.3(b)(7)). Lastly, condition 8 previously required the disclosure to "seriously and demonstrably impair current national security emergency preparedness plans or reveal current vulnerabilities of systems" (Executive Order 13292, 2003, Sec. 3.3(b)(8)). EO 13526 sets the standard at "seriously impair" (Executive Order 13256, 2009, Sec. 3.3(b)(8)). While the extent of the impact of these changes depends on agency and possibly judicial review, the threshold changes arguably make it easier to exempt information from automatic declassification.

In addition to a number of procedural changes to automatic declassification, EO 13526 makes a key change in the time frame of overall automatic declassification. EO 13526 requires that "all records exempted from automatic declassification…shall be automatically declassified on December 31 of a year that is no more than 50 years from the date of origin" (Executive Order 13526, 2009, Sec. 3.3(h)). Records that reveal "(A) the identity of a confidential human source or a human intelligence source; or (B) key design concepts of weapons of mass destruction" or in "extraordinary cases" may be exempt from the mandatory automatic declassification for an addition twenty-five years if the exemptions can be proven "clearly and demonstrably" (Executive Order 13526, 2009, Sec. 3.3(h)(1)).

6.2.7 Part 3 – Declassification and Downgrading Section 3.7. National Declassification Center

In addition to the declassification database established in EO 13292, EO 13526 creates a National Declassification Center designated to "streamline declassification

processes, facilitate quality-assurance measures, and implement standardized training regarding the declassification of records determined to have permanent historical value" (Executive Order 13526, 2009, Sec. 3.7(a)). While the establishment of the National Declassification Center is unlikely to have any impact on FOIA litigation it highlights the continued influence of the policy for openness established in the introduction. In addition, the National Declassification Center provides an additional avenue for access to information should FOIA requests and appeals fail.

6.2.8 Part 5 – Implementation and Review Section 5.3. Interagency Security Classification Appeals Panel

A significant change made in EO 13526 regards the Interagency Security Classification Appeals Panel. The panel makes determinations pertaining to "appeals by persons who have filed classification challenges," "agency exemptions from automatic declassification," and "requests for mandatory declassification review" (Executive Order 13526, 2009, Sec. 5.3(b)). Previously the Director of Central Intelligence had authority to "object to its conclusion because he has determined that the information could reasonably be expected to cause damage to the national security" (Executive Order 13292, 2003, Sec. 5.3(f)). This veto power applied only to "information owed or controlled by the Director of Central Intelligence" (Executive Order 13292, 2003, Sec. 5.3(f)). This power was fully revoked in EO 13526 and replaced with the right of an agency head to "appeal a decision of the Panel to the President through the National Security Advisor" (Executive Order 13526, 2009, Sec. 5.3(f)).

Chapter 7: Legal Status of the Freedom of Information Act

FOIA established the procedural requirements of the request and disclosure of government information and Executive Orders determining the specifics of non-disclosure. This next section will describe the judicial process that FOIA requests go through and then analyze some of the major court cases in which the procedures from both FOIA and Executive Orders have been applied.

7.1 Standard of Review

7.1.1 Courts of Appeals

Courts of Appeals for the District of Columbia, First, Second, Fifth, Sixth, and Eighth Circuits[1] apply a de novo standard of review in appeals of FOIA cases. A "court's nondeferential review of an administrative decision, through a review of the administrative record plus any additional evidence the parties present" (Garner, 2004). The de novo standard in FOIA national security cases was explained in Ray v. Turner. The court must follow the following guidelines in making a "de novo determination" and "the judge would accord substantial weight to detailed agency affidavit" (Ray v. Turner, 1978, p. 1194).

[1] The standard of review has been supported recently by the following cases in their jurisdiction. Consumers' Checkbook v. HHS, 554 F.3d 1046, 1049-50 (D.C. Cir. 2009). Carpenter v. DOJ, 470 F. 3d 434, 437 (1st Cir. 2006). Assoc. Press v. DOD, 554 F. 3d 274, 283 (2d Cir. 2009). Abrams v. Dep't of Treasury, 243 F. App'x 4, 5 (5th Cir. 2007). Joseph W. Diemert, Jr. & Assoc. Co. v. FAA, 218 F. App's 479, 481 (6th Cir. 2007). Mo. Coal. For the Env't Found. V. U.S. Army Corps of Eng'rs, 542 F. 3d. 1204, 1209 (8th Cir. 2008). Abdelfattah v. DHS, 488 F. 3d 178, 182 (3rd Cir. 2007). Enviro Tech Int'l, Inc. v. EPA, 371 F. 3d 370, 373-74 (7th Cir. 2004). Rein v. U.S. Patent & Trademark Office, 553 F.3d 252, 258 (4th Cir. 2009). Pac. Fisheries, Inc. V. United States, 539 F.3d 1143, 1149 (9th Circ. 2008). Trentadue v. Integrity Comm., 501 F. 3d 1215, 1226 (10th Cir. 2007). Office of the Capital Collateral Counsel v. DOJ, 331 F. 3d 799, 802 (11th Cir. 2003). (Department of Justice Guide to the Freedom of Information Act, Litigation Considerations, 827-828)

The Courts of Appeals for the Third and Seventh Circuits apply "two-tiered analysis" that evaluates whether the district court had an "adequate factual basis for its decision and, if so, whether that decision is clearly erroneous" (Department of Justice, 2009, p. 829).

The Courts of Appeals for the Fourth, Ninth, Tenth, and Eleventh Circuits "distinguish between the district court's factual basis for its decision, which is reviewed under a clearly erroneous standard" and the evaluation of the FOIA exemption which is review de novo (Department of Justice, 2009, p. 830).

7.1.2. In camera Review

An in camera review occurs when the court will evaluate information either in private chambers or "with all spectators excluded" (Garner, 2004). In camera review is allowed by FOIA and is heavily utilized in national security cases where describing the information sought publicly would "compromise the secret nature of the information" (Vaughn v. Rosen, 1973, p. 826). Agencies will generally provide as much information as possible in public affidavits: "an agency should be given the opportunity, by means of detailed affidavits or oral testimony, to establish to the satisfaction of the District Court that the documents sought fall clearly beyond the range of material that would be available to a private party in litigation with the agency" (Environmental Protection Agency v. Mink, 1973, p. 93). The Supreme Court stated, "plainly in some situations, in camera inspection will be necessary and appropriate" (Environmental Protection Agency, 1973). The Supreme Court stresses the importance of proper evaluation of the need for

an in camera review, but an in camera review "need not be automatic" (Environmental Protection Agency, 1973).

The in camera review of the records may be conducted by either representative sampling or random sampling. Representative sampling occurs when "documents are selected that are 'representative' of those being withheld and submitted to the court for in camera review" (Dickstein Shapiro LLP v. Department of Defense, 2010, p. 3). Random sampling is when the government selects "every tenth document at issue to deliver to the court" (Dickstein Shapiro LLP, 2010).

As recently as August 2010, courts have upheld the validity of in camera inspections. In *Dickstein Shapiro LLP*, an appeal of a denial of a FOIA request for information pertaining to Guantanamo detainees, the court determined that an in camera review was necessary "in order to determine whether government met its burden of demonstrating that documents or information contained therein fell within claimed exemptions under FOIA" (Dickstein Shapiro LLP, 2010). "Ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible.'" **(**Wolf v. Central Intelligence Agency, 2007, p. 374-75).

7.2 Methods of Interpretation

7.2.1 Glomar response

The Glomar Explorer, a ship built in 1973 and first owned by Howard Hughes, was secretly used by the CIA in Project JENNIFER involving the retrieval of sunken Russian ballistic missile submarines (Glomar Explorer, 2005). When FOIA requests for information pertaining to the ship were first submitted the CIA claimed that they could

"neither confirm nor deny the existence of material related to the project," citing Exemptions 1 and 3 (Glomar Explorer, 2005). This response has since been dubbed the Glomar response after the ship (Glomar Explorer, 2005).

The Glomar response, a refusal to confirm or deny the existence of information, is generally applied in national security FOIA cases due to the statutory exemption to "protect intelligence sources and methods" (Hunt v. Central Intelligence Agency, 1992, p. 1120). The Glomar response has generally been upheld by the courts where "to confirm or deny the existence of records ... would cause harm cognizable under an FOIA exception" (Gardels v. Central Intelligence Agency, 1982, p. 1103). In order to verify the proper application of the Glomar response the court will "perform an ad hoc balancing of privacy and public interest implicated by disclosure of any responsive material" (Nation Magazine, Washington Bureau v. U.S. Customs Service, 1995, p. 888).

The Glomar response has been denied in certain circumstances. The Glomar response was ruled inadmissible in *El Badrawi v. Department of Homeland Security* because the Department of Homeland Security did "not provide sufficiently detailed and specific information as to why the information would hinder the ability to obtain such information in the future or why such secrecy is allowed by the terms of the executive order" and "it does not allow the court to engage in a de novo review of the propriety of the withholding" (El Badrawi v. Department of Homeland Security, 2008, p. 314).

In addition, in the American Civil Liberties Union's appeal of a FOIA denial from the Department of Defense for various information, including photographs of prisoner abuse at Abu Ghraib prison and the torture memos, the District Court felt that "the

purpose of the CIA's Glomar responses is less to protect intelligence activities, sources or methods than to conceal possible "violations of law" in the treatment of prisoners, or "inefficiency" or "embarrassment" of the CIA" (American Civil Liberties Union v. Federal Bureau of Investigation, 2006, p. 26). Therefore the District Court ruled that they were "not given enough relevant information to make the de novo determinations that FOIA would seem to require" (American Civil Liberties Union, 2006) ruling that they Glomar response was invalid for certain documents.

7.2.2 Doctrine of Segregability

The doctrine of segregability refers to FOIA 552(b), which states, "any reasonably segregable portion of the record shall be provided to any person requesting such record after deletion of the portions which are exempt" (FOIA, 5 U.S.C. 552(b)). The doctrine holds that "non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions" (Mead Data Central, Inc. v. U.S. Department of Air Force, 1977, p. 260). The court must first make a ruling on the applicability of the doctrine of segregability prior to ruling on the application of the FOIA exemption (Summers v. Department of Justice, 1998).

7.2.3 Mosaic or Compilation Theory

The mosaic theory is a concept of intelligence gathering in which "disparate items of information, though individually of limited or no utility to their possessor, can take on added significance when combined with other items of information" (Pozen, 2005, p. 630). In the scope of FOIA litigation the mosaic theory is an argument posed by the defendant agency supporting the nondisclosure of information that, coupled with other

disclosed information, would pose a threat to national security. The mosaic theory is generally used to deny a FOIA request and has been used substantially more often post-9/11 (Pozen, 2005, p. 630-631).

Mosaic theory initially came into use for FOIA litigation in *Halkin v. Helms*. *Halkin* stems from a request by Vietnam War protesters for National Security Agency (NSA) information and draws from the initial mosaic theory case, *United States v. Marchetii* (Halkin v. Helms, 1978). The court in *Halkin* "tried to ascertain the mosaic-based risks of disclosure before finding for the government" (Pozen, 2005, p. 640). *Halkin* was followed by *Halperin v. CIA*, a D.C. Circuit Court case reviewing FOIA nondisclosure relating to business agreements and legal fees (Halperin v. Central Intelligence Agency, 1980). The circuit court accepted the application of the mosaic theory without determining how the requested information could be combined with "other small leads" and results in harm to national security (Pozen, 2005, p. 641).

7.3 Other Considerations

7.3.1 Vaughn Index

The Vaughn Index is a supporting document for the agency's affidavit, which results in an itemized index "correlating each withheld document (or portion) with a specific FOIA exemption and the relevant part of the agency's nondisclosure justification" (Department of Justice, 2009, p. 775; Vaughn v. Rosen, 1973). The index allows the court to make a decision on whether the information in question was properly classified. It also allowed the court to become more familiar with the information in question without evaluating the actual records. The index must be "sufficiently detailed"

and failure to meet this standard may result in the court requiring an in camera inspection or ruling in favor of the requestor (Vaughn v. Rosen, 1973, p. 27). While no strict requirements exists for "sufficiently detailed," some courts have provided examples of what information would meet this standard: "such an index provides the date, source, recipient, subject matter and nature of each document in sufficient detail to permit the requiring party to argue effectively against the claimed exemptions and for the court to assess to applicability of the claimed exemptions" (St. Andrews Park, Inc v. U.S. Department of Army Corp of Engineers, 2003, p. 1272). The Vaughn Index is helpful in addressing various issues in FOIA litigation including, but not limited to, the segregation, redaction, reclassification, and the Glomar response.

7.3.2 Adequacy of Search

In FOIA litigation the agencies must show, if contested, that they preformed an adequate search of the information they possess for the information requested. The agency must show a "good-faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information" (Oglesby v. U.S. Department of the Army, 1990, p. 68). The adequacy of the search is proven in agency affidavits, which are relied upon by the court when they are "relatively detailed and nonconclusory" (Morely v. Central Intelligence Agency, 2007, p. 1116). These affidavits will show the "types of files that an agency maintains, states the search terms that were employed to search though the files selected for the search, and contains an averment that all files reasonably expected to contain the requested records were, in fact, searched" (Department of Justice, 2009, p. 759).

Chapter 8: Court Cases

The follow are major cases in Freedom of Information legislation grouped by major topics pertaining to the national security exemptions. All of the following cases were decided prior to the enactment of Executive Order 13526.

8.1 Proper Classification

Prior to evaluating additional claims in FOIA cases the court must determine if the records in question were properly classified pursuant to the prevailing Executive Order. The following cases have addressed different aspects of proper classification and comprised the general framework courts may use to rule on this issue.

In determining if there was proper classification the agency will submit affidavits to the court supporting the classification. First the court will determine if the procedures for classification established in the prevailing Executive Order were followed. In doing so the court evaluates affidavits submitted by the agency. *American Jewish Congress v. Department of Treasury* presented a FOIA Exemption 1 case in which the court had to evaluate if the requested information was properly classified. After determining that the procedures established by the agency for classification have been followed the courts "need not go further to test the expertise of the agency, or to question its veracity when nothing appears to raise the issue of good faith" (American Jewish Congress, 1982, p. 1276). In addition to evaluating that the classification itself was proper and that no bad faith existed, the agency affidavits show that the search for the request information was proper and adequate (Shaw v. U.S. Department of State, 1983).

The affidavit provided by the agency must be "from an individual with classifying authority" (Wickwire Gavin, PC v. Defense Intelligence Agency, 2004, p. 600). The affidavit must also, "provide "detailed and specific" information demonstrating both why the material has been kept secret and why such secrecy is allowed by the terms of an existing executive order" (American Civil Liberties Union v. Federal Bureau of Investigation, 2006, p. 187). In evaluating the agency affidavit the court also presumes agency expertise in the matter (Bevis v. Department of State, 1983).

Other issues in proper classification include classification by foreign governments. The courts have held that classification by foreign governments is proper as long as it is allowed by the controlling Executive Order (Southam News v. U.S. Immigration & Naturalization Service, 1987). The Executive Order in question in *Southam* was EO 12356 which states, "foreign government information shall either retain its original classification or be assigned a United States classification that shall ensure a degree of protection at least equivalent to that required by the entity that furnished the information" (Executive Order 12356, 1982, Sec. 1.5(d)). In addition, EO 12356 "specifically provides that the release of foreign government information in presumed to cause damage to national security" (Southam News, 1987, p. 885).

8.2 Reclassification

Reclassification, when an agency classifies a record that has either been declassified or classified at a different level, is an important issue in FOIA national security exemption cases. The issue of reclassification hinges on the ruling authority, currently Executive Order 13526. Declassification also brings with it difficulties with

prior disclosure cases, which are further discussed above. The following cases address various issues that arise in reclassification cases.

8.2.1 Goldberg v. U.S. Department of State

Goldberg stems from a FOIA request for responses from U.S. ambassadors to a Department of State unclassified questionnaire addressing "host government diplomatic practices and reciprocity" (Goldberg v. U.S. Department of State, 1987, p. 74). Claiming Exemption 1 to FOIA, the Department of State withheld a large portion of the requested information reclassifying a number of documents after reviewing the information for the FOIA request (Goldberg, 1987).

At the time of Goldberg's request Executive Order 12356 was the classification authority. EO 12356, similar to EO 13292, "explicitly allows agencies to make classification and reclassification decisions in light of, and at the time of, FOIA requests" (Goldberg, 1987, p. 77). EO 12356 stated "the President or an agency head or official designated… may reclassify information previously declassified and disclosed if it is determined in writing that (1) the information requires protection in the interest of national security; and (2) the information may reasonably be recovered" (Executive Order 12356, 2009, Sec. 1.6(A)). Similarly, EO 13292 stated:

> Information may be reclassified after declassification and release to the public under proper authority only in accordance with the following conditions: (1) the reclassification action is taken under the personal authority of the agency head or deputy agency head, who determines in writing that the reclassification of the information is necessary in the interest of the national security; (2) the information may be reasonably recovered; and (3) the reclassification action is reported promptly to the Director of the Information Security Oversight Office
>
> Executive Order 13292, 2003, Sec. 1.7(c).

Therefore, the court in *Goldberg* determined that "the only question for this court is whether the information withheld under Exemption 1 has been properly classified…whether it was once unclassified is immaterial under FOIA" (Goldberg, 1987, p. 79). In addition, the court held that the appellant must bring evidence to "somehow undermine or call into question the correctness of the classification status of the withheld information, or the agency's explanation for the classification" as opposed to the validity of a reclassification (Goldberg, 1987, p. 81). Based on the applicable Executive Order courts in FOIA litigation are not required to make a finding on reclassification of non-disclosed information and courts are left only with the authority to evaluate whether the information was properly classified.

8.2.2 Branch v. Federal Bureau of Investigation

In *Branch* the plaintiff submitted a FOIA request for information pertaining to Stanley Levison from the FBI (Branch v. Federal Bureau of Investigation, 1988). The FBI responded by partially disclosing the information and claiming FOIA Exemption 1 and 7 for the remainder of the information (Branch, 1988). In ruling on the reclassification issue the court stated, "Executive Order 12, 356 explicitly allows agencies to make classification and reclassification decisions upon receipt of a FOIA request" (Branch, 1988, p. 48). In determining if reclassification was proper, the agency "determined that the withheld documents contain information concerning intelligence activities, sources, and/or methods" (Branch, 1988, p. 48). Based on this argument

supported by the agency's affidavit and the courts in camera inspection, the court found that the reclassification of the information was proper (Branch, 1988).

8.3 Prior disclosure of Information

Prior disclosure of information may come about in many situations. Information may have been unclassified, declassified, or disclosed without authorization or by a non-U.S. government body. The following cases address how the courts have addressed prior disclosure of information.

8.3.1 Founding Church of Scientology of Washington, D. C., Inc. v. National Security Agency

In *Scientology* the appellant had requested information from the National Security Agency for all records "on appellant and the philosophy it espouses, as well as records reflecting dissemination of information about appellant to domestic foreign governments" and references to L. Ron Hubbard (Founding Church of Scientology of Washington, D. C., Inc. v. National Security Agency, 1979, p. 825). The NSA replied to the FOIA request by denying possession of any records matching the requests descriptions (Founding Church of Scientology of Washington, D. C., Inc., 1979). After showing that the NSA did in fact possess such records the NSA "declined to supply more than minimal information" (Founding Church of Scientology of Washington, D. C., Inc., 1979, p. 826) citing FOIA Exemption 3. The district court held that the records in question were properly exempt under FOIA Exemption 3 and moved for summary judgment in favor of the defendant (Founding Church of Scientology of Washington, D. C., Inc., 1979).

The Court of Appeals found that the district court "failed in this litigation to conduct a true de novo review" as the affidavit supplied by the NSA was "far too conclusory to support the summary judgment" (Founding Church of Scientology of Washington, D. C., Inc., 1979, p. 311). The NSA had argued that disclosing the information would make public "vital national security information concerning the organization, function and communication intelligence capabilities of the NSA" (Founding Church of Scientology of Washington, D. C., Inc., 1979, p. 831). Without more specific supporting details from the agency affidavit, the court could not accept the NSA's position that damage may result from records that "may implicate aspects of the agency's operations already well publicized" and stated "suppression of information of that sort would frustrate the pressing policies of the Act without even arguably advancing countervailing considerations" (Founding Church of Scientology of Washington, D. C., Inc., 1979, p. 832). The case was remanded to the district court (Founding Church of Scientology of Washington, D. C., Inc., 1979).

8.3.2 Afshar v. Department of State

In *Afshar* the appellant, editor of the Iran Free Press and chairman of the Committee for Free Iran, had submitted a FOIA request to the Department of State, the CIA, and the Department of Justice requesting all records relating to "him or his activities on the newspaper of the Committee" (Afshar v. Department of State, 1983, p. 1128). The agencies replied to the FOIA request with partial disclosure of redacted information claiming Exemptions 1 and 3 for the remainder of the information (Afshar, 1983). After holding that the records in question were properly classified pursuant to Executive Order 12356, the district court denied Afshar's motion for reconsideration stating "the exercise

of this authority…is left to the unreviewable discretion of the Executive" (Afshar, 1983, p. 1129).

On appeal the court evaluated four issues including "whether the Act allows the government agencies herein to withhold information under exemptions 1 and 3 where there have been prior disclosures of similar information" (Afshar, 1983, p. 1127). Afshar argued that the agencies denial of his FOIA request was improper because "information fitting the defendants' descriptions of the withheld information has already been released to the public" and therefore posed no additional identifiable damage to national security (Afshar, 1983, p. 1129). In addition, *Afshar* argues that the "government should be compelled to show how the withheld information is both different from and more sensitive than the information already released" in order for non-disclosure to be proper (Afshar, 1983, p. 1130). The court stated that while initially the government bears the burden in FOIA cases "a plaintiff asserting a claim of prior disclosure must bear the initial burden of pointing to specific information in the public domain that appears to duplicate that being withheld" (Afshar, 1983, p. 1129).

Afshar differs from other FOIA prior disclosure cases, as the plaintiff is not claiming that the information withheld is the exact information that was previously disclosed but is similar to the information previously disclosed. While the court in *Afshar* acknowledges the difficulty for plaintiffs in prior disclosure FOIA cases to meet that burden without a more in-depth knowledge of the information withheld, the court, "unless it senses bad faith or a general sloppiness in the declassification or review process, a court will feel with special urgency the need to 'accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record'"

much like a court's evaluation of proper classification (Afshar, 1983, p. 1131). This holding was recently supported in *Amnesty International USA v. Central Intelligence Agency* in which the courts ruled on a FOIA Exemption 1 case pertaining to CIA enhanced interrogation techniques. The court stated that regardless of "the fact that the government disclosed general information on its interrogation program does not require full disclosure of aspects of the program that remain classified" (Amnesty International USA v. Central Intelligence Agency, 2010, p. 23). The court held "the information contained in the withheld records are more detailed than the information that already exists in the public domain and would seriously damage national security if released" (Amnesty International USA, 2010, p. 23).

8.4 Redaction of Information

Redaction is a common technique used by agencies to segregate classified and non-classified information in order to meet FOIA requests. The following cases address how the courts have ruled on the redaction of information in FOIA case.

8.4.1 Larson v. Department of State

In *Larson* the appellants had requested information from the National Security Agency, the Central Intelligence Agency, and the Department of State about violence in Guatemala in the 1970s and 1980s (Larson v. Department of State, 2009). The NSA responded to the plaintiffs FOIA request with partial disclosure of some of the requested records and redacted those disclosed (Larson, 2009). The NSA claimed Exemptions 1 and 3 for the non-disclosed information (Larson, 2009). The district court ruled in favor of the NSA's request for summary judgment holding "FOIA Exemptions 1 and 3

protected the withheld materials from disclosure" (Larson, 2009, p. 862). The Court of Appeals held, on the question of whether redaction of information is proper, that the agency bears the burden of showing that the exemption applies to the information redacted and that "ultimately, an agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible.'" (Gardels v. Central Intelligence Agency, 1982, p. 1105). Under FOIA, information may be redacted as long as agencies meet their burden.

8.5 Existence or Non-Existence of Information

As discussed above the Glomar response, neither denying nor admitting to the existence or non-existence of information, is often used as a response to FOIA requests by agencies. The following cases address how the courts have ruled on the Glomar response.

8.5.1 Hougthon v. National Security Agency

Houghton allows a look at a more recent case decided in 2010. In Houghton the appellant requested all information from the National Security Agency (NSA) "in which my name is mentioned, including any investigations of me; any interviews of others regarding me; any investigations of a group to which I belonged and am mentioned as a member; and any records in which my name is mentioned but I was not a direct subject of an investigation" (Houghton v. National Security Agency, 2010, p. 236). The NSA determined that the information was exempt from FOIA under Exemptions 1 and 3. The NSA responded to Houghton that they "could neither confirm nor deny whether

intelligence records relating to him exist, or whether any specific technique or method was employed in those efforts" (Houghton, 2010, p. 237).

The third circuit first determined whether the two exemptions were properly applied. The court found that Exemption 1 was properly applied and that the NSA met its burden as the information was properly classified under the prevailing Executive Order, EO 13292 (Houghton, 2010). EO. 13292 allows for the classification of information that "could be reasonably expected to result in damage to the national security" (Executive Order 13292, 2003, Sec. 1.1(a)(4)). The court stated that the agency official "reasonably determined that the information sought by Houghton could reveal information about intelligence activities…and, therefore falls within the category of classified information" (Houghton v. National Security Agency, 2010, p. 238). The court also determined that the agency properly refused to confirm or deny the existence of the information because doing so would also "reveal information that is currently classified CONFIDENTIAL pursuant to the Executive Order and would allow individuals to accumulate information and draw conclusions about the NSA's technical capabilities" (Houghton, 2010, p. 238).

8.5.2 El Badrawi v. Department of Homeland Security

In *El Badrawi* the plaintiff requested information concerning himself, including alternative spellings of his name, from five agencies including the Department of Homeland Security (El Badrawi v. Department of Homeland Security, 2008). The defendants moved for summary judgment based on their showing that "it had conducted a search reasonably calculated to uncover all relevant documents" (El Badrawi, 2008, p.

298). The court denied the defendant's request as they failed to "provide sufficiently detailed and specific information as to why the information would hinder the ability to obtain such information in the future or why such secrecy is allowed by the terms of the executive order" and "it does not allow the court to engage in a de novo review of the propriety of the withholding" (El Badrawi, 2008, p. 314).

Most recently, in *Amnesty International USA v. Central Intelligence Agency* (2010) the court held that a prior disclosure by a foreign government is not equal to a disclosure by a US government agency. In this case the Yemeni government made an official disclosure of the existence of operational cables regarding interrogation techniques. The court held that the Glomar response issued by the CIA was proper, even with the Yemeni government's disclosure, due to the possible harm to national security (Amnesty International USA v. Central Intelligence Agency, 2010).

Chapter 9: Impact of Executive Order 13526

The previous cases motioned were all decided prior to Executive Order 13526 issued by President Obama, which went into effect June 2010. As mentioned earlier the application of EO 13526 may moderately impact the application of FOIA disclosures in national security cases. This section will analyze the impact of EO 13526 on topics mentioned above that relate to the national security exemptions.

9.1 Proper Classification

The basic requirements to show information was properly classified under the pertinent Executive Order remain the same in EO 13526. In determining proper classification the agency must submit an affidavit attesting to the fact that the information

was properly classified, which is generally in the form of a Vaughn Index. The court will give substantial weight to this affidavit. EO 13526, while including new provisions for original classification, does not include any requirements pertaining to the affidavit. In regards to proper classification EO 13526 supports the overall policy of open access by encouraging agencies not to classify information if there is "significant doubt" as to the propriety of classification, yet denies any new "substantive or procedural rights" (Executive Order 13526, 2009, Sec. 1.1(b)(1)). EO 13526 does leave a cause of action available in regards to the level of classification. Yet, this would not provide an alternative route for courts as the information would still be classified, and therefore exempt from disclosure, regardless of the changes in EO 13526 (Executive Order 13526, 2009, Sec. 1.2(c)). The lack of effective change applies to the other requirements of proper classification. Courts will still accept the expertise of the agency and classification by foreign governments as proper classification.

There are some possible, if tenuous, avenues for litigants from EO 13526. The addition of the training requirement in Section 1.3(d) might support individuals' arguments that the classification was not proper if they are able to show that the agency failed to meet the training requirements of EO 13526. In addition, failure to meet training requirements might indicate bad faith on the part of the agency, which would allow the court to further question the affidavit. If the court recognizes any bad faith on the part of the agency, or if the agency fails to provide a "detailed and specific" affidavit, the court may evaluate if the agency properly weighed the harm of disclosure against the need for disclosure as the agency is now required not to classify information "unless its unauthorized disclosure could reasonably be expect to cause identifiable or describable

damage to the national security" (Executive Order 13526, 2009, Sec. 1.4). The court may require the agency to support this conclusion "in writing, including identifying or describing the damage" (Executive Order 13526 Implementing Directive, 2009, p. 37255).

Other areas that the court may evaluate further include whether the agency failed to meet other requirements, such as failing to meet time limits on classification (Executive Order 13526, 2009, 1.5(c)), improperly indefinitely classifying information (Executive Order 13526, 2009, Sec. 1.5(d)), or not "clearly and demonstrably" demonstrating threats to national security as a waiver to automatically declassified information (Executive Order 13526, 2009, Sec. 1.5(a)). EO 13526 also allows for review of mandatory review of classification guidance (Executive Order 13526, 2009, Sec. 1.9) and automatic declassification (Executive Order 13526, 2009, Sec. 3.3). In addition, EO 13526 now restricts agencies from continuing to classify information to "conceal violations of law, inefficiency, or administrative error" or to prevent embarrassment (Executive Order 13526, 2009, Sec. 1.7(a)). While this provision was previously available the continued classification or failure to declassify is now an additional cause of action.

The court may make use of an in camera to evaluate these claims. These avenues to contest proper classification will be available only in extreme cases. Currently there are internal checks to ensure agencies meet these requirements and the chance of an outside individual gaining proof of such violations is slim. These are, however, new possibilities for individuals denied access and courts seeking to evaluate agency actions in properly classifying national security information.

9.2 Reclassification

Much like in proper classification many of the new causes of action for reclassification are well hidden from the public. The new requirement for agency heads to approve reclassification in writing is unlikely to be violated, yet if it is violated individuals are unlikely to discover the violation until discovery (Executive Order 13526, 2009, Sec. 1.7(c)). The most significant change to reclassification, the requirement that information may not be reclassified "without bringing undue attention to the information" may make a profound impact on FOIA litigation (Executive Order 13526, 2009, Sec. 1.7(c)(2)). Future litigation on the meaning of "undue attention" is necessary in order to have a thorough understanding of the impact of this change, though the implementing directive sheds some light on the meaning.

In *Goldberg*, the court only evaluated "whether the information withheld under Exemption 1 has been properly classified" not whether recovering the information would bring undue attention (Goldberg v. U.S. Department of State, 1987, p. 79). While the exact details of *Goldberg* that would impact this new issue are unknown, as the court did not find it a question at issue, in reevaluating the case the court would look at the number of people who have the information, the extent of the information they possess, and the way the information was disclosed (Executive Order 13526 Implementing Directive, 2009, p. 37257). The court in *Branch* came to a similar conclusion. The court held that the question was not whether reclassification was appropriate, as the Executive Order explicitly allows for reclassification, but whether the classification was proper (Branch v. Federal Bureau of Investigation, 1988). In a case with the right set of facts it is likely that this change in EO 13526 would alter the courts holding in reclassification cases. In such

a case these requirements for reclassification, coupled with new possible causes of action in the issue of proper classification, are likely to yield an entirely different result. Unfortunately, very few cases have addressed the issue of reclassification.

Executive Order 13526 makes no changes that would impact the agencies right to reclassify information at the time of a FOIA request and conditions 3 and 4 of Section 1.7(c) are unlikely to provide any additional support for litigants as they apply to internal procedures. These additional procedures do, however, support the overall policy for open information.

9.3 Prior Disclosure of Information, Redaction of Information, and the Glomar Response

Aside from the possible causes of action now available under proper classification there are no apparent changes to litigation pertaining to the majority of prior disclosure, redaction, or Glomar response cases. In fact, to address many of the issues at hand in these cases the courts defer to the agency affidavit.

In prior disclosure cases the court will evaluate the agency affidavit in determining whether the information that was previously disclosed duplicates the information now being withheld and, even in the case of prior disclosure of duplicate information, whether making the information public would disclose "vital national security information" (Founding Church of Scientology of Washington, D. C., Inc. v. National Security Agency, 1979, p. 831).

Similarly, redaction of information and the Glomar response are still acceptable under EO 13526. Courts will still evaluate, based on the agency affidavit, whether "an

agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible'" (Wolf v. Central Intelligence Agency, 2007, p. 374-75). In redaction and Glomar response cases the courts also address if the doctrine of segregability and the mosaic theory were properly applied. This evaluation also rests on the agency affidavit and the determination of proper classification.

While the new avenues described under proper classification are available in these cases additional changes would have to be made to EO 13526 in order to strengthen the courts scope of review in national security FOIA cases. These recommendations are detailed below.

Chapter 10: Recommendations

Executive Order 13526 takes many opportunities to support the policy of open access through the policy statements throughout the EO and actions such as the establishment of the National Center for Declassification. While these changes are likely to result in more disclosure of government information through FOIA from the start of the request process, EO 13526 makes little impact on FOIA national security litigation. EO 13526 makes few changes that would strongly effect the results of past national security FOIA exemption cases. The new causes of action provided by EO 13526 are at most tenuous and questionable. In order for the policy stated in EO 13526 to influence substantial and practical results there are number of recommendations should be implemented. The implementation of these changes in the current climate may encounter difficulties. Due to the concerns with homeland security, such as the implications of the

Patriot Act, and leaks of classified information to sources such as WikiLeaks agencies are slower to implement procedural changes.

10.1 Changes to Future Executive Order

Future Executive Orders should implement textual changes in order to make the supported policy procedure. First, the Executive Order should include a substantive and procedural right for information that was classified with "significant doubt about the need to classify" (Executive Order 13526, 2009, Sec. 1.1(b)). Second, the publication of agency review of classification guidance and training should be included in Section 1.9 requiring that the agency publicly publish details showing the agency has met these requirements. Third, identifying information should be publicly published for records that are automatically, or otherwise, declassified.

Lastly, the Executive Order needs to include a standardization of government affidavits pertaining to classification of information. While EO 13526 makes progress on the standardization of classification of government information, the affidavits provided to the courts by agencies in FOIA cases do not mirror this standardization. Future Executive Orders need to establish a standard for agency affidavits as current court held requirements for the Vaughn index are not adequate to meet the needs of the courts and litigants and may not apply to every jurisdiction. Standardization would supply both the courts and the litigants with a more thorough understanding of the reasons and procedures for classification. This understanding would allow for a more accurate ruling in FOIA cases.

Improving the agency affidavits will also improve court holdings on other issues including prior disclosure of information, redaction of information, and the Glomar response. In addition to improvements to affidavits future Executive Orders or other litigation may address concerns with these issues. While the redaction of information is appropriate in circumstances where the agency proves the need for classification, refusal to disclose information that was previously disclosed requires additional action. These actions should include increased communication between agencies and governments when information is accidentally, or purposefully, disclosed when classified. Agencies must also ensure the standardization of markings on classified and controlled unclassified information. Lastly, the courts must rule on the application of new definitions for "bringing undue attention to the information" and the supporting implementing information (Executive Order 13526, 2009, Sec. 1.7(C)(2); Executive Order 13526 Implementing Directive, 2009, p. 37257).

Lastly, future actions should include specific requirements for information that may entail the Glomar response. These requirements may include agency head approval, a higher threshold to apply the response to the information in question, and the inclusion of what information pertaining to the records may be released in the event that the courts do not accept the Glomar response.

10.2 Procedure and Review Transparency

A significant hurdle for individuals filing FOIA appeals is the lack of information about how FOIA procedures have been followed inside the agency and the results of agency review processes. Without access to this information litigants are unable to prove

essential aspects of their case, are unaware of possible causes of action, and courts are unable to properly evaluate agency affidavits. Future Executive Orders should increase transparency of this information to the courts and litigants.

This information might include records schedules, agency head authorizations, training, and review schedules. While it is possible that this information might be protected by the national security exemptions, or other FOIA exemptions, the Executive Order should place the burden on the agency for verifying the application of these exemptions. By establishing the presumption of individual access to this information, litigants have more support for their claims that information was not properly classified or that agencies failed to follow the Executive Order's procedures.

In addition to aiding litigants and the courts in preparing for and evaluating agency affidavits procedure and review transparency will also benefit the agency itself and other Federal agencies. A better understanding of the successes and failures of agency procedures will allow all agencies to properly evaluate their own procedures. This will result in better-formulated procedures and encourage a critical eye in review processes.

Chapter 11: Conclusion

Regardless of the reluctance of President Johnson to sign the Freedom of Information Act it was enacted with support from the roots of the United States. FOIA fortified the principles of freedom of information that had been a part of U.S. policy since the Declaration of Independence (Relyea, 2009a). FOIA was enacted in order to provide individuals with "broad disclosure of Government records" giving U.S. citizens the tools

needed to actively and effectively participate in their democracy (Department of Justice v. Julian, 1988, p. 8).

After 9/11, freedom of information in the U.S. moved backward resulting in barriers to access to government information (Jaeger & Bertot, 2010). FOIA's original objectives were to balance the protection of classified information against the need for public disclosure, especially in regards to national security information (Floor consideration of S. 1160, 1965, p. 26821). This policy has been hindered by past Executive Orders, which shifted the balance in favor of protection of government information (Jaeger & Bertot, 2010). President Obama intended to remove the barriers and shift policy towards freedom of information with the assistance of Executive Order 13526 on Classified National Security Information (White House, 2009, p. 1).

The true effect of EO 13526 is yet unknown as past court cases were based on past Executive Orders. In identifying the differences between President Bush's EO 13292 and President Obama's EO 13526 distinctions in policy and the procedure could be pinpointed. The implications to FOIA national security exemption litigation, however, requires applying these changes to past court holdings on important issues. Based on these comparisons and the application of the changes to FOIA national security exemption cases, EO 13526 fails to effectually support freedom of information in litigation.

Textual changes between Executive Order 13292 and 13526 are significant yet are restricted to general policy and some internal agency procedure. Changes and support of policy are important as they demonstrate the mindset of the administration when

addressing related issues. In addition, changes to internal agency policy may have significant impact. Internal agency policy may result in a decrease to over-classification, an increase of declassification, an increase in information disclosed through FOIA requests, and a possible decrease in the number of FOIA request that result in litigation. These changes, however significant an impact on freedom of information, fail to change the outcome of significant FOIA national security exemption litigation and current precedent.

This failure has left a void between the policy supported by EO 13526 and the actual effect of the order on FOIA national security exemption litigation. Additional changes are needed in order to close this void. In order to make an actual impact with freedom of information policy additional actions are needed. These include making textual changes to the ruling Executive Order that support the disclosure of information, providing additional information on agency actions for plaintiffs and courts, and giving courts greater scope of judicial review in FOIA cases. In addition, freedom of information should include access to internal agency procedure and review to ensure compliance with FOIA and Executive Order provisions. In doing so the policy supported throughout Executive Order 13526 would be an effectual policy as opposed to verbal vagueness.

Appendix A: Freedom of Information Act

http://www.archives.gov/about/laws/foia.html

Appendix B: Executive Order 13292

http://www.archives.gov/isoo/policy-documents/eo-12958-amendment.pdf

Appendix C: Executive Order 13526

http://edocket.access.gpo.gov/2010/pdf/E9-31418.pdf

Bibliography

Abdelfattah v. U.S. Department of Homeland Security. 488 F.3d 178 (C.A.3 (N.J.), 2007).

Abrams v. U.S. Department of Treasury. 243 Fed.Appx. 4, 2007 WL 1721506 (C.A.5 (Tex. (C.A.5 (Tex.), 2007).

Administrator, Federal Aviation Administration v. Robertson. 422 U.S. 255, 95 S.Ct. 2140 (U.S.Dist.Col. 1975).

Afshar v. Department of State. 702 F.2d 1125, 226 U.S.App.D.C. 388 (C.A.D.C., 1983).

American Civil Liberties Union v. Federal Bureau of Investigation. 429 F.Supp.2d 179 (D.D.C., 2006).

American Jewish Congress v. Department of the Treasury. 549 F.Supp. 1270 (D.C.D.C., 1982).

American Mail Line, Limited v. Gulick. 411 F.2d 696 133, U.S.App.D.C. 382 (C.A.D.C. 1969).

Amnesty International USA v. Central Intelligence Agency. No. 07-5435, 2010 WL 3033822 (S.D.N.Y. Aug. 2, 2010).

Associated Press v. U.S. Department of Defense. 554 F.3d 274 (C.A.2 (N.Y.), 2009).

Atkinson v. FDIC. No. 79-1113, 1980 U.S. Dist. LEXIS 17793, (D.D.C. Feb. 13, 1980)

Bevis v. Department of State. 575 F.Supp. 1253 (D.C.D.C., 1983).

Bonner v. U.S. Department of State. 928 F.2d 1148, 289 U.S.App.D.C. 56 (C.A.D.C., 1991).

Branch v. Federal Bureau of Investigation. 700 F.Supp. 47 (D.D.C., 1988).

Campbell v. U.S. Department of Justice. 164 F.3d 20, 334 U.S.App.D.C. 20 (C.A.D.C., 1998).

Carpenter v. U.S. Department of Justice. 470 F.3d 434 (C.A.1 (Mass.), 2006).

Charles River Park A, Inc. v. Department of Housing and Urban Development. 519 F.2d 935, 171 U.S.App.D.C. 286 (C.A.D.C. 1975).

Consumers' Checkbook Center for the Study of Services v. U.S. Dept. of Health and Human Services. 554 F.3d 1046, 384 U.S.App.D.C. 306 (C.A.D.C., 2009).

Department of Defense. (2010). DOD Freedom of Information Act Handbook. Washington, DC: U.S.

Department of Justice. (2010). Department of Justice Guide to the Freedom of Information Act Reference Guide. http://www.justice.gov/oip/referenceguide.htm. Washington, DC: U.S

Department of Justice. (2009). Department of Justice Guide to the Freedom of Information Act. Washington, DC: U.S.

Department of Justice. (2005). Department of Justice Guide to the Freedom of Information Act. Washington, DC: U.S.

Department of Justice. (2008). Freedom of Information Regulations. 28 CFR 16.4(a).

U.S. Department of Justice v. Julian. 486 U.S. 1, 108 S.Ct. 1606 (U.S.Ariz.,1988).

Dickstein Shapiro LLP v. Department of Defense. 2010 WL 3057140 (D.D.C.) (D.D.C., 2010).

El Badrawi v. Department of Homeland Security. 583 F.Supp.2d 285 (D.Conn., 2008).

Electronic Freedom of Information Act Amendments of 1996. Pub. L. No. 104-231, 110 Stat 3048.

Enviro Tech Intern., Inc. v. U.S. E.P.A. 371 F.3d 370 (C.A.7 (Ill.), 2004).

Environmental Protection Agency v. Mink. 410 U.S. 73, 93 S.Ct. 827 (U.S.Dist.Col. 1973)

Executive Order No. 12,065. 43 Fed. Reg. 28,949 (July 3, 1978).

Executive Order No. 12,356. 47 Fed. Reg. 14,874, 15,557 (April 6, 1982).

Executive Order No. 13,292. 68 Fed. Reg. 15,315 (March 28, 2003).

Executive Order No. 13,526. 75 Fed. Reg. 707 (January 5, 2010).

Executive Order No.12,958. 60 Fed. Reg. 19,825 (April 20, 1995).

Floor Consideration of S. 1160. Congressional Report. 111 Cong. Rec. 26820, (1965).

Founding Church of Scientology of Washington, D. C., Inc. v. National Security Agency. 610 F.2d 824, 197 U.S.App.D.C. 305 (C.A.D.C., 1979).

Forsham v. Harris. 445. U.S. 169, 100 S.Ct. 977 (U.S.Dist.Col.,1980).

Freedom of Information Act. 5 U.S.C.A. § 552, As Amended By Public Law No. 104-231, 110 Stat. 3048 (West 2009).

Gardels v. Central Intelligence Agency, 689 F.2d 1100, 223 U.S.App.D.C. 88 (C.A.D.C., 1982).

Garner, B. (Ed.). (2004). *Black's Law Dictionary*. St. Paul, MN: Thomson West.

Glomar Explorer. (2005). In Encyclopedia of Intelligence & Counterintelligence. Retrieved from http://www.credoreference.com/entry/sharpint/glomar_explorer.

Goldberg v. U.S. Department of State. 818 F.2d 71, 260 U.S.App.D.C. 205 (C.A.D.C., 1987).

Government in the Sunshine Act of 1976. 5 U.S.C.A. §552B (West)

Halkin v. Helms. 598 F.2d 1, 194 U.S.App.D.C. 82 (C.A.D.C. 1978).

Halperin v. Central Intelligence Agency. 629 F.2d 144, 203 U.S.App.D.C. 110 (C.A.D.C., 1980).

Houghton v. National Security Agency. 378 Fed.Appx. 235, 2010 WL 1784058 (C.A.3 (N.J. (C.A.3 (N.J.), 2010).

Hunt v. Central Intelligence Agency. 981 F.2d 1116 (C.A.9 (Cal.), 1992).

Intelligence Authorization Act of 2002. Pub. L. No. 107-306, 116 Stat 2383.

Jaeger, P. T., & Bertot, J. C. (2010). Transparency and technological change: Ensuring equal and sustained public access to government information. Government Information Quarterly, 27, 371-376.

Johnson, L. (1966). Statement by the President upon Signing S.1160. 2 Weekly Compilation of Presidential Documents 887 (July 11, 1966).

Joseph W. Diemert, Jr. and Associates Co., L.P.A. v. F.A.A. 218 Fed.Appx. 479, 2007 WL 627867 (C.A.6 (Ohio (C.A.6 (Ohio), 2007).

Kintner, R. (1966, June 24). Signing of Information Bill. [June 1966 (Notes, Instructions, Doodles) Memorandum for the President from Robert E. Kintner]. Special Files, 1927-1973, Handwriting File (Box 15). Lyndon B. Johnson Library Austin, TX.

Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 100 S.Ct. 960, (U.S.Dist.Col.,1980).

Larson v. Department of State. 565 F.3d 857, 385 U.S.App.D.C. 394 (C.A.D.C., 2009).

Little Rivers Inc v. U.S. Bureau of Reclamation. 272 F.Supp 2d 1313 (D. Utah 2003)

Marchetti v. U.S. 390 U.S. 62, 72, 88 S.Ct. 716, 716, 19 L.Ed.2d 906, 43 O.O.2d 231 (U.S. 1968).

Mead Data Central, Inc. v. U.S. Department of Air Force. 566 F.2d 242, 184 U.S.App.D.C. 350, 368 (C.A.D.C. 1977).

Meeropol v. Meese. 790 F.2d 942, 252 U.S.App.D.C. 381 (C.A.D.C., 1986).

Military Audit Project v. Casey. 656 F.2d 724, 211 U.S.App.D.C. 135 (C.A.D.C., 1981).

Missouri Coalition for Environment Foundation v. U.S. Army Corps of Engineers. 542 F.3d 1204 (C.A.8 (Mo.), 2008).

Morley v. Central Intelligence Agency. 508 F.3d 1108 (C.A.D.C., 2007).

Moyers, B. (2005, December). *In the Kingdom of the Half-Blind*. Address delivered for the 20th anniversary of the National Security Archive George Washington University, Washington, DC.

Nation Magazine, Washington Bureau v. U.S. Customs Service. 71 F.3d 885, 315 U.S.App.D.C. 177 (C.A.D.C., 1995).

Office of Capital Collateral Counsel, Northern Region of Florida ex rel. Mordenti v. Department of Justice. 331 F.3d 799 (C.A.11 (Fla.), 2003).

Oglesby v. U.S. Department of Army. 920 F.2d 57, 287 U.S.App.D.C. 126 (C.A.D.C., 1990).

OPEN FOIA Act of 2009. Pub. L. No. 111-83, 123 Stat. 2142.

OPEN Government Act of 2007. Pub. L. No. 110-175, 121 Stat 2524.

Pacific Fisheries, Inc. v. U.S. 539 F.3d 1143 (C.A.9 (Wash.), 2008).

Pentagon Federal Credit Union v. National Credit Union Administration. No. 95-1475, 1996 U.S. Dist. LEXIS 22841 (E.D. Va. June 7, 1996).

Powell v. U.S. Department of Justice. 584 F.Supp. 1508 (D.C.Cal., 1984).

Pozen, D. (2005). The Mosaic Theory, National Security, and the Freedom of Information Act. Yale Law Journal, 115, 628-679.

Privacy Act of 1974. 5 U.S.C.A. § 552a (West 2010).

Ray v. Turner. 587 F.2d 1187, 190 U.S.App.D.C. 290 (C.A.D.C., 1978).

Rein v. U.S. Patent & Trademark Office. 553 F.3d 353 (C.A.4 (Va.), 2009).

Relyea, H. C. (2009a). Federal freedom of information policy: Highlights of recent developments. Government Information Quarterly, 26, 314-320.

Relyea, H. C. (2009b). Congress and freedom of information: A retrospective and a look at a current issue. Government Information Quarterly, 26, 437-440.

Senate Committee on the Judiciary. Congressional Report. S. Rep. No. 813, (1965).

Shaw v. U.S. Department of State. 559 F.Supp. 1053 (D.C.D.C., 1983).

Southam News v. U.S. Immigration and Naturalization Service. 674 F.Supp. 881 (D.D.C., 1987).

St. Andrews Park, Inc. v. U.S. Department of Army Corps of Engineers. 299 F.Supp.2d 1264 (S.D.Fla., 2003).

Summers v. Department of Justice. 140 F.3d 1077, 329 U.S.App.D.C. 358 (C.A.D.C., 1998).

Trentadue v. Integrity Committee. 501 F.3d 1215 (C.A.10 (Utah), 2007).

U.S. Constitution, Article II, Section 1.

U.S. Copyright Office. (2010). The FOIA: An Overview and Reference Handbook. http://www.copyright.gov/foia/. Washington, DC: U.S.

U.S. Department of Defense v. Federal Labor Relations Authority. 510 U.S. 487, 114 S.Ct. 1006 (U.S.,1994)

U.S. Department of Justice v. Julian. 486 U.S. 1, 108 S.Ct. 1606 (U.S.Ariz., 1988).

U.S. Department of State v. Ray. 502 U.S. 164, 112 S.Ct. 541 (U.S.Fla., 1991).

U.S. Government Accountability Office, GAO-06-385, Information Sharing: The Federal Government Needs to Establish Policies and Processes for Sharing Terrorism-Related and Sensitive but Unclassified Information (2006).

Vaughn v. Rosen. 484 F.2d 820, 157 U.S.App.D.C. 340 (C.A.D.C. 1973).

Wickwire Gavin, P.C. v. Defense Intelligence Agency. 330 F.Supp.2d 592 (E.D.Va., 2004).

Wolf v. Central Intelligence Agency. 473 F.3d 370, 374 U.S.App.D.C. 230 (C.A.D.C., 2007).

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 72 S.Ct. 863 (U.S.1952).