

# Now You See It, Now You Don't— NARA's Response to Reclassification

## A Summary with Commentary

Bill Sleeman

In a *New York Times* article published in February 2006 journalist Scott Shane drew the nation's attention to a little-known document "reclassification" project that had been underway at the National Archives and Records Administration (NARA).<sup>1</sup> While the re-review program by a number of military and civilian intelligence agencies began during the closing year of the Clinton administration, the program, as so many other changes in access to government information, has grown dramatically since 9/11.<sup>2</sup>

Intriguingly, the re-review efforts had been alluded to previously in several published accounts (including an earlier piece by Shane) and at an open meeting of the U.S. Advisory Committee on Historical Diplomatic Documentation in 2002.<sup>3</sup> However, it was the February story that really caught the public's attention. In his article, Shane reported on claims by independent historian Matthew Aid that a number of documents that Aid had worked with in the past had been removed from public access. The article by Shane helped to catalyze the issue and resulted in a strong reaction from historians, journalists, and information professionals against the project. In response, the newly installed archivist of the United States, Allen Weinstein, promised that the program would be put on hold while an investigation was undertaken, a promise that was fulfilled on April 26, 2006, when NARA's Audit Report was released to the public and made available on the NARA Internet site.<sup>4</sup>

The report, *Withdrawal of Records from Public Access at the National Archives and Records Administration for Classification Purposes* (hereafter Audit Report), was prepared by the archive's Information Security Oversight Office (ISOO) and provides valuable insight into how nearly 26,000 "records" (or was it 55,000 pages?—the total number remains unclear) were removed and either reclassified, assigned a classification for the first time, or are still awaiting a final review decision.<sup>5</sup> The Audit Report also speaks volumes about what is wrong with the nation's current regime of secrecy. As was stated almost a decade ago in the Moynihan Report on secrecy, many agencies that are engaged in national security activities still do not recognize that public access to government information is "an important agency mission."<sup>6</sup>

### Legal Background

Before looking at the results of the investigation, it is worthwhile to consider briefly the three primary pieces of law

upon which the re-review activities were based as discussed in the Audit Report.

### Presidential Executive Order 12958 and Presidential Executive Order 13292 (amending E.O. 12958)

The core documents used in the original declassification efforts and the subsequent re-reviews with which the Audit Report is concerned are these two Executive Orders. The Clinton order (E.O. 12958) veered toward declassification and more open access, particularly when an agency was in doubt about the need to retain a document as classified or was unable to identify a specific threat or danger associated with the release of the information. Although some in the intelligence community were opposed to the Clinton effort, the overall goal, according to a report by the Congressional Research Service, was for only a "small quantity of the most highly sensitive information" to be subject to classification.<sup>7</sup> It was the Clinton order that created the goal of generally declassifying content that was twenty-five years old or older. The Bush order (E.O. 13292), with its focus on *securing* information, pulled back from many of the advances in access promulgated in the Clinton order and created additional classifying parameters, including the ability to block release of information approved by the Interagency Security Classification Appeals Panel (ISCAP). The feature of the Bush E.O. that is most relevant for the NARA re-review is the expanded options provided for the reclassification of previously declassified documents.<sup>8</sup>

### 32 CFR 2001

This section of the *Code of Federal Regulations* addresses the duties of NARA's ISOO and serves to codify and, to a lesser extent, define the process for classification, declassification, and related tasks devoted to the security of the content.<sup>9</sup> Particularly noteworthy in this instance is section 2001.13, which addresses the process for reclassifying information that had been declassified (as opposed to information that has never been classified before) and released to the public. There are ample examples, both in the Audit Report and in earlier congressional testimony about the re-review efforts that the

agencies involved ignored the requirement to first determine if the already released information was in fact "recoverable." Several of the agencies behaved as if by pulling the originals in the National Archives they would be able to control access by the public or, as expressed by one congressman, they could "put the toothpaste back into the tube."<sup>10</sup>

The Audit Report also makes reference to the Kyl-Lott Amendment in conjunction with the re-review by the Department of Energy (DOE). This law applies only to the DOE efforts that are still under investigation.

## The Audit Report

The Audit Report was requested in January 2006 when historian Matthew Aid first expressed his concern about missing materials in a letter to the National Archives.<sup>11</sup> Eventually Aid's complaints, with the assistance of staff from the National Security Archive (NSA), got the attention of Congress. Aid, Weinstein, and NSA director Thomas Blanton were all invited to testify before Congress about the increase in government secrecy generally and the NARA re-review efforts.<sup>12</sup>

The goals of the audit—most of which were achieved—were to identify the number of records withdrawn from the *open shelves*; to identify the agencies involved and the depth of their activities; to identify the authorization and justification claimed by the agencies for the withdrawal; and, finally, to use statistical sampling to determine the level of appropriateness of the classification efforts.<sup>13</sup>

After reviewing the goals, the Audit Report proceeds to lay out the policy considerations relevant to the process. There were eight points considered by ISOO in this section. Some of the points considered were:

- Could the agency undertaking the reclassification "identify or describe the damage?" The request for re-review had to be more than just a "trust us"-type demand.
- Requesting agencies were expected to provide a level of risk analysis about the document before proceeding with a request to reclassify. Had they done this?
- Who is the appropriate person(s) to perform the review? Were all relevant agencies consulted prior to the original declassification? If not, was a review for reclassification in order?
- Could material declassified inappropriately and already released to the public be retrieved in an effective and thorough manner?

The Audit Report goes on to discuss the various groups of records reviewed by the agencies. Some of these, such as the Department of Energy review, were discovered to be a problem not because of the review by the agency, but because of DOE's decision to expand the review process to include other agencies.<sup>14</sup> DOE's review of restricted data and formerly restricted data is statuto-

rily mandated, but the process of referring documents to other agencies was questioned. Other agency activities were clearly inappropriate, such as the Central Intelligence Agency's decision to pull "a significant number" of otherwise unclassified documents to obscure the nature of the few valid documents they wanted to protect. And finally, one agency—the Federal Emergency Management Agency (FEMA)—which pulled from the Eisenhower Presidential Library 134 documents that had long been properly declassified was clearly engaged in a re-review that was, based on the applicable legislation, unwarranted.<sup>15</sup>

The Audit Report next moves to consider by way of statistical sampling whether the actions for re-review undertaken by the various agencies were either "appropriate," "questionable," or "inappropriate." The results by agency are:

- DOE re-review = still under investigation by ISOO.
- Central Intelligence Agency (CIA) (Bureau of Intelligence and Research) re-review = 50 percent were appropriate; 18 percent were questionable; 32 percent were inappropriate.
- CIA (other various archival collections) re-review = still under review by ISOO.
- FEMA re-review at Eisenhower Library = 100 percent were inappropriate.
- NARA re-review at Kennedy Library = 98 percent were appropriate; 2 percent were questionable.
- NARA re-review at George H. W. Bush Library = still under review by ISOO.
- U.S. Air Force re-review = 74 percent were appropriate; 18 percent were questionable; 8 percent were inappropriate.
- CIA review of Internet resources = 78 percent were appropriate; 9 percent were questionable; 13 percent were inappropriate.

It is interesting to note that for many of the re-review efforts that were determined to have been inappropriate, a common factor was the age of the document. One can only wonder why the representatives of these agencies believed that a document more than forty years old posed a national security risk. As was pointed out in a recent newspaper article about Cold War era MIAs:

[Patricia Lively] Dickinson questioned the sensitivity of material a half-century old. "The sources are very elderly, and probably most of them are deceased," she said in an interview. "And as for the [intelligence gathering] methods, if the methods have not improved in the last 50 years, I think we're in trouble. It's just an extremely frustrating situation."<sup>16</sup>

For researchers who want or need to get information from the government, it is indeed frustrating. Equally frustrating is the seeming absence of consideration by the

agencies involved that the public might actually benefit from having access to this information. Consider again the case of FEMA, an agency with arguably little responsibility for protecting national security secrets.<sup>17</sup> Still, the agency was allowed to participate in the process of identifying records for re-review. As FEMA's primary mission is to mitigate the effect of a disaster on the public, one has to ask how is the public served by being prevented from knowing about some event or contingency plan studied forty years earlier. Given the age of the documents and the administration involved, it is hard to imagine what

information FEMA thought it could legitimately claim still posed a national security risk. Wisely, but belatedly, all of the records pulled by FEMA were determined to be inappropriate for reclassification.

## Overall Findings

The Audit Report identified ten significant findings as a result of the investigation. They are briefly summarized in figure 1.<sup>18</sup>

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1. Records at NARA containing classified national security information were inappropriately designated and released to the public.	Recommendation: Create a National Declassification Initiative to craft the necessary procedures and standards for an executive branch-wide declassification effort. The effort would include training in recognizing other affected agencies.
2. Previously declassified records at NARA were removed from public access when continued classification was not appropriate.	Recommendation: NARA and the agencies involved must work to return to public access as quickly as possible those records not appropriate for classification.
3. Agencies reclassified records that had been declassified under proper authority.	Recommendation: The recommendation from number one above must be applied to all records, whether the records were classified appropriately or pulled for possible reclassification.
4. In one instance, unclassified records were deliberately removed from public access by NARA.	Recommendation: The "complexity of the issues" in this instance requires ongoing ISOO involvement.
5. Sufficient judgment is not always applied when withdrawing previously declassified records from public access.	Recommendation: The recommendation from number one above must include collaboration between NARA and the agencies in determining the appropriateness of any action and that provisions for appeal of any review are provided.
6. Sufficient quality control and oversight has not been provided for the process.	Recommendation: Greater quality control is required throughout the review process. ISOO should regularly audit any future review activities.
7. Sufficient documentation is not being maintained for declassified records.	Recommendation: Within sixty days ISOO and the affected agencies "must" develop the specific documentation to accompany any declassification actions. These should be part of the National Declassification Initiative mentioned in number one above.
8. NARA has not kept pace with re-review and declassification activities.	Recommendation: NARA "must" redesign its current procedures and practices to guarantee that records are processed and made available to the public as soon as legally possible. NARA must exercise greater oversight of agency activities.
9. Standards for re-review of declassified records have not been created.	Recommendation: A draft protocol (attachment two of the Audit Report) has been prepared and the affected agencies have agreed to follow this until an official procedure has been formulated.
10. Current referral process for review by affected agencies is not adequate.	Recommendation: Create a National Declassification Initiative to craft the necessary procedures for an executive branch-wide declassification effort.

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Figure 1. Findings of the Audit Report

## Concluding Thoughts

Was John Jay correct when he wrote that it is “better to keep many unimportant things secret, than by observing too little reserve?”<sup>19</sup> Certainly many in the current political leadership in Washington believe that less public access to information of any kind is better. As has been seen far too often in the past six years, many officials in Washington hold the public’s right to know in outright contempt.<sup>20</sup> Unfortunately, the staff members at the National Archives who “acquiesced” to the secret re-review appear to be of the same mindset.<sup>21</sup> These officials not only went along with the re-review, but also agreed that the effort should be kept secret from the public—not, apparently, out of concern about the loss of content (which is lamentable), but rather from the greater political fear that the public might find out about the re-review project and be upset, as indeed they were.<sup>22</sup> Had the program not been outed by such individuals as Aid, Shane, and Thomas Blanton of the National Security Archive, one has to conclude that the secret re-review program would still be underway.<sup>23</sup>

However, the academic community and users of government information should be pleased that the archivist of the United States, Allen Weinstein, moved as quickly as he did to halt the various projects and to call for an examination of the process. Weinstein, in his keynote address at the April meeting of the Mid-Atlantic Archivists Conference in Baltimore, acknowledged that the program should never have been conducted in secret, and that future re-review efforts, if any, would be as transparent as possible.<sup>24</sup> But true transparency—when talking about classified intelligence—is a nebulous quality at best. What one agency may see as transparent, another may see as excessive and perhaps dangerous access. As Information Security Oversight Office director Bill Leonard pointed out, in his message accompanying the Audit Report, “the classification process is a tool that must be wielded with precision.”<sup>25</sup> Yet most of the agencies involved appear to have approached the task with a chainsaw rather than a scalpel. When agency representatives are allowed to pull masses of innocent documents in order to purposefully obscure a few items that are truly secret, and thereby overwhelm the system, an open process is not likely to develop.

Dovetailing with this—and featured prominently as part of the findings—is the far more significant fact of how unprepared NARA was to contend with the scale of requests for review. As the Audit Report makes clear, NARA lost control of the re-review process. For some materials, the original record structure was destroyed by the agencies; in other instances, the agencies cannot account for all material they pulled, so NARA still does not know *exactly* what was removed from some files. Certainly there are individual documents, records, and even entire series that, in the interest of national security, must remain closed to the public and ISOO should do everything it can to facilitate that process. However, NARA and ISOO also have an obligation to preserve the historical record for future researchers, and that

doesn’t appear to have been a key consideration by NARA at the beginning of the process.<sup>26</sup> This failure may be due to a lack of staffing and funds, which, as suggested in the Audit Report, resulted in a lack of attention to the details of the process—essentially NARA took its eye off the ball. It is also possible that NARA got outmaneuvered by bigger agencies that could play the “national security” trump card and could not say “no” even if it had wanted to. However it happened, it doesn’t appear that NARA, despite its good intentions, had the clout or the administrative support necessary in its dealings with the agencies involved to fully protect the public’s right to know. Thus it is imperative that the library community and other stakeholders not consider these events to be closed with the publication of the Audit Report. The library community should urge Congress to improve ISOO funding and support so that staff are not overwhelmed in their important work. GODORT can do this in part by adding its support to the Audit Report’s proposal to revise 32 CFR clarifying prohibitions and limitations on classification by agencies.<sup>27</sup> Finally, GODORT could more carefully monitor NARA to help ensure that future re-review efforts are indeed transparent and 100 percent appropriate. ■

*Bill Sleeman, Assistant Director of Technical Services, Thurgood Marshall Law Library, The University of Maryland School of Law, bsleeman@law.umaryland.edu.*

## Notes and References

1. Although “reclassification” is not technically accurate for the re-reviews undertaken it is the phrase that has caught on in the media about the event. In this piece I will use “re-review” as shorthand for the overall event and provide specific examples of other activities as needed; Shane, Scott. “U.S. Reclassifies Many Documents in Secret Review.” *The New York Times*, Feb. 21, 2006. [www.nytimes.com](http://www.nytimes.com).
2. The agencies identified in NARA’s audit report are the United States Air Force, Central Intelligence Agency, Federal Emergency Management Agency, Department of Energy, and the National Archives and Records Administration.
3. Shane, Scott. “Since 2001, Sharp Increase in the Number of Documents Classified by the Government.” *New York Times*. July 3, 2005, International sec.: 12; U.S. Department of State. Advisory Committee on Historical Diplomatic Documentation, Dec. 2–3, 2002. Minutes. Available at [www.fas.org/sgp/advisory/state/hac1202.html](http://www.fas.org/sgp/advisory/state/hac1202.html).
4. National Archives and Records Administration. Information Security Oversight Office. *Audit Report: Withdrawal of Records from Public Access at the National Archives and Records Administration for Classification Purposes*. Apr. 26, 2006. [www.archives.gov/isoo/reports/2006-audit-report.pdf](http://www.archives.gov/isoo/reports/2006-audit-report.pdf).
5. These 26,000 records could be a single page or multiple pages related to a particular topic, thus leading to the confusion about the total number of pages involved.

- The Audit Report is not completely clear on this, as it indicates some materials were not available to the audit compilers for analysis, and in fact they admit that they are not sure how much material—in some instances—was actually pulled, nor can the agencies that pulled the information account for the material. See for example *Audit Report*, 10.
6. United States. Commission on Protecting and Reducing Government Secrecy. *Report of the Commission on Protecting and Reducing Government Secrecy, Pursuant to Public Law 236, 103rd Congress* (Washington, D.C.: GPO, 1997): 52.
  7. Relyea, Harold C. *Security Classification Policy and Procedure: E.O. 12958, as Amended* (Washington, D.C.: Library of Congress, Congressional Research Service, 2005).
  8. Public Citizen. "Analysis of Executive Order 13292: Changes in Classification Policy Imposed by the Bush Administration Executive Order." [www.bushsecrecy.org](http://www.bushsecrecy.org).
  9. 32 CFR 2001.13 (2005).
  10. *Audit Report*, 20. See also Shane, Scott. "Why the Secrecy? Only the Bureaucrats Know." *The New York Times*, Apr. 16, 2006. [www.nytimes.com](http://www.nytimes.com).
  11. *Audit Report*, 3.
  12. House Committee on Government Reform, Subcommittee on National Security, Emerging Threats and International Relations. *Drowning in a Sea of Faux Secrets: Policies on Handling of Classified and Sensitive Information*. 109th Cong., 2nd sess., March 14, 2006. <http://reform.house.gov/NSETIR/Hearings/EventSingle.aspx?EventID=40820>.
  13. *Audit Report*, 3–4.
  14. *Ibid.*, 7.
  15. *Ibid.*, 9.
  16. "Russia Provides Scant Help as U.S. Searches for MIAs." *The Baltimore Sun*, May 18, 2006. [www.baltimoresun.com](http://www.baltimoresun.com).
  17. For a definition of the agencies with "intelligence" responsibilities see Best, Richard A., Jr., *Intelligence Issues for Congress. CRS Issue Brief for Congress* (Washington, D.C.: Library of Congress, Congressional Research Service, updated Apr. 10, 2006): 2.
  18. *Audit Report*, 18–25.
  19. As quoted in: White, Laura A. "The Need for Government Secrecy: Why the U.S. Government Must Be Able to Withhold Information in the Interest of National Security." *Virginia Journal of International Law* 43, no. 4 (Summer 2003): 1073.
  20. Silva, Mark. "Cheney Won't Explain Records Classification." *The Baltimore Sun*. Apr. 30, 2006: 18A.
  21. *Audit Report*, 2.
  22. See, for example, Craig, Bruce, ed. "A Home Run for Historians and Openness Advocates in Exposing Government Reclassification Efforts." *NCH Washington Update* 12, no. 9 (Feb. 24, 2006). [www.h-net.org/~nch/](http://www.h-net.org/~nch/) or Librus. "Sanitizing American History through Reclassification." *PoliticalCortex* (Mar. 2, 2006), [www.political-cortex.com](http://www.political-cortex.com)
  23. National Security Archive. "Secret Understanding Between National Archives and CIA Exposes Framework for Surreptitious Reclassification Program." Apr. 19, 2006. [www.gwu.edu/~nsarchiv/news/20060419](http://www.gwu.edu/~nsarchiv/news/20060419).
  24. Presentation by Archivist of the United States Allen Weinstein at the Annual Meeting of the Mid-Atlantic Archivist Conference, Apr. 21, 2006. (Notes on file with author.)
  25. *Audit Report, Attachment 1. ISOO Director's Message*. [www.archives.gov/isoo/reports/2006-audit-report-attach-1.pdf](http://www.archives.gov/isoo/reports/2006-audit-report-attach-1.pdf): 1.
  26. This basic proposition, often overlooked by those who oppose any form of government secrecy, was asserted in the "Moynihan Report" on government secrecy. United States. *Commission on Protecting and Reducing Government Secrecy. Report of the Commission on Protecting and Reducing Government Secrecy, Pursuant to Public Law 236, 103rd Congress*. S. doc 105-2 (Washington, D.C.: GPO, 1997), 49.
  27. *Audit Report, Attachment 2. Interim Guidelines Governing Re-review of Previously Declassified Records at the National Archives*. [www.archives.gov/isoo/reports/2006-audit-report-attach-2.pdf](http://www.archives.gov/isoo/reports/2006-audit-report-attach-2.pdf).