September 24, 2014

Dear Interagency Classification Reform Committee Members:

We appreciated the chance to meet with you earlier this month. It was a very productive exchange, and we hope it represents the beginning of an ongoing dialogue between the Classification Reform Committee (CRC) and open government advocates. As we stated in the meeting, we were early supporters of the creation of your committee, and we believe your work is vital both to national security and to the proper functioning of our democracy.

We know that one of your tasks is to consider the 2012 recommendations of the Public Interest Declassification Board (PIDB). To that end, we thought it might be helpful for you to see our commentary on the PIDB's report. Our responses to the PIDB's specific recommendations, which we provided to the PIDB in private communications, are attached.

In addition, at our meeting, we were heartened to hear you acknowledge that your mandate goes beyond considering the PIDB's recommendations, and encompasses classification reform more broadly. As you perform this crucial role, we urge you to consider the following reform measures, which we all support and which we discussed at our meeting:

(1) *Create a system of self-cancelling classification.* We believe that the PIDB's fifth recommendation (to create a system of self-cancelling classification) should be strengthened and expanded. We think that all classified information that is operational or based on a specific date or event should be automatically declassified when that operation or event passes without the option for additional review or exemption. This information should be specially marked "No Review" at the time of creation, and an actual automatic declassification process should be created.

Of course, we recognize that there may be cases where circumstances change and information needs to remain classified for longer than originally specified. But for these types of documents, we think the default should be automatic declassification, with a special, non-automated process available for extending the deadline under changed circumstances.

As the CRC no doubt recognizes, without creating truly automatic declassification for at least some categories of documents, there is no realistic possibility of declassification efforts keeping pace with classification in the electronic information age.

(2) *Expand and improve Mandatory Declassification Review*. More than any other disclosure mechanism available to the public, Mandatory Declassification Review (MDR) results in the declassification of information that can safely be released. However, the process is time-consuming – with some appeals pending before the Interagency Security Classification Appeals Panel (ISCAP) for years – and is unavailable in many instances. We therefore ask you to consider the following measures:

(a) *Create an "expedited review" track.* Under the Freedom of Information Act (FOIA), expedited review is available for requests where there is a compelling need. There is no parallel provision for MDR. We believe the MDR process should include an expedited review option, with priority given to requests for information that would contribute significantly to a current public debate. A particularly compelling need would justify bypassing the administrative appeals process and going straight to ISCAP, which would then work within a suitably compressed time frame.

(b) *Remove arbitrary limits on requests*. MDR is not available for information contained within an intelligence "operational file"; information that is the subject of pending litigation; or information required to be "submitted for prepublication review or other administrative process pursuant to an approved nondisclosure agreement." Often, these categories of information are precisely those where the public interest in disclosure is highest. In criminal cases and habeas corpus cases, there is no practical way for attorneys to avoid litigation, and the limits on MDR can make it impossible to obtain independent review of the propriety of maintaining classification. Moreover, citizens seeking disclosure should not have to choose between a years-long, backlogged ISCAP process and Freedom of Information Act litigation with an extremely deferential standard of review. These limitations are needless barriers to timely declassification and should be removed.

(c) *Prohibit excessive fees*. Agencies' MDR fees typically mirror their FOIA fees. While the fee structures vary by agency, they generally are fair and prohibit agencies from requiring a requester to make advance payments unless an agency estimates the fees will be exorbitant. On September 23, 2011, however, the CIA posted into the Federal Register – without a notice for public comment – changes to its MDR fee regulations establishing that declassification reviews would cost requesters up to $72 per hour, *even if no information was found or released*. To submit a request, members of the public would have to agree to pay a minimum of $15. After thirty-six groups petitioned the CIA to repeal its regulations and one group filed suit, the CIA agreed to suspend implementation pending the lawsuit's outcome. The CIA's attempt in this instance to price requesters out of filing requests is antithetical to the principles of open government, or a sustainable system of classification.

(3) *Ensure accountability for improper classification.* Under the current system, the person charged with reviewing the propriety of a classification decision (for instance, if an authorized holder brings a challenge) may be the very Original Classification Authority who classified the information in the first place. Such obvious conflicts of interest weaken existing oversight mechanisms.

More broadly, there is no regular system in place for agencies to monitor classification decisions and to impose accountability for overclassification that is routine, deliberate, or grossly negligent. We recognize that original classification decisions are often judgment calls that are difficult to second-guess. But in those instances in which original classification decisions are clearly improper, accountability is critical. Moreover, improper uses of *derivative* classification authority should be relatively easy to identify.

The CRC therefore should consider measures, possibly in the nature of pilot projects, to implement accountability for overclassification in appropriate cases. (The Brennan Center suggested one model in its 2011 report *Reducing Overclassification Through Accountability*.)

(4) *Clarify limits on classification of "intelligence sources and methods."* The National Security Act of 1947 prohibits the disclosure of "intelligence sources and methods." Unfortunately, the statute does not define these terms. Construed as broadly as possible, "sources" could include newspaper articles and other open-source materials, while "methods" could include the simple fact that intelligence agencies rely on human intelligence. Such an interpretation would lead to absurd results and would serve no valid national security purpose, thus violating basic principles of statutory construction.

A sensible working definition of "intelligence sources and methods" is in order. At a minimum, the president should specify that he interprets these terms, as used in the National Security Act, to include only those techniques the disclosure of which reasonably could be expected to harm national security.

(5) *Rescue declassification.* Notwithstanding the efforts of the National Declassification Center (NDC), the current declassification system is hopelessly slow and inefficient, errs significantly on the side of continued classification, and is simply no match for the tidal wave of classified electronic information that will pour into the National Archives in coming years. In addition to creating a system of self-cancelling classification for certain categories of records, as discussed above, CRC should consider the following measures:

(a) *End all agency equities at 25 years.* The best mechanism to fundamentally transform classification is already required under the president's executive order on classification; unfortunately, it is not followed by declassification authorities. With limited exceptions, Executive Order 13526 mandates that, "[u]pon reaching the date or event [specified for declassification], the information shall be automatically declassified." But instead, classified material that reaches the declassification date is referred to every agency that has potential "equities" in the information for line-by-line review, stalling declassification for years at a time (and sometimes indefinitely).

President Obama instructed the NDC in his December 29, 2009, memorandum on Implementation of the Executive Order, "Classified National Security Information," that "further referrals of these records [records of permanent historical value] are not required except for those containing information that would clearly and demonstrably reveal [confidential human sources or key WMD design concepts]."* Despite this memo, the referral equity process for these historic documents has continued, rather than the President's intended, streamlined process. The CRC at a minimum should ensure enforcement of the president's order. It also should recommend that all agency equities end at 25 years, at which time the sole responsibility for declassification should lie with NDC and NARA.

(b) *Speed up the RD and FRD review process.* The 1999 Kyl-Lott amendments that require the Department of Energy to review all information "not highly unlikely to contain RD/FRD" (Restricted Data and Formerly Restricted Data) throughout all U.S. National

* Presidential Memorandum - Implementation of the Executive Order, "Classified National Security Information," December 29, 2009, http://www.whitehouse.gov/the-press-office/presidential-memorandum-implementation-executive-order-classified-national-security.

Archives and presidential libraries, and mandate that all agencies do a "Kyl-Lott" review for RD and FRD before declassifying documents in the future, has dramatically impeded the timely declassification of historically important records. The key to speeding up this process is for the administration and agency leadership to empower declassifiers to be less reticent about labeling documents as "highly unlikely to contain" RD or FRD, and, when RD/FRD review is truly necessary, to conduct it at the same time as declassification review.

(c) *Establish a process to ensure that public interest declassification occurs.* As the General Counsel for the Director of National Intelligence recently urged,† classifiers and declassifiers should make full use of the authority granted in Executive Order 13526 to declassify information when "public interest in disclosure outweighs the damage to the national security that might reasonably be expected from disclosure."‡ To that end, the CRC should take steps to develop and institutionalize a process to ensure that the public interest is considered during classification and declassification decisions.

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We hope that the above recommendations, along with the attached response to the PIDB's report, are useful. We are happy to meet with you to discuss these further, and we look forward to being in touch as you move forward with your work.

Sincerely,

Brennan Center for Justice at NYU School of Law
The Constitution Project
Federation of American Scientists
National Security Archive
OpenTheGovernment.org

† Keynote Remarks as Prepared for Delivery: Mr. Robert S. Litt, General Counsel, ODNI, American University Washington College of Law: Freedom of Information Day Celebration, March 18, 2014, http://icontherecord.tumblr.com/post/79998577649/as-prepared-for-delivery-remarks-of-odni-general.

‡ Executive Order 13526- Classified National Security Information, December 29, 2009, http://www.whitehouse.gov/the-press-office/executive-order-classified-national-security-information.