

January 28, 2011

Mr. Jacob J. Lew
Director
The Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Dear Director Lew:

We write with regard to the President's new initiative to review the implementation of safeguarding procedures for classified information in the wake of the WikiLeaks disclosures. This effort is a necessary and commendable response to the WikiLeaks matter. However, we want to ensure that the review is carried out in a manner that is targeted to the problem at hand and does not sweep so broadly as to infringe on protected constitutional rights and privacy interests of employees.

The newly required assessments are detailed in a January 3rd memo from the Office of Management and Budget (OMB) and an attached Memo from the National Counterintelligence Executive and the Information Security Oversight Office. They require agencies that handle classified information to assess weaknesses or gaps in information security with respect to an attached 9-page list of questions, and to formulate plans to resolve the issues. The assessments are to be completed by January 28.

Most of the actions suggested by the federal government's on-going assessments of classified information policies are a natural, and appropriate, response to address some of the vulnerabilities in our current systems that were exposed in the massive disclosure of classified national security information by WikiLeaks. For the most part, the guidelines focus appropriately on actual safeguarding policies and practices and oversight measures. Those parts of the review that address personnel security, however, should focus on standards-based and publicly-reviewed rules for personnel security practices.

Some of the suggested steps, however, are not narrowly tailored to the security review's purpose, and may intrude upon protected First Amendment rights. In addition, focusing agency attention on such inquiries could divert agency resources from actions needed to actually improve information security.

A question of particular concern is the suggestion that agencies monitor employees' pre- and post-employment activities or participation in on-line media data mining sites like WikiLeaks or Open Leaks. It is not at all clear how agencies could accomplish this, and, more importantly, such monitoring sweeps so broadly as to threaten constitutional rights. Surely pre- and post-employment actions cannot be considered job-related activities that can or should be monitored by government agencies absent probable cause and a judicially-authorized warrant.

The memo also suggests agencies require employees to report all contact with the media. The policy does not distinguish between job-related contacts and those conducted in an employee's capacity as a private citizen. The suggestions also appear to apply to all employees in an agency, regardless of their access to classified information. We understand this may be a common policy within the intelligence community, but the universe of agencies that can create and use classified information is much wider and more diverse. Adopting this policy across the board in such agencies would unnecessarily clamp down on the ability of federal employees to openly discuss and explain how the agency is fulfilling its duties to the public.

We also are particularly concerned that the memo may provide the basis for profiling of, and creating suspicious activity files on, employees. Some of the suggested questions would permit targeting of employees who have complained of discrimination, waste, fraud, abuse or illegality within the agency or may simply be unhappy with their agency or supervisor. Those profiles might then be used as a pretext to investigate, fire or otherwise retaliate against employees who don't fall in line or who expose waste, fraud, and abuse to others inside and outside the government.

We applaud the federal government for taking prompt action to improve the security of national security information. However, such efforts must be focused on the task at hand, and we urge you not to craft policies that encourage agencies to unduly restrict free speech, or otherwise distract agencies from actually improving information security.

Sincerely,

Laura W. Murphy, Director, Washington Legislative Office
American Civil Liberties Union

Lynne Bradley, Director, Office of Government Relations
American Library Association

Elizabeth Goitein, Co-Director, Liberty and National Security Program
Brennan Center for Justice

Anne Weismann, Chief Counsel
Citizens for Responsibility and Ethics in Washington

Sharon Bradford Franklin, Senior Counsel, Rule of Law Program
The Constitution Project

Mark Cohen, Executive Director
Government Accountability Project

Sean Moulton, Director, Federal Information Policy
OMB Watch

Patrice McDermott, Director
OpenTheGovernment.org

Danielle Brian, Executive Director
Project On Government Oversight

cc: William J. Bosanko Director, Information Security Oversight Office
Robert M. Bryant, National Counterintelligence Executive