

Access to Classified and Other Restricted Information: Congressional Rights

1. **The executive branch does not have a monopoly on the right to information.** Members of Congress and their staff need to stop perceiving themselves as subservient to or an advisory group for the executive branch. The Constitution clearly delineates Congressional authority to receive information, including classified information, as part of their legislative and oversight duty. This right has been upheld by the Judicial Branch.
2. **Recognize that resistance from the executive branch, various agencies, and corporate entities is part of the process.** The executive branch has always taken exaggerated positions regarding its right to withhold information from Congress. Do not take it personally or hesitate to employ stringent tactics. Remember that this is about your obligation to your boss's constituents and the promises he or she made when they took the oath of office.
3. **Giving information to Congress is not the same as giving it to the public.** Some government agencies have taken the tactic of routing Congressional requests through their Freedom of Information Act offices which redact information under the FOIA which the public is exempted from seeing. Congress has the right to receive information that the public does not.
4. **Know your arsenal.** Members of Congress have successfully used a variety of tactics to compel disclosure of information. There are legitimate options that must be used to enforce Congress' rights and responsibilities, including:
 - **Subpoena Power.** Congressional Committees and their Chairmen have varying degrees of authority to issue subpoenas for information. Agency officials who refuse to comply with a subpoena can be held in contempt of Congress.
 - **Senate Holds.** Senators can put a hold on an executive branch nomination or on legislation in order to compel disclosure.
 - **Power of the Purse.** Through authorization and appropriation bills, Congress can exert its authority over government agencies, for example, by taking away desired funding.
 - **Congressional Declassification.** Congress has rules for declassifying information, but these rules have never been used according to experts.
5. **Circumvent official channels.** When public affairs offices are obstructing your oversight, whistleblowers and concerned insiders can provide information to you. The Lloyd LaFollette Act of 1912 protects the right of the Congress to receive information from civil servants. However, take care to protect the identities of sources who can face retaliation if an agency discovers they have leaked information.

6. **Don't be fooled by pseudo-classifications.** Post 9/11, government agencies have dramatically expanded the use of pseudo-classifications such as "Controlled Unclassified Information," "Sensitive But Unclassified," "Controlled But Unclassified," and "For Official Use Only." These pseudo-classifications are a veritable "wild west" of government secrecy in which almost anything can be marked secret by an agency. There are currently more than 100 different policies for such information across the executive branch. However, Congress not only has the right to receive this information, but it should take an active role in challenging the frequent abuses of secrecy which are occurring.
7. **Be patient and persistent.** The executive branch will try to use the Constitution as a justification to withhold information. Agencies will try and test your resolve by giving you just a little bit of the puzzle at a time hoping that your interest and the pressure to comply will drop off. Remember, there is always more you can do.
8. **Do not accept the argument that others have already investigated and found nothing.** Agencies will try to deter you from getting the information. They may say that the material has already been reviewed by another committee, the Inspector General etc., and therefore you don't really have a need for it. This is just part of the dialogue, but do not let it be the end.
9. **Fight and win the public relations battle.** This can be done either through the press or by conducting hearings. If the administration is preventing you from fulfilling your oversight responsibility, make sure people know about it and that they are the ones who look bad because of it. You want them to be painted as uncooperative, not you painted as ineffectual.
10. **Work with other investigators.** Find out whether the Inspector General or the GAO are doing any investigations. Check with other committees that may have jurisdiction. Oversight is not a zero sum game, helping others does not harm your investigation.
11. **Consult the experts.** Separation of powers experts at the Congressional Research Service can help you sort out how to best challenge executive branch secrecy assertions.

For more information:

Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure, Congressional Research Service, Order Code RL 34097, May 8, 2014.

The Protection of Classified Information: The Legal Framework, Congressional Research Service, Order Code RS 21900, January 10, 2013.

Presidential Claims of Executive Privilege: History, Law, Practice, and Recent Developments, Congressional Research Service, Order Code R 42670, August 21, 2012.

Protection of Classified Information by Congress: Practices and Proposals, Congressional Research Service, Order Code RS 20748, August 31, 2011.

Congressional Oversight Manual, Congressional Research Service, Order Code RL 30240, January 6, 2011.

Presidential Claims of Executive Privilege: History, Law, Practice and Recent Developments, Congressional Research Service, Order Code RL 30319, September 17, 2007

Congressional Access to Classified National Security Information, Center for National Security Studies, March, 2007.

The Protection of Classified Information: The Legal Framework, Congressional Research Service, Order Code RS 21900, December 21, 2006.

Protection of Classified Information by Congress: Practices and Proposals, Congressional Research Service, Order Code RS20748, April 5, 2006.

PSEUDO-SECRETS: A Freedom of Information Audit of the U.S. Government's Policies on Sensitive Unclassified Information, National Security Archive, March 14, 2006.

Statutory Procedures Under Which Congress Is To Be Informed of U.S. Intelligence Activities, Including Covert Actions, Congressional Research Service Memorandum, January 18, 2006.

Congressional Access to Executive Branch Information: Legislative Tools, Congressional Research Service, Order Code RL30966, May 17, 2001.