

Tip Sheet on Congressional Access to Classified, Sensitive, or Privileged Information

In the course of its oversight and investigative work, Congress sometimes requires executive branch agencies or companies to produce classified, sensitive, privileged, or otherwise restricted information.¹ The executive branch does not have a monopoly on the right to information. Members of Congress and the 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 your legislative and oversight duty.² Indeed, Congress is the only branch of government with constitutionally explicit original classification authority, per Article I, Sec. 5 of the Constitution. This right has been upheld by the judicial branch.

You should consult with legal counsel before requesting, compelling the production of, and working with any of the categories of information. Rules and practices for handling such information might depend on your employing office, your security clearance, and arrangements made for protecting the information, including entering into a nondisclosure agreement or placing the information under lock and key.³

The following is a list of laws, Executive Orders, rules, and regulations that might apply to certain types of information:

- Classified Information (restricted, confidential, secret, and top secret) pursuant to Executive Order 13526⁴
- Controlled Unclassified Information (CUI) subject to Executive Order 13556, forthcoming National Archive and Records Administration regulations, and agency-specific regulations
- Executive Privileges⁵
- Privacy Act under 5 U.S.C. § 552a
- Tax information subject to 21 U.S.C. § 6103
- Health Insurance Portability and Accountability Act of 1996 (HIPAA)
- Trade Secrets Act under 18 U.S.C. §§ 1831-1839
- Exemptions to the Freedom of Information Act at 5 U.S.C. § 552
- Speech or Debate Clause

¹ Updates and changes to the materials we've listed are common. Please check to see if any new reports have been issued or changes to the laws or rules have been made.

² Congressional Research Service, *Congressional Access to Executive Branch Information: Legislative Tools*, May 17, 2001.

³ Congressional Research Service, *Congressional Oversight Manual*, December 19, 2014.

⁴ Congressional Research Service, *Classified Information Policy and Executive Order 13526*, December 10, 2010; Congressional Research Service, *The Protection of Classified Information: The Legal Framework*, January 10, 2013; Congressional Research Service, *Protection of Classified Information by Congress: Practices and Proposals*, August 31, 2011; Kate Martin, *Congressional Access to Classified National Security Information*, a joint product of OpenTheGovernment.org, the Center for National Security Studies, and the Center for American Progress, March 2007.

⁵ Congressional Research Service, *Presidential Claims of Executive Privilege: History, Law, Practice, and Recent Developments*, August 21, 2012. (Hereinafter *Presidential Claims of Executive Privilege*)

You are not completely barred from receiving information from a whistleblower or an agency when the executive branch claims that information is classified, sensitive, or privileged. Requests for certain information might require a lot of work and, in certain instances, agreements. Once received, you must also pay close attention to the risks to you, your office, and the sources that provided the information if you intentionally or unintentionally publicly release restricted or sensitive information.

Classified Information

Everyone knows that clearances are everything when working on certain defense and intelligence investigations. If you have a proper clearance, the executive branch may still attempt to argue that you lack the “need to know”—but Congress is in a better position to evaluate its own need to know than is the executive branch, and you should resist such arguments. You might have clearance to receive the information, initiate a procedural challenge to whether the information was classified properly, or request that the information be redacted or declassified: consult with counsel to ensure that you are properly cleared. If your office received information that should not have been shared, counsel should report it to the appropriate security office (we talk more about working with whistleblowers below).

If you don’t have the proper clearance, you should remember that Members of Congress have access to classified information by virtue of their position. If the agency still isn’t forthcoming with classified information, even if you don’t have a clearance you can consider filing a classification challenge or working with an appropriate committee to request a classification review by the Public Interest Declassification Board (PIDB).⁶ This is an uphill battle because the PIDB has limited authority to recommend declassification after examining classified documents, and the final decision to declassify records or information requires White House approval, but it might be worth it in some cases. Declassification provides access to information, but it also allows the information to be publicly released if Congress chooses. Sometimes, negotiations between the two branches might have a quicker and better result, so also consider the power of persuasion to gain access to classified information.

In some cases, Congress and the executive branch can negotiate an arrangement so that Congress can obtain, see, or be briefed on the classified information. In addition, the House and Senate can hold secret sessions and receive confidential information, which must be protected.⁷ Congress needs to be prepared and equipped to protect that information.

Although you may be allowed to receive this information, national security and intelligence community (IC) whistleblowers are not adequately protected for making disclosures to Congress. There is only limited administrative recourse if an IC whistleblower faces retaliation for going to Congress, and those protections are only available if the disclosure is a matter of “urgent concern” and is first made to an IG and then to the congressional intelligence committees following certain procedures. These procedures are described in the Intelligence Community Whistleblower Protection Act of 1998 (Section 8H of the Inspector General Act of 1978) and protected under Presidential Policy Directive 19 (PPD-19).

⁶ 50 U.S.C § 3161 notes (permitting a classification review upon the request of one of the committees with jurisdiction).

⁷ Constitution, Article I, Section 5 (“Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy....”). See House Rules X, clause 11, and XVII, clause 9; and Senate Rules XXI, XXIX, XXXI. See also Congressional Research Service, *Secret Sessions of the House and Senate: Authority, Confidentiality, and Frequency*, December 30, 2014.

If you need to protect a source who is exposing classified information, consider using a Sensitive Compartmented Information Facility (SCIF). A SCIF can be used as long as you are receiving the information and not sharing classified information.

If the matter involves wrongdoing in the Departments of Defense or State, or the intelligence community, and your Member does not have confidence that the House or Senate Intelligence or Armed Services Committees will be receptive to the IC whistleblower's concerns, try to use a SCIF not under the active control of the committee in order to protect the source. If the whistleblower's complaint involves non-Special Compartmented Information (SCI), consultation with the House Committee on Oversight and Government Reform may be in order, as they may be able to receive the information and take on the whistleblower's case.

The Government Accountability Office (GAO) has SCIF space and is also a potential avenue for the IC whistleblower to report his or her concerns. Consult with the Comptroller General's counsel and Congressional Affairs office about their procedures in these kinds of cases.

A Member of Congress can often protect a whistleblower if a dedicated staffer is allowed to make the whistleblower a priority. During investigative and regular authorization or appropriations hearings, agency officials can be questioned about retaliation. If your Member does not sit on the committee of jurisdiction, it may still be possible for your Member to sit in on the hearing and have the opportunity to ask questions pursuant to a unanimous consent agreement prior to the hearing. You can send request letters asking for records or a response, or even request that an IG open a reprisal investigation into a protected disclosure. Let the agency know you're watching, but ensure that the source is comfortable being a topic of discussion. Retaliation can come in many forms and can happen long after your work is completed, so be mindful of exposing a source.

Once Congress has access to classified information, it might find that the classification markings are being used to conceal information from the public. You can always turn to the PIDB and request declassification or file a classification challenge. Additionally, Congress can make classified information publicly available pursuant to their Rules in instances when the public interest would be served by a disclosure. The House rule allowing disclosure by the House Permanent Select Committee on Intelligence can be found in Rules of the 114th Congress, U.S. House of Representatives, Rule X, Section 11(g)(1). Senate Resolution 400, section 8, agreed to May 19, 1976 (94th Congress, 2nd Session) allows the Senate to make a public disclosure. This step might be controversial, so involve your boss and ensure that counsel is onboard.

Controlled Unclassified Information

Congress has a right to information marked with any one of the many controlled unclassified information (CUI) markings, just as it has a right to classified information. CUI markings come in all shapes and acronyms, including For Official Use Only (FOUO), Sensitive Security Information (SSI), and Law Enforcement Sensitive (LES) to name just a few. As with classified information, safeguarding CUI is advised when warranted. However, CUI labels do not carry the same legal authority as classified markings. Agency CUI markings are administratively created and apply to government officials and authorized holders, but they lack statutory authority to bind anyone outside the agency. Such markings have grown in number and use, and some policymakers are questioning the need for all of them and their use to conceal embarrassing government information. The proliferation of CUI markings doesn't limit your access to information so marked. For example, the Supreme Court held in early 2015 in *Homeland Security v. MacLean* that CUI markings did not remove whistleblower protections when former Air Marshall Robert MacLean

disclosed information that the agency considered CUI. You should push for such information from the agency and be comfortable receiving it from a source.

Unclassified Information

For information that isn't classified, you can push back on the agency or company, request a briefing, or seek the help of a committee. Additionally, Congress has a number of other options available to it when the executive branch or a company refuses to produce requested documents. These options include a subpoena,⁸ withholding funds, Senate holds on appointments, and conducting investigative and oversight hearings. Another legislative tool for forcing information from agencies is exclusive to the House: the *resolution of inquiry*, which requires a vote in the committee of jurisdiction on the request.⁹ The resolution of inquiry is "a simple resolution making a direct request or demand of the President or the head of an executive department to furnish the House of Representatives with specific factual information in the possession of the executive branch."¹⁰

A briefing or *in camera* review of records, while not compliant with a records request, can assist you in learning more about the policies and actions of others. Such briefings can also lead to arrangements to settle disputes, including narrowing a request and agreeing to certain redactions in order to receive copies of the records that you need.

When public affairs offices are obstructing your oversight, whistleblowers and concerned insiders can provide information to you. The Lloyd LaFollette Act of 1912 (5 U.S.C. § 7211) protects the right of 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.

Executive Privileges

A major obstacle to obtaining information is the executive branch invocation of executive privilege at the demand of the President. The executive privilege has been cited in numerous responses when executive branch officials have refused to comply with a congressional subpoena. The privilege has long been upheld to immunize certain White House officials in certain cases: "foreign relations and military affairs, two separate topics that are sometimes lumped together as 'state secrets,' law enforcement investigations, and confidential information that reveals the executive's 'deliberative process' with respect to policymaking."¹¹

A civil contempt of Congress order from a court and a trial is one option to challenge a privilege claim. That said, in most executive privilege cases, the better trick is to reach an agreement that preserves the privilege—an agreement to protect the executive branch's right to operate as an independent branch of government but to also provide congressional access to the requested

⁸ To combat non-compliance with a subpoena, Congress can exercise contempt powers or seek judicial enforcement. Congressional Research Service, *Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure*, May 8, 2014; See also Hon. David M. McIntosh, Hon. Mark Gitenstein, and Sean P. McDonnell, *Understanding Your Rights in Response to a Congressional Subpoena*, no date.

⁹ Louis Fisher, *The Politics of Executive Privilege*, Durham, North Carolina: Carolina Academic Press, 2004, chapter 7. http://www.loc.gov/law/help/usconlaw/pdf/fisher_politics_ch_07.pdf (Downloaded July 15, 2015) (Hereinafter *The Politics of Executive Privilege*)

¹⁰ U.S. Congress, House, *Deschler's Precedents of the United States House of Representatives*, H. Doc. 94-661, 94th Congress, Second Session, Vol. 7, Ch. 24, § 8. For more information on the resolution of inquiry, see *The Politics of Executive Privilege*.

¹¹ *Presidential Claims of Executive Privilege*, p. 8.

records. A conciliatory approach should be considered before taking more political or aggressive approaches that might actually hinder a quick resolution.

The executive branch also cites numerous testimonial privileges that conceal information from Congress, including constitutional protections and attorney-client, work-product, deliberative process, and state secrets privileges.¹²

Privacy Act

The Privacy Act, 5 U.S.C. § 552a, is one of the frequently cited statutes for withholding information from Congress. It is frequently raised in relation to personnel records, traveler records, and any database information related to individuals. Agency custodians have good reason to protect such information, but the statute explicitly authorizes disclosure of such information to committees and subcommittees of Congress¹³:

(b) **Conditions of Disclosure.**- No agency shall disclose any record...unless disclosure of the record would be—

* * *

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee....

The executive branch argues that this exemption is only available to majority staff when there is request letter from a chairman of a committee. However, there is nothing in the statute or in any case law that limits the right to receive such information to the majority or that requires a request letter from a chairman. The plain language of the statute authorizes disclosure to “any committee or subcommittee” regardless of whether the chairman or anyone at all requests the information.

Tax Information

Certain committees have a statutory right to tax information. According to 26 U.S.C. § 6103(f), the House Committee on Ways and Means, the chairman of the Senate Committee on Finance, and the chairman of the Joint Committee on Taxation have access to “any return or return information” specified in a request to the Internal Revenue Service. If the taxpayer can be identified, such information “shall be furnished to such committee only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure.” The information can generally be obtained after agreeing to restrict access to it, or to keep the material under controlled conditions, such as safeguarding information in a locked filing cabinet for which only the clerk or the lead investigator has the key.

Health Information

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) protects the privacy of individually identifiable health information. HIPAA is a common statute cited for withholding

¹² Morton Rosenberg, *When Congress Comes Calling: A Primer on the Principles, Practices, and Pragmatics of Legislative Inquiry*, the Constitution Project, 2009, pp. 25-43.

¹³ 5 U.S.C. § 552a(b)(9)

information from Congress, especially Department of Veterans Affairs medical records. Similar to obtaining tax information, a proposal to restrict access or place the materials in a controlled location will often result in reducing agency custodian concerns.

Trade Secrets and Privileges

Obtaining information from companies might also require some finagling. Companies are often protective of trade secrets, also known as commercial proprietary information, which are generally protected pursuant to 18 U.S.C. §§ 1831-1839 and 1905. Obtaining information from privately held companies can be more problematic. As witnessed during the October 2007 House Oversight and Government Reform Committee hearing on private security contracting in Iraq and Afghanistan, representatives of Blackwater were less than forthcoming with company information. Blackwater's justification was that "we are a private company, and there is a key word there, private."¹⁴ Companies and individuals also might withhold information from Congress by claiming attorney-client privilege or work product.

Despite those hindrances, Congress possesses very broad authority to conduct an investigation or hearing. Therefore, you still have the ability to request information, ask for a briefing, conduct an interview, or issue a subpoena. As advised above, arrangements that include certain restrictions or handling safeguards might be enough to obtain the information that you need without issuing a subpoena and potentially enforcing it in court.

However, public disclosure of trade secrets not protected by the Speech or Debate Clause (discussed later) puts your Member in jeopardy of potentially causing unintended loss or injury to a business or individual by releasing their sensitive or privileged data. Be careful what you release.

Exemptions to the Freedom of Information Act

In many instances the executive branch considers a congressional request letter to be no different from a request pursuant to FOIA from a member of the public. Courts have drawn a distinction between Congress as a body and a Member acting as a sole part of Congress, holding that FOIA exemptions cannot be used to withhold records from Congress—i.e., committee chairs—but can be used to withhold records from Members.¹⁵ Certainly you should fight an agency demand to submit a FOIA request and push back on that agency if information is withheld pursuant to a FOIA exemption. If the agency doesn't relent, find a committee or subcommittee chairman who has jurisdiction and is willing to submit a request letter to the agency. Congress has a right to receive information that the public does not. Also, it is important to remember and to remind agencies that FOIA is a disclosure statute and its exemptions are discretionary. A FOIA exemption, therefore, does not legally prevent an agency from releasing the information if it chooses to do so. It merely means that they are not legally required to release such information by FOIA.

Other Provisions

Additional provisions affecting the Departments of Defense and Energy and the intelligence community are found in multiple laws and regulations. If you are working with whistleblowers in any of those areas, you might want to review the following provisions for any specific restrictions

¹⁴ Testimony of Erik Prince, Chairman, The Prince Group, LLC and Blackwater USA, before the House Oversight and Government Reform Committee, Hearing on Private Security Contracting in Iraq and Afghanistan, October 2, 2007, p. 173.

¹⁵ *Murphy v. Dep't of the Army*, 613 F.2d 1151 (D.C. Cir. 1979).

placed on national security information, restricted data, or foreign intelligence and surveillance information: National Security Act (50 U.S.C. Ch. 44); Atomic Energy Act (10 CFR pt. 1045); and the Foreign Intelligence Surveillance Act, as amended (50 U.S.C. Ch. 36).

And then there are the Speech or Debate Protections...

In the 1970s, Senator Mike Gravel entered the classified Pentagon Papers into the Congressional Record, citing immunity based on the Constitution's Speech or Debate Clause.¹⁶ That clause provides immunity for a Member's legislative acts to allow free speech, debate, and deliberations without reprisal from other branches of government. Floor speeches and hearings offer Speech and Debate protections. The Supreme Court has recognized that the clause protects staff as well as Members, as long as they are acting in the course of their legislative or oversight duties. In the current environment, however, realize that statements in press releases or on social media most likely are not protected since they do not involve legislative activities.

Speech or Debate protections can apply in the context of classified information, as well as in the public release of unclassified information, but don't forget that House and Senate confidentiality rules may apply.¹⁷

Conclusion

Obtaining information isn't easy. In fact, considering all of the hindrances, it seems as though Congress will be in a perpetual fight to gain access to executive branch, company, or personal information. That might be the case, but understanding the rights and duties of all of the parties, and a few tricks to gain access to information, might make the difference between breaking a big investigation and not.

Recognize that resistance from the executive branch, corporate entities, and individuals 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 serve your boss's constituents and to help fulfill the promises to the nation he or she made upon taking the oath of office.

At the same time, keep in mind that your investigation or oversight hearing might harm a government mission or innocent people if you carelessly release classified or otherwise sensitive information. Moreover, remember that it is important to protect your sources or the whistleblowers, and that certain requests for information might place your sources in the hot seat. There might be liability for you and your office, but the stakes might be greater for the people assisting you.

¹⁶ Congressional Research Service, *The Speech or Debate Clause: Constitutional Background and Recent Developments*, August 8, 2012.

¹⁷ See footnote 7.