

Congressional Oversight Training Series  
Access to Classified and Proprietary Information:  
Congressional Rights Session  
February 2007

**Congressional Tip Sheet**

Obstacles:

The Executive tells Congress that it may not have access to classified information and/or other “privileged” information– it asserts executive privilege.

The Administration claims that only those with proper authority in the Executive Branch can declassify national security information.

Responses:

Congress has a number of options available to it when the Executive Branch refuses to share (turn over) classified information. These include: subpoena, contempt-of-Congress, withholding of funds; oversight.

Usually through negotiation Congress and the Executive can work out an arrangement. Congress needs to be prepared and equipped to protect classified information. When Congress is united across party lines and acts as an institution, it is at its most powerful. Be wary of legal showdowns and keep your counsel fully and regularly informed.

The process of declassification between Congress and the Executive is usually much less formal than using rules and involves negotiation between the two branches to declassify information or release declassified forms of the information.

Both chambers of Congress have passed rules allowing them to declassify information. Neither rule has been used by Congress.

The House rule allowing declassification by the House Permanent Select Committee on Intelligence can be found in Rules of the 109th Congress, U.S. House of Representatives, Rule X.

Senate Resolution 400, section 8, agreed to May 19, 1976 (94th Congress, 2nd Session) allows the Senate to declassify.

In the 1970s, Senator Mike Gravel entered the classified Pentagon Papers into the Congressional Record and cited immunity based on the Constitution's Speech or Debate Clause.

Congress has also created a Public Interest Declassification Board, but it has little power currently. It only has power to recommend declassification after examining classified documents at the request of congressional committees. But first the White House has to agree to allow it access to the documents.

Whistleblowers are warned not to present classified information to Congress. Even to the Intelligence Committee, even in closed session.

Agencies mark documents with control/safeguarding labels – such as “sensitive but unclassified, (SBU);” “sensitive security information, (SSI);” “for official use only, (FOUO)”– and assert (or leave the impression) that these carry the same weight as classified information labels.

Can Members receive classified information from a whistleblower in a manner that protects the whistleblower? The answer is not completely clear.

Members are allowed to receive this information, but national security and intelligence whistleblowers may not be adequately protected, as they are required to get permission first – opening them up to retaliation. Nor are they currently given any administrative or legal recourse in law if they are retaliated against (see the Intelligence Community Whistleblower Protection Act–called a “misnomer” by the current Acting Defense Department IG).

Even for non-national security whistleblowers, the current Whistleblower Protection Act rarely protects them. A Member of Congress or a Senator can often protect if a dedicated staffer is allowed to make the whistleblower a priority.

Also, during investigative and regular authorization / appropriations hearings, agency managers can be questioned about retaliation. But ensure that the whistleblower is comfortable being a topic during the hearing.

Congress has a right to this information, just as it has a right to national security classified information. As with classified information, safeguarding is advised *when it is warranted* (for example, almost everything in the Defense Department is labeled FOUO). However, in most cases, these labels do not carry the same weight as classified information. Most do not have a basis in statute and are instead administratively created and only apply internally within the agency. For an example of an abused control marking with few standards for its use, see the Homeland Security Department's Sensitive Security Information marking.

Oversee and follow-up on the efforts underway in the Information Sharing Environment program office at the Office of the Director of National Intelligence to reduce the more than 100 such markings to a dozen or fewer government-wide and to impose some controls on their creation and use.