

Document in response
to question 5.



October 4, 2004

MEMORANDUM FOR: Deputy Secretary
Under Secretaries
Commandant, U.S. Coast Guard
Director, Citizenship and Immigration Services
Assistant Secretary, Immigration and Customs Enforcement
Assistant Secretary, BTS Policy
Commissioner, Customs and Border Protection
General Counsel

FROM: Tom Ridge *Tom Ridge*

SUBJECT: Department of Homeland Security Guidelines for the Use of Classified Information in Immigration Proceedings

Please find attached the Department's Guidelines for the Use of Classified Information in Immigration Proceedings. These Guidelines establish the basic Department procedures for determining the limited circumstances in which the use of classified national security information in immigration proceedings is appropriate. Officials and supervisors should take appropriate steps to ensure that these Guidelines are followed. All questions regarding the scope and implementation of the Guidelines should be directed to your respective counsel offices.

Attachment

Department of Homeland Security
Guidelines for the Use of Classified Information in Immigration Proceedings

I. Introduction

These Guidelines set forth the Department's procedures governing the use of classified national security information (classified information) in immigration proceedings. The Department has a critical role in the protection of the United States through the use of its national security-related civil immigration authority. The Department will bring to bear the full weight of the law against individuals posing national security threats. To enable the Department to effectuate its role, Congress has equipped the Department with extensive enforcement tools, including the ability in certain circumstances to use classified evidence *in camera* and *ex parte*.¹ The Department must employ all such tools as appropriate in evaluating and countering national security threats.

At the same time, the Department must insure that it protects civil rights and civil liberties. Consequently, in balancing our national security needs with the imperative of protecting national freedom, the Secretary in his discretion has determined that classified information will be introduced in immigration proceedings only as a last resort, as defined in part IV.A below. The Guidelines will thus provide a process that serves the Department's goals of protecting the United States while maintaining the public's trust.

II. Scope of the Guidelines

These Guidelines apply only to cases where the Department contemplates that classified information will be formally introduced as evidence in an immigration proceeding. These Guidelines do not apply in situations where the Department merely considers classified information, but does not introduce the information as evidence. For example, these Guidelines do not apply when the Department considers classified information in deciding whether and what immigration charge(s) to bring, whether to admit an alien, or whether to grant a benefit, status, or protection.

These Guidelines shall be treated as internal operating instructions and will be applicable to all Department components and employees. These Guidelines are issued as a matter of the Secretary's discretion and create no private right of action or other judicially or administratively enforceable right, interest, privilege, claim, defense, presumption, or remedy. Additionally, the Secretary of the Department or his designee in the exercise of his discretion may determine in any case, or class of cases, that exigent circumstances require the use of an abbreviated procedure in place of the procedures set forth in these Guidelines.

¹ Section 240(b)(4)(B) of the Immigration and Nationality Act (INA or Act), 8 U.S.C. § 1229a(b)(4)(B), codifies long-standing case precedent and immigration regulations authorizing the use of classified information in immigration proceedings to oppose alien admissions to the United States and discretionary relief applications. See also INA § 235(c), 8 U.S.C. § 1225(c) and 8 C.F.R. § 235.8 (authorizing the use of classified information in cases where an "immigration officer or immigration judge suspects that an arriving alien appears to be inadmissible" on security or related grounds).

These Guidelines are not intended to apply to persons situated outside the geographic limits of the United States as defined in the Immigration and Nationality Act (INA or Act) § 101(a)(38), 8 U.S.C. § 1101(a)(38).

For purposes of the Department's actions under the INA, 8 U.S.C. §§ 1101 *et seq.*, these Guidelines are not intended to supersede the Attorney General's Interim Procedures for Removal Court Actions Against Alien Terrorists under INA §§ 501 *et seq.*, 8 U.S.C. §§ 1531 *et seq.* Further, these Guidelines are not intended to supersede the Executive Orders in effect regarding classified information nor are they applicable to circumstances governed by the Classified Information Procedures Act, Pub. L. No. 96-456, 94 Stat. 2025 (1980), and the "Security Procedures Established Pursuant to PL 96-456, 94 Stat. 2025, by the Chief Justice of the United States for the Protection of Classified Information"; and the Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801 *et seq.*).

III. Definitions

As used in these Guidelines, the term "immigration proceedings" includes all exclusion, deportation or removal proceedings instituted under Title II of the INA and any adjudication by the Department under the INA in which the use of classified information is authorized or permitted by law. The term immigration proceedings shall also include all hearings and appeals conducted under the jurisdiction of the Executive Office for Immigration Review (EOIR) involving charges of removal, applications for relief and/or protection from removal and bond determinations.

The term "classified information" means information that has been determined, pursuant to Executive Order 12958 (Apr. 17, 1995), as amended by Executive Order 13292 (Mar. 25, 2003), or any predecessor order, to require protection against unauthorized disclosure.

IV. Limitations on the Use of Classified Information

While the Act and regulations allow for the use of classified information, the Secretary of the Department has determined, in his discretion, that the Department will use classified information only as a last resort.

A. Last Resort

"Last resort" means that classified information will be introduced in an immigration proceeding only where other options have been examined and weighed, no alternative option exists that will ensure success on the merits, and the case presents a compelling need for use of such information. In cases where the Department is considering the use of classified information, the alien must be investigated for any violation of law, including but not limited to the civil and criminal provisions of the INA. In many instances, the alien may have committed visa fraud, passport fraud, misrepresentation, perjury, identity fraud, and other civil and criminal offenses, which, if pursued, might eliminate the need to rely on classified evidence. Similarly, unclassified derogatory facts that are relevant to the immigration case but are not actionable in a

criminal proceeding may exist and may be sufficient to achieve the Department's purpose without the Department resorting to using classified evidence; consequently such unclassified information should also be thoroughly investigated and explored for use in immigration proceedings.

B. Compelling Need

"Compelling need" as used in the definition of last resort, exists where the classified information materially enhances the government's case that the alien is ineligible for admission into the United States, is subject to removal from the United States, or is or was ineligible for a benefit (including bond), status, or protection. An example of this is where an alien concedes removability, but applies for discretionary relief. In some instances, a thorough investigation may reveal the availability of unclassified adverse information which could be used to oppose a favorable exercise of discretion, but there is unreasonable litigation risk because the unclassified information indicates only minor adverse factors. It would be appropriate to consider using the classified information in such a case, if the classified information would materially enhance the government's position that relief should be denied, either because it establishes a statutory bar or a significant adverse factor requiring denial as a matter of discretion.

C. Additional Requirements

In addition to all the other limitations set forth in these Guidelines, the Department will use classified information only where the classified information indicates that the alien is or was ineligible for admission into the United States, is subject to removal from the United States, or is or was ineligible for a benefit (including bond), status, or protection, because of a statutory bar or as a matter of discretion, and in addition, where one of the following qualifications exists:

- (1) There are reasonable grounds to believe that the alien's admission to the United States, continued presence, or activities in the United States constitute a threat to the "national security" as defined in INA § 219(c)(2), 8 U.S.C. § 1189(c)(2), or to the public safety; or
- (2) The alien is described in INA §§ 212(a)(3) or 237(a)(4), 8 U.S.C. §§ 1182(a)(3) or 1227(a)(4); or
- (3) There are reasonable grounds to believe that the alien has engaged in serious human rights violations; or
- (4) The alien has made false or misleading claims with respect to an alleged intelligence affiliation with a department, agency, or component of the United States government.

V. Protection of Classified Information

Appropriate classification, safekeeping, transmission, and storage of classified information will be in accordance with the Department's classified information handling procedures as established by the Department's Office of Security, which are in keeping with the prevailing Executive Orders prescribing a uniform system for classifying, safeguarding, and declassifying national security information, including Exec. Order 12958, as amended by Exec. Order 13292.

When appropriate or when there are uncertainties associated with classification issues, the Department's Office of Security will be consulted.

VI. Review and Recommendation Process for the Use of Classified Information

A. Secretary Approval/Ex Parte and In Camera

Classified information may be introduced in immigration proceedings only with the approval of the Secretary of the Department, pursuant to the procedures set forth in these Guidelines, unless the Secretary or his designee in the exercise of his discretion determines in any case, or class of cases, that exigent circumstances require the use of an abbreviated procedure in place of the procedures set forth in these Guidelines. Pursuant to these Guidelines, classified information will be introduced in immigration proceedings *ex parte* and *in camera*. In all cases, the consent of the agency originating the information is required before the classified information may be introduced in an immigration proceeding.

In any case in which the Department uses classified evidence in an immigration proceeding, the Department should provide the alien with an unclassified summary if the originating agency determines it can do so consistently with safeguarding both the classified nature of the information and its sources.

B. Department Clearance Process

Regardless of which component seeks to use the classified information, the Office of the Principal Legal Advisor (OPLA) for U.S. Immigration and Customs Enforcement (ICE) will be responsible for making a recommendation to the DHS Office of the General Counsel regarding the use of such information once the review process set out below is completed. ICE OPLA's written recommendation will be based upon the factual and legal case assessment of ICE OPLA's National Security Law Division (NSLD). In cases that come to the attention of an ICE Chief Counsel, he or she will immediately notify ICE OPLA, which shall consider the enforcement and prosecutorial options available in the case to determine whether the use of classified information is both necessary and appropriate.

The recommendation shall be made after appropriate consultation with all relevant ICE components, including the Office of Intelligence, the Office of Investigations, and the Office of Detention and Removal. ICE OPLA will concurrently advise the Office of the Assistant Secretary for ICE and the DHS General Counsel.

1) Threat Assessment

ICE OPLA's recommendation will include a threat assessment. The assessment will include a statement concerning the nature of the threat the alien poses and the consequences of non-action or release of the alien from Department custody. Working in consultation with the Office of National Security Threat Protection (NSTP) in the Office of Investigations and the Office of Intelligence for ICE, ICE NSLD will consult with the Department of Justice, the Federal Bureau of Investigation, the Department of Defense, the Central Intelligence Agency, the Department of

State, or other relevant agencies, where appropriate, to request and obtain the production of a threat assessment by the department or agency with primary interest in the alien. The assessment will provide decision makers with a broad overview of the third party agency's concerns regarding the alien.

2) **General Counsel Evaluation and Concurrence of the Under Secretary for Border and Transportation Security**

The DHS General Counsel will evaluate ICE OPLA's recommended course of action and then seek concurrence from the Under Secretary for Border and Transportation Security. The DHS General Counsel, with the concurrence of the Under Secretary, will then make a recommendation for action to the Secretary of the Department.

C. **ICE, CBP, and CIS Internal Clearance Process**

1) **Evaluation of Operational Goals**

ICE NSLD will review any available classified and unclassified information and consult with ICE NSTP and the ICE Office of Intelligence to ascertain what operational options might be pursued. ICE NSLD will also consult with the relevant Department components concerning their operational goals in the case at hand. For example, U.S. Citizenship and Immigration Services (CIS) may seek to deny an application for a benefit, status, or protection, while U.S. Customs and Border Protection (CBP) may seek the denial of admission pursuant to INA § 235(c), 8 U.S.C. § 1225(c). ICE OPLA and ICE NSTP will coordinate with each component and will ensure that their operational positions are included as part of the recommendation.

To ensure that all options have been thoroughly examined prior to issuing a recommendation that classified evidence be used in an immigration proceeding, operational and legal components of ICE should coordinate with the Office of the Assistant Secretary for ICE and the DHS Office of the Assistant Secretary for Information Analysis.

2) **Consultation with Intelligence Agencies**

ICE OPLA will consult with relevant intelligence agencies including, but not limited to, the Department of Defense and its components, the Federal Bureau of Investigation, the Department of State, and the Central Intelligence Agency. This process should ensure that ICE OPLA has all relevant and available information for the case assessment. All consultation with the Intelligence Community should be conducted in coordination with the Office of the Assistant Secretary for Information Analysis.

3) **Consultation with the Department of Justice**

ICE OPLA will consult with Department of Justice components with interests or expertise helpful to its evaluation. This consultation may include discussions with DOJ's Civil Division, Office of Immigration Litigation, Criminal Division, and Office of Intelligence Policy and Review. Additionally, recognizing the need to consider all procedural options for handling cases

involving the use of classified information, including possible referral to the Alien Terrorist Removal Court (ATRC), such consideration should include consultation with the ATRC Task Force established pursuant to the Attorney General's ATRC Interim Procedures.

4) Request for Declassification

For cases arising in their respective components, the Office of the Chief Counsel for U.S. Customs and Border Protection (CBP OCC) and the Office of the Principal Legal Advisor for U.S. Citizenship and Immigration Services (CIS OPLA) shall have the authority to conduct any initial request for declassification of classified information to the originating agency and coordinate with the originating agency regarding using the information for lead purposes in order to develop the information in an unclassified manner. If such initial efforts fail, ICE OPLA will coordinate any subsequent efforts for declassification of the information and will make a further request in writing for declassification to the originating agency. If neither of these options (i.e., declassification or using the information for lead purposes) is available, ICE OPLA will determine whether the facts of the case and law allow for the use of classified information. The assessment will cover both the bond proceeding and the exclusion, deportation or removal proceeding against the alien.

5) ICE OPLA's Assessment

ICE OPLA will evaluate the information and determine whether there are any actions or strategies not involving classified evidence that may be employed to detain or remove the alien.

ICE NSLD's assessment to the Principal Legal Advisor of ICE will include a factual summary of both the classified and unclassified information in the case and the legal strategies available to the Department. Should the case involve matters solely or partly within CBP's jurisdiction (e.g., including but not limited to Port-of-Entry and INA section 235(c)), ICE NSLD will make a similar evaluation on the factual and legal merits of the case and coordinate its recommendation with CBP OCC. CBP OCC and CBP Operations personnel, who have the appropriate security clearances necessary to review the relevant classified information, will be provided an opportunity to examine such information, provided that such personnel have a "need-to-know" as defined by Exec. Order 12958, as amended by Exec. Order 13292 section 6.1(z). CBP OCC will consult with and represent the views of CBP Operations during the assessment process. CBP's views will be included in the assessment. Upon completion of such coordination, ICE OPLA will concurrently forward the recommendation to the DHS General Counsel, Commissioner of CBP and Assistant Secretary of ICE.

Should the case involve matters solely or partly within CIS' jurisdiction, ICE OPLA will timely consult with CIS OPLA in any case where either CIS or ICE is considering the use of classified evidence in denying an application for benefit, status, or protection; or reopening, reconsidering, withdrawing, terminating, or otherwise revoking an immigration-related benefit, status, or protection based on classified evidence. CIS OPLA and CIS Operations personnel, who have the appropriate security clearances necessary to review the relevant classified information, will be provided an opportunity to examine such information, provided that such personnel have a "need-to-know" as defined by Exec. Order 12958, as amended by Exec. Order 13292 section

6.1(z). CIS OPLA will consult with and represent the views of CIS Operations during the assessment process. CIS's views will be included in the assessment. After consulting with CIS OPLA, ICE OPLA will concurrently forward its recommendation to the DHS General Counsel, Director of CIS and Assistant Secretary of ICE.

ICE OPLA will also ensure that any restrictions or protections for sensitive but unclassified materials are maintained, including the use of protective orders.²

6) Cases Involving Information Derived Pursuant to the Foreign Intelligence Surveillance Act

The Department will seek authorization from the Attorney General prior to using classified information derived under the Foreign Intelligence Surveillance Act (FISA) in an immigration proceeding.³ ICE NSLD working in consultation with ICE NSTP and the ICE Office of Intelligence, will consult with the Federal Bureau of Investigation and DOJ's Office of Intelligence Policy and Review to request authorization from the Attorney General to use classified FISA derived information.

D. Key Actions to Be Taken In Rendering a Recommendation

There are several points in the review process that are critical for an effective evaluation of cases that satisfy the qualifications set out in these Guidelines. Therefore, the following are key actions that shall be taken in rendering a recommendation on the use of classified evidence. As set forth in these Guidelines, in specific situations, there may be other actions that will also be necessary.

- (1) ICE OPLA shall request access to all files and information or disseminated reporting related to the alien in question;
- (2) If ICE OPLA has identified classified information it wishes to use as classified evidence, and the originating agency maintains in its regular course of business an assessment of the reliability and accuracy of that information, ICE OPLA shall request access to that assessment or, in lieu of access, a writing from the originating agency setting forth its assessment of reliability and accuracy of that information;
- (3) ICE OPLA shall inquire of the originating agency whether it has knowledge of any corroborating or contradictory information available to it;
- (4) ICE OPLA shall request that the originating agency certify that the information is properly classified under the pertinent Executive Order(s);

² For example, Sensitive Security Information (SSI) is prohibited from public release. See 49 U.S.C. §§ 114(s) and 40119(b), 49 C.F.R. pts. 1520 and 15. Restrictions may also apply to "law enforcement sensitive" and "for official use only" materials.

³ Additionally, the Department of Justice policy is that advance Attorney General approval is also required for the use of previously declassified FISA information. Accordingly, the Department of Homeland Security, through the DHS General Counsel, will consult with the Attorney General prior to using unclassified information derived under FISA in an immigration proceeding, while the departments develop a written understanding on this issue.

- (5) The Department will only use the classified evidence in the proceedings if the information is relevant and the proposed use of the classified information is authorized or permitted by law;
- (6) The Department will not use classified evidence in an immigration proceeding without the consent of the originating agency;
- (7) The Department will not use unclassified summaries in an immigration proceeding without the consent of the originating agency;
- (8) If classified information is approved for use in a proceeding before an immigration judge, ICE OPLA shall notify the Department of Justice, including the Office of the Deputy Attorney General, the Office of Immigration Litigation, and the Executive Office for Immigration Review's Office of the General Counsel that the case will involve classified information and will verify that the immigration judge assigned to the case has the proper security clearance and that other appropriate security measures are in place to handle the information; and
- (9) ICE OPLA will inform the third-party agency of its evaluation for possible classified evidence proceedings. ICE NSLD will also solicit the third party agency's views regarding the case so that the third party agency's opinion may be incorporated into ICE OPLA's assessment.

VII. Secretary Consultation

In evaluating a recommendation to use classified evidence in an immigration proceeding, the Secretary or his designee may consult with the Attorney General or his designee. When considering a case based on non-Department of Justice originated information, the Secretary may also consult with the head of the originating agency, or any other federal agency he deems appropriate.