



**Statement of Caroline Fredrickson, Director**

**American Civil Liberties Union Washington Legislative Office**

**On**

**“The Improving Public Access to Documents Act of 2008”**

**Before the Subcommittee on Intelligence, Information Sharing, and  
Terrorism Risk Assessment**

**House Committee on Homeland Security**

**June 11, 2008**

**Statement of Caroline Fredrickson, Director**

**American Civil Liberties Union Washington Legislative Office**

**On**

**“The Improving Public Access to Documents Act of 2008”**

**Before the Subcommittee on Intelligence, Information Sharing, and  
Terrorism Risk Assessment**

**House Committee on Homeland Security**

**June 11, 2008**

Good morning Chairwoman Harman, Ranking Member Reichert, and Members of the Subcommittee. Thank you for the opportunity to testify on behalf of the American Civil Liberties Union, its hundreds of thousands of members and fifty-three affiliates nationwide, about an issue of critical importance to all Americans: the right of the people to know what our government is doing and to have access to documents created at taxpayer expense. As this Committee knows, excessive government secrecy harms our national security and undermines our democratic institutions. Secrecy interferes with the timely sharing of accurate and actionable information, unnecessarily increases government costs, and frustrates democratic accountability by improperly limiting public access to information.

We testify today in support of the “Improving Public Access to Documents Act of 2008,” which is an important step toward creating a more accountable government by compelling the Department of Homeland Security to develop policies and programs that limit and regulate the federal government’s use of control markings on unclassified documents. This important bill makes clear that controlled unclassified information (CUI) can be shared with state, local, and tribal governments, the private sector, and the public, as appropriate.

**The need for legislation to reduce unnecessary government secrecy**

Our nation has often faced grave threats to our security, but abandoning our fundamental democratic principles to address those threats does not make us stronger. During the height of the Cold War President John F. Kennedy said,

The very word "secrecy" is repugnant in a free and open society; and we are as a people inherently and historically opposed to secret societies, to secret oaths and to secret proceedings. We decided long ago that the dangers of excessive and unwarranted concealment of pertinent facts far outweighed the dangers which are

cited to justify it. Even today, there is little value in opposing the threat of a closed society by imitating its arbitrary restrictions. Even today, there is little value in insuring the survival of our nation if our traditions do not survive with it.<sup>1</sup>

Despite the near-universal recognition that the failure to effectively share information was a contributing factor in the intelligence breakdowns that led to 9/11, government agencies have been increasingly using a multitude of unregulated control designations that restrict the free flow of information and increase confusion among agencies regarding what information may be shared, with whom, and how. The improper use of control markings can forestall the sharing of critical information with state, local and tribal law enforcement officials making it all the more difficult for local law enforcement to know the vulnerabilities in their own communities.

In testimony before this Subcommittee last year, Ambassador Ted McNamara, Program Manager of the Director of National Intelligence Information Sharing Environment, revealed that 20 federal government departments and agencies use at least 107 different control markings with more than 131 different procedures for handling what those agencies considered “sensitive” information.<sup>2</sup> McNamara concluded, not surprisingly, that the confusion over how information marked with a particular control designation should be handled reduced information sharing. What should be shocking to the American public, however, is that all the information subject to these 107 unregulated control markings is, by law, *unclassified*. According to the Congressional Research Service, federal agencies began using control markings on *unclassified* documents they considered “sensitive” in the 1970’s, but the term “sensitive but unclassified” (SBU) has never been defined in statutory law.<sup>3</sup>

The government regulates the disclosure of “national security information” through a classification system established in Executive Order 12958, as amended. “National security information” subject to classification under the executive order is defined through extraordinarily broad categories of information:

- military plans, weapon systems, or operations;
- foreign government information;
- intelligence activities, sources and methods, or cryptology;
- foreign relations or foreign activities of the United States, including confidential sources;
- scientific, technological, or economic information related to the national security;
- U.S. programs for safeguarding nuclear material and facilities;
- vulnerabilities and capabilities of U.S. systems, installations, infrastructure, projects, plans or protection services related to the national security; and
- weapons of mass destruction.<sup>4</sup>

By definition, any information designated SBU falls outside these broad categories, so any national security argument for restricting the distribution of SBU information is greatly diminished.

Moreover, the problem with the unrestricted use of SBU markings by government agencies is not limited to impeding effective sharing of intelligence information among federal agencies and their partners in state, local and tribal government. The unchecked ability to shield

government documents from disclosure encourages agencies to hide their mistakes and thwarts effective oversight. The Director of the Defense Capabilities and Management at the Government Accountability Office (GAO), Davi M. D'Agostino, studied how the Departments of Energy and Defense handled CUI and noted:

...neither Departments' policies identify what would be an inappropriate use of the FOUO [For Official Use Only] or OOU [Official Use Only] designation. Without such guidance, the Departments cannot be confident that their personnel will not use these markings to conceal mismanagement, inefficiencies, or administrative errors, or to prevent embarrassment.<sup>5</sup>

SBU designations have even been used to obstruct congressional oversight. Representative Henry Waxman, Chairman of the House Government Reform and Oversight Committee, noted in 2006:

Last year, Chairman Shays and I sought documents from three agencies, the Defense Department, State Department, and the Department of Homeland Security, that had been restricted as 'Sensitive But Unclassified' or 'For Official Use Only.' To date, we have received none of these documents. It is particularly telling that in their responses, the agencies claimed they had no way to provide such information because they don't keep track of it. As another agency wrote, there is no regulatory or other national policy governing the use of 'For Official Use Only,' this designation, as opposed to the controls on classified national security information.<sup>6</sup>

Last month the White House issued a memorandum to the heads of all Executive Branch agencies that adopts "Controlled Unclassified Information" (CUI) as the sole SBU designation for the federal government and establishes a framework for its use. The stated purpose of this executive order is "to standardize practices and thereby improve the sharing of information, not to classify or declassify new or additional information."<sup>7</sup> The ACLU has grave concerns that once a CUI framework is developed executive branch officials could ignore this lofty purpose and use CUI markings to improperly withhold unclassified documents from public disclosure, much the way the classification system is currently over-used and abused. Providing legislative guidance is both necessary and appropriate to ensure that executive branch officials use CUI markings in the manner intended, to increase information sharing rather than to restrict it.

Congress recognized the public's right to information held by our government when it passed the Freedom of Information Act in 1966, and voted to strengthen it in 1974, 1976, 1986, 1996, and again last year. FOIA exemptions permit the government to withhold information that is properly classified for national security or law enforcement purposes; trade secrets and privileged and confidential commercial or financial information; interagency deliberations; and personnel files requiring privacy, among other types of information. By creating these broad exemptions Congress has already established a process for limiting disclosure of information that might harm the national security or some other important government or private interest. CUI markings should never be allowed to undermine FOIA and interfere with the public's right to know.

## **Federal agencies need consistent standards and statutory guidance to limit the use of CUI designations and ensure appropriate public access to unclassified information**

As the findings in the Improving Public Access to Documents Act of 2008 indicate, the proliferation of SBU control markings interferes with accurate, actionable and timely information sharing, unnecessarily increases costs, and needlessly limits public access to information. The finding acknowledging the negative impact the overuse of control markings has on our national security is crucial to correcting the trend toward secrecy that, as the bill states, is antithetical to the concept of an information sharing environment.

The ACLU has long been concerned about the unregulated use of SBU markings, and any legislation that establishes a legal framework for controlling unclassified information must be drafted carefully to insure that it does not inadvertently create a secondary classification system that further restricts the public's access to information inappropriately. The Improving Public Access to Documents Act of 2008 accomplishes this feat by requiring the Secretary of the Department of Homeland Security to develop CUI policies "in order to maximize the disclosure to the public." Requiring the DHS Secretary to coordinate and consult with the Archivist of the National Archives and Records Administration, representatives of state, local and tribal governments, as well as civil liberties and government oversight organizations and the private sector will ensure that all stakeholders have a say in the development of these DHS policies and procedures.

The bill includes two critically important provisions establishing that CUI markings are not a determinant of public disclosure pursuant to FOIA and ensuring public access to unclassified information, even if marked CUI, under an appropriate FOIA request. We urge you to protect these provisions throughout the legislative process to ensure their inclusion in any final legislation that may be signed into law.

The bill properly limits what types of information may be designated CUI, and prohibits use of CUI markings to conceal violations of law or prevent embarrassment to an agency. The bill also properly limits the number of employees who are authorized to make CUI markings, and establishes mechanisms to track their decisions and hold them responsible, which hopefully will change the current culture from need-to-know to need-to-share.

The bill includes other important elements that will ensure proper oversight of the implementation of the CUI framework, including an ongoing auditing mechanism administered by the DHS Inspector General that will assess whether CUI markings are being used properly, with a requirement for annual reporting to Congress. Establishing a reward process where employees can challenge CUI markings will also be helpful to limiting improper designations. And the requirement that DHS maintain a publicly available list of documents marked CUI that have been withheld under FOIA will increase public oversight, and hopefully will compel more thorough deliberation when marking or withholding requested documents.

## Conclusion

Without a legal framework, federal agencies' use of SBU control markings can intentionally or inadvertently obscure critical information from the public as well as from state, local, and tribal law enforcement. The Improving Public Access to Documents Act of 2008 would enhance information sharing with state, local, and tribal governments by requiring a more uniform standard for handling CUI and alleviating confusion about what information can be shared. Definitive statements that CUI markings are not a determinant of public disclosure under FOIA will ensure that the purpose of this bill is realized by improving public access to documents. We are happy to support the Improving Public Access to Documents Act of 2008 and look forward to working with you to protect its most essential provisions as it moves through the legislative process.

---

<sup>1</sup> John F. Kennedy, Address Before the American Newspaper Publisher's Association, New York, N.Y., (Apr. 1, 1961), available at <http://www.jfklibrary.org/Historical+Resources/Archives/Reference+Desk/Speeches/JFK/003POF03NewspaperPublishers04271961.htm>.

<sup>2</sup> *The Over-Classification and Pseudo-Classification of Governmental Information: The Response of the Program Manager of the Information Sharing Environment: Hearing Before the Subcommittee on Intelligence, Information Sharing, and Terrorism Risk Assessment H. Committee on Homeland Security*, 110<sup>th</sup> Cong. (Apr. 26, 2007) (Statement of Ambassador Ted McNamara, Program Manager, Information Sharing Environment), available at <http://homeland.house.gov/SiteDocuments/20070427081925-82568.pdf>.

<sup>3</sup> Genevieve J. Knezo, SENSITIVE BUT UNCLASSIFIED INFORMATION AND OTHER CONTROLS: POLICY OPTIONS FOR SCIENTIFIC AND TECHNICAL INFORMATION, CRS Report for Congress (Dec. 29, 2006), available at <http://www.fas.org/sgp/crs/secretcy/RL33303.pdf>.

<sup>4</sup> Exec. Order No.13,292, amending Exec. Order No. 12,958, (Mar. 25, 2003), available at <http://www.whitehouse.gov/news/releases/2003/03/20030325-11.html>.

<sup>5</sup> *Drowning in a Sea of Faux Secrets: Policies on Handling of Classified and Sensitive Information: Hearing Before the Subcomm. on National Security, Emerging Threats, and International Relations of the H. Committee on Government Reform*, 109<sup>th</sup> Cong. 243 (2006) (Statement of Davi M. D'Agostino Director of the Defense Capabilities and Management at the Government Accountability Office (GAO)).

<sup>6</sup> *Drowning in a Sea of Faux Secrets: Policies on Handling of Classified and Sensitive Information: Hearing Before the Subcomm. on National Security, Emerging Threats, and International Relations of the H. Committee on Government Reform*, 109<sup>th</sup> Cong. 8-9 (2006) (Statement of Rep. Waxman, Ranking Member, H. Comm. on Government Reform).

<sup>7</sup> Memorandum from George W. Bush to the Heads of Executive Departments and Agencies, "Designation and Sharing of Controlled Unclassified Information, May 9, 2008, <http://www.whitehouse.gov/news/releases/2008/05/20080509-6.html>.